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Article 38.071 of the Texas Code of Criminal Procedure: A Legislative Response to the Needs of Children in the Courtroom Comment.

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I. INTRODUCTION

In almost all aspects, our society responds to children as individuals with unique characteristics and needs that are fulfilled by specially trained persons or specialized procedures.[1] It seems ironic, therefore, that the criminal justice system, the purpose of which is to provide an arena for justice, is one of the last areas of society to recognize that specialized procedures are needed when children enter that system.[2] However, due to the recent focus on the sexually abused child, the criminal justice system has been forced to address the problems of dealing with children as witnesses.[3] This focus has highlighted the inadequacies in the criminal justice system as a greater number of children have been called upon to testify in legal proceedings.[4]

Specialized courtroom procedures must be utilized when children are used as witnesses if sexual offenses are to be prosecuted and children are to be protected from the trauma of the legal process.[5] Numerous state legislatures

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1. *See* Berger, *The Child, the Law and the State*, in CHILDREN'S RIGHTS 153 (1971) (discussion of children in work force, juvenile system and school); *see also* Hansen, *Guardians Ad Litem in Divorce and Custody Cases: Protection of the Child's Interest*, in THE RIGHTS OF CHILDREN 239 (1973) (discussion of guardian ad litem and his role in representing interest of child).

2. *See* Bulkley, *Preface and Acknowledgments* to AMERICAN LEGAL RESOURCE CENTER FOR CHILD ADVOCACY AND PROTECTION, RECOMMENDATIONS FOR IMPROVING LEGAL INTERVENTION IN INTRA-FAMILY CHILD SEXUAL ABUSE CASES at v (1982) (in past legal system has caused additonal harm to children due to insensitive procedures); *see also* Goodman & Michelle, *Would you Believe A Child Witness?*, PSYCHOLOGY TODAY, Nov. 1981, at 91 (comparing civil custody proceeding where child questioned privately to avoid trauma with criminal case where child must testify openly).

3. *See* B. MOROSCO, THE PROSECUTION AND DEFENSE OF SEX CRIMES 9.01 (1985) (number of child sexual abuse prosecutions escalates as reports of child abuse increase); *see also* Sgroi, *Child Sexual Assault: Some Guidelines for Intervention and Assessment*, in SEXUAL ASSAULT OF CHILDREN AND ADOLESCENTS 130 (1978) (increased reporting of child sexual abuse illustrates broad spectrum of types of abuse involved).

4. *See* Sgroi, *Introduction: National Needs Assessement for Protecting Child Victims of Sexual Assault*, in SEXUAL ASSAULT OF CHILDREN AND ADOLESCENTS, at xix (1978). Dr. Sgroi identified four problems that arise when children enter the criminal justice system. The first problem is that few sexual abuse cases are pursued based on the evidence alone unless someone such as a parent is willing to proceed with criminal charges. Second, when charges are filed against an accused offender, the offender is usually released on bond without an injunction to stay away from the family. Next, too much time passes before the cases go to court, resulting in children recanting due to family pressure. Finally, the victim will probably have to repeat his or her story many times before and during trial as well as undergo cross-examination. *See id.*

5. *See* AMERICAN LEGAL RESOURCE CENTER FOR CHILD ADVOCACY AND PROTECTION, RECOMMENDATIONS FOR IMPROVING LEGAL INTERVENTION IN INTRA-FAMILY CHILD SEXUAL ABUSE CASES 8-9 (1982) (discussing areas in legal system that may be modified to reduce trauma of child in legal process). It is recommended that a child have a special advocate. *See id.* at 9. Specialized interviewing techniques, as well as coordination among professionals, are recommended to reduce the number of interviews. *See id.* at 10-11. One

have responded by adopting different variations of hearsay exceptions[6] and videotaping laws.[7] In 1983, the Texas legislature responded to the obstacles confronting the child victim of sexual abuse who is called by the prosecution as a witness against an alleged offender by enacting article 38.071 of the Texas Code of Criminal Procedure.[8] This article provides three alternative methods to the traditional courtroom setting whereby a child, twelve years or younger, may testify in the prosecution of an offense committed against that child.[9] Most significantly, in each of the three alternatives, the alleged offender does not have face-to-face contact with the child during his or her testimony.[10] In only one of the alternatives does the defendant have the opportunity to have face-to-face contact with the child during cross-examination.[11]

As a result of the passage and subsequent use of article 38.071, a battle has ensued over its constitutionality.[12] The prosecution contends that there is a legitimate state interest in protecting the vast number of child victims of sexual abuse in Texas.[13] History indicates that the traditional method of handling children in the criminal justice system is traumatic to the child and

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prosecutor should be assigned to handle a sexual abuse case at all stages of the legal process. *See id.* at 11; *see also* Burgess & Holmstrom, *The Child and Family During the Court Process*, in SEXUAL ASSAULT OF CHILDREN AND ADOLESCENTS 205 (1978) (description of victim-witness advocacy program). The Sexual Assault Center in Seattle, Washington, recommends that the criminal justice staff utilize special techniques to encourage cooperation of victims and to realize the inherent limitations of the child's performance. *See id.*

6. *See, e.g.*, COLO. REV. STAT. § 13-25-129 (Supp. 1985); IND. CODE ANN. § 35-37-4-6 (1985); KAN. STAT. ANN. § 60-460 (dd) (1983); UTAH CODE ANN. § 76-5-411 (Supp. 1985); WASH. REV. CODE ANN. § 9A.44.120 (Supp. 1986).

7. *See* ARIZ. REV. STAT. ANN. § 2312 (1982); ARK. STAT. ANN. § 43-2035 to -2036 (Supp. 1985); CAL. PENAL CODE § 1346 (West. Supp. 1986); COLO. REV. STAT. § 18-3-413 (Supp. 1985); FLA. STAT. ANN. § 90.90 (West Supp. 1984); KY. REV. STAT. § 421.350 (Supp. 1984); ME. REV. STAT. ANN. § 1205 (Supp. 1983); MONT. CODE ANN. § 46-15-401 (1983); N. M. STAT. ANN. § 30-9-17 (Supp. 1984); S.D. CODIFIED LAWS ANN. § 23A-12-9 to-10 (Supp. 1985); TEX. CRIM. PROC. CODE ANN. art. 38.071 (Vernon Supp. 1986); WIS. STAT. ANN. 967.04 (West Supp. 1985).

8. *See* TEX. CRIM. PROC. CODE ANN. art. 38.071 (Vernon Supp. 1986).

9. *See id.* §§ 2-4.

10. *See id.*

11. *See id.* § 2.

12. *Compare* Powell v. State, 694 S.W.2d 416, 421 (Tex. App.—Dallas 1985, pet. granted) (art. 38.071 held unconstitutional) *with* Jolly v. State, 681 S.W.2d 689, 697 (Tex. App.—Houston [14th Dist.] 1984, pet. granted) (art. 38.071 videotape held admissible).

13. *See* Amicus Curiae Brief for State at 12, Powell v. State, 694 S.W.2d 416 (Tex. App.—Dallas 1985, pet. granted) (number of sexual abuse victims in Texas between 1981 and 1984 more than doubled). It is urged that article 38.071 properly balances the interests of the state and those of the defendant. *See id.* at 11. The interests that article 38.071 addresses are compelling and serious. *See* Brief for State at 24, Long v. State, 694 S.W.2d 185 (Tex. App.—Dallas 1985, pet. granted).

often results in acquittal or nonprosecution of the defendant.[14] With the use of videotaped testimony, however, the child is afforded an opportunity to testify in a less traumatic environment.[15] The prosecution asserts that this environment increases the child's ability to give both credible and reliable testimony.[16] On the other side, the defense is armed with the sixth amendment to the United States Constitution[17] and years of precedent holding that a defendant has the right to confront adverse witnesses.[18] This faction contends that the current enactment of article 38.071 not only infringes upon the defendant's rights,[19] but also poses a greater risk of wrongful conviction.[20] Although the Texas Court of Criminal Appeals has yet to rule upon the constitutionality of this provision, it has recently heard argument in one case[21] and granted petition on another[22] so as to consider this matter.

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14. *See* Note, *The Testimony of Child Victims in Sex Abuse Prosecution: Two Legislative Innovations*, 98 HARV. L. REV. 806-07 (1985) (low conviction rate for child sex offenders due to child's inability to testify in courtroom). Various state legislatures have responded to the problem children encounter in the courtroom by enacting hearsay exceptions or videotaping laws. *See id.* at 808. It is a traumatic experience for children to testify in court, especially when they are victims of sexual abuse. *See* Comment, *Criminal Procedure—Child Witnesses—the Constitutionality of Admitting the Videotap Testimony at Trial of Sexually Abused Children*, 7 WHITTIER L. REV. 639 (1985) (discussing constitutionality of various state videotaping laws).

15. *See* Comment, *Criminal Procedure—Child Witnesses—The Constitutionality of Admitting the Videotape Testimony at Trial of Sexually Abused Children*, 7 WHITTIER L. REV. 639, 644 (1985) (purpose of videotape is to allow child to testify in criminal justice system without subjecting child to great pressure). The videotaping laws allow children's testimony to be preserved, thus sparing the child the trauma of repeated court appearances. *See* Note, *The Testimony of Child Victim in Sex Abuse Prosecution: Two Legislative Innovations*, 98 HARV. L. REV. 806, 808 (1985).

16. *See* Amicus Curiae Brief for State at 15, Powell v. State, 694 S.W.2d 416 (Tex. App.—Dallas 1985, pet. granted) (article 38.071 enhances child's accuracy).

17. *See* U.S. CONST. amend. VI.

18. *See* Mattox v. United States, 156 U.S. 237, 242 (1894) (discussing essential elements of confrontation clause); *see also* California v. Green, 399 U.S. 149, 158 (1969) (court compares out-of-court statement with confrontation clause).

19. *See* Petition for Review for Appellant at 18-24, Jolly v. State, 681 S.W.2d 689 (Tex. App.—Houston [14th Dist] 1984, pet. granted) (addressing infringement on defendant's right to confrontation by article 38.071). Article 38.071 denies the defendant the protections afforded by the confrontation clause. *See* Long v. State, 694 S.W.2d 185, 188 (Tex. App.—Dallas 1985, pet. granted) (defendant's conviction for sexually abusing child reversed due to article 38.071 infringing on defendant's confrontation rights).

20. *See* Graham, *Difficult Times for the Constitution: Child Testimony Absent Face-to-Face Confrontation*, CHAMPION, Aug. 1985, at 18 (defense attorney's viewpoint of protecting children in courtroom); *see also* Howson, *Child Sexual Abuse Cases: Dangerous Trends and Possible Solutions*, CHAMPION, Aug. 1985, at 6 (number of defendants wrongfully accused of sexual abuse has increased over past few years due to zealous prosecution).

21. *See* Jolly v. State, 681 S.W.2d 689 (Tex. App.—Houston [14th Dist] 1984, pet. granted).

22. *See* Long v. State, 694 S.W.2d 185 (Tex. App.—Dallas 1985, pet. granted).

The objective of this comment is first to discuss the nature and effects of sexual abuse of children and then to explore what obstacles the victim encounters when entering the criminal justice system. Only by understanding the problems associated with the sexual abuse of children can the need for judicial change be comprehended. Further, this comment will examine what action the Texas legislature has taken in enacting article 38.071 and what constitutional issues remain in question. This comment will also examine the evolution of videotaping in Texas, the results of the use thus far, and how the various Texas courts have ruled on the admissibility of videotaped testimony.

II. THE REALITY OF SEXUAL ABUSE OF CHILDREN: THE NEED FOR LEGAL INTERVENTION

A. *The Extent of Sexual Abuse of Children Today*

While the true dilemma facing sexually abused children is not conveyed by statistics, empirical data is a beginning point in comprehending the parameters of the problem. Research over the past several years indicates that the number of known victims is not representative of the true extent of sexual abuse of children in this country.[23] This is often illustrated by an increase in referrals to child welfare agencies whenever there is a media campaign pertaining to the sexual abuse of children.[24] One source states that an incident of child abuse occurs every four minutes, and half of these incidents are sexual offenses.[25] It has been estimated that approximately

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23. *See Child Sexual Abuse: Incest, Assault, and Sexual Exploitation,* 2 CHILD ABUSE & NEGLECT 1 (1980) (extent of problem unknown since statistics reflect only cases officially reported to authorities); Comment, *The Crime of Incest Against the Minor and the States' Statutory Responses,* 17 J. FAM. L. 93, 95 (1978-79) (accurate statistics not available due to social stigma associated with topic); *see also* Spencer, *Father-Daugther Incest: A Clinical View From the Corrections Field,* 57 CHILD WELFARE 581, 581 (1978) (estimate of incest unreliable when based on known cases).

24. *See* Wenck, *Sexual Child Abuse: An American Shame That Can be Changed,* 12 CAP. U.L. REV. 355, 356 (1983) (experience in Baltimore indicates only "tip of the iceberg" seen since referrals increase with publicity); *see also* Schultz, *The Sexual Victimology of Youth,* in SEXUAL VICTIMIZATION OF CHILDREN: TRAUMA, TRIAL AND TREATMENT 5 (1981) (available from the Child Protection Center/Special Unit Children's Hospital National Medical Center Washington, D.C.) (sexual abuse project in Knoxville received 1,389 calls in one month after publicity campaign).

25. *See* Wenck, *Sexual Child Abuse: An American Shame That Can be Changed,* 12 CAP. U.L. REV. 355, 356 (1983) (citing statistics from FBI and Center on Child Abuse and Neglect); *see also* B. JUSTICE & R. JUSTICE, THE BROKEN TABOO: SEX IN THE FAMILY, 16 (1979) (citing numerous statistical reports of child sexual abuse). According to the National Center on Child Abuse and Neglect, approximately one hundred thousand children are sexually abused each year. However, 250,000 is considered a conservative estimate by other authorities. *See id.*

one-fourth to one-third of both the male and female population have been exploited sexually while growing up.[26] Research findings consistently indicate that females are victimized more often than males.[27] In a retrospective study of 796 college students, one in five females and one in eleven males reported a sexual encounter in childhood with a person much older.[28] Great uncertainty, however, exists concerning the sexual abuse rate in the male population.[29] Experts hypothesize that males exhibit an even greater hesitancy to report such abuse, thus compounding the detection problem.[30]

B. *The Perfect Crime: Sexual Abuse of Children*

1. The Nature of the Crime

The unique nature of sexual abuse of children inhibits discovery of the problem.[31] The act first involves the subject of sex, a subject both adults and

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26. *See* Swift, *Research Into Violent Behavior: Overview and Sexual Assaults, Hearings, Before House Subcomm. on Domestic and International, Scientific Planning Analysis and Cooperation,* 95th Cong., 2d Sess. 352 (1978) (cited in Prager, *"Sexual Psychopathy" and Child Molesters: The Experiment Fails*, 6 J. JUV. L. 49, 62 (1982)); *see also* F. RUSH, THE BEST KEPT SECRET: SEXUAL ABUSE OF CHILDREN 5 (1980).

27. *See* F. RUSH, THE BEST KEPT SECRET: SEXUAL ABUSE OF CHILDREN 5 (1980) (of 5,058 sex crimes reported in New York City in 1975, 6.4% were male children victims and 20% female children victims); Greenberg, *The Epidemiology of Childhood Sexual Abuse*, PEDIATRIC ANNALS, May 1979, at 18 (citing numerous statistics on child sexual abuse victims, one study showing 13.7% of 117 juvenile rape victims were male; another showing 84% of child sexual abuse victims were female).

28. *See* D. FINKELHOR, SEXUALLY VICTIMIZED CHILDREN 143 (1979) (data on sexual abuse victims); *see also* Elweel, *Sexually Assaulted Children and Their Families*, 1979 SOCIAL CASEWORK: THE JOURNAL OF CONTEMPORARY SOCIAL WORK 227, 228-29 (citing research data on sexual abuse victims). On a national level it is estimated that there are between 200,000 and 500,000 cases of child sexual abuse. *See id.* at 228.

29. *See* L. SCHULTZ, THE SEXUAL VICTIMOLOGY OF YOUTH 23 (1980) (boys report sexual abuse less often than girls). Schultz attributes the difference in the reporting rate between male and female children to be due to the difference in preparation by their parents for sexual victimization. *See id.*; *see also* Prager, *"Sexual Psychopathy" and Child Molesters: The Experiment Fails*, 6 J. JUV. L. 49, 62 (1982) (sexual abuse of males less reported but may occur as often as abuse to females). It is suggested that if only the most severe types of sexual abuse are reported by males, they may be more victimized than females. *See id.*

30. *See* R. GEISER, HIDDEN VICTIMS: THE SEXUAL ABUSE OF CHILDREN 76 (1979). There is a significant difference in the treatment between male and female victims of sexual assault. Society tends to project the image that girls are to be taken care of and boys are not; while females are allowed to be traumatized over the sexual assault, the males are expected to "stop crying and forget it." Another significant difference is that male victims, if molested by a male, are seen as losing their masculinity. Parents of males become fearful that their son will choose a homosexual lifestyle due to the molestation by a male. *See id.*; *see also* Nasjletic, *Suffering in Silence*, 59 CHILD WELFARE 269, 299 (1980) (examination of why male victims do not report sexual abuse). Society's treatment of males as masculine, disapproving of any emotional expression, has resulted in the male victim remaining silent. *See id.* at 270-71.

31. *See* L. SCHULTZ, THE SEXUAL VICTIMOLOGY OF YOUTH 29 (1980) (discussing why

children are conditioned not to address openly.[32] History is replete with society's ignorance regarding the individual development of human sexuality.[33] This historical ignorance has resulted in sexual suppression,[34] thereby preventing society from freely recognizing and acknowledging the sexual abuse of children.[35] Secondly, the offense entails a socially deviant sexual act.[36] The deviancy of the act often ensures the victim's non-disclosure.[37]

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sexual abuse is last frontier encountered in abuse of children). Schultz sets forth several obstacles to identifying child sexual abuse. These obstacles include a failure to recognize the phenomena of child sexual abuse and failure to secure medical corroboration. The major contention by Schultz is that unless society is willing to believe child sexual abuse exists, society cannot protect children against the crime. The obstacles that face society are founded in ignorance and taboo. *See id.*

32. *See* Abel, Becker, & Cunningham-Rothner, *Complications, Consent and Cognitions in Sex Between Children and Adults*, 7 INT'L J.L. & PSYCHIATRY 89, 90 (1984) (discussing historical suppression of sexuality); *see also* E. BRECHER, THE SEX RESEARCHERS 51 (1969) (sex denounced as sin for centuries). Brecher discusses the views of Richard Von Krafft-Ebing. Brecker alleges that Krafft-Ebing is responsible for spreading the doctrine that sex is a disease. Krafft-Ebing's literary works, written around 1886, dealt with homosexuality, sadism, and masochism. *See id.* at 50. Brecker states that it is alarming to find that Krafft-Ebing's works are still in demand today. *See id.* at 60.

33. *See* L. SCHULTZ, THE SEXUAL VICTIMOLOGY OF YOUTH 3 (1980) (historical analysis of children and their sexuality). There are two early phases in the history of children and sexualtiy. *See id.* In the first phase, up to 1800, children were used as sex objects by adults. *See id.* at 3-4. In this phase, men freely engaged in sex with young boys and girls. *See id.* at 4. In the second phase, after 1800, society seemed focused on killing off the natural sexual development of the child. *See id.* at 5. These efforts were supposedly for the good of the child. *See id.* at 4. Adults feared that masturbation by young boys would result in insanity or death and masturbation by girls would result in prostitution or nymphomania. Efforts were made to suppress sexual feelings in children. *See id.* at 9. Surgical procedures were employed on children, such as removing the clitoris, slitting the penis, castration, and cutting out the nerves of the male and female gentalia. *See id.* at 10.

34. *See* F. RUSH, THE BEST KEPT SECRET: SEXUAL ABUSE OF CHILDREN 1 (1980) (" 'Children are the least articulate and most exploited population suffering from society's failure to confront the phenomenon of human sexuality.' ") (quoting C. SWIFT, SEXUAL ASSAULT OF CHILDREN AND ADOLESCENTS (1978)); *see also* R. GEISER, HIDDEN VICTIMS: THE SEXUAL ABUSE OF CHILDREN 162 (1979) (development of healthier attitudes about sex needed for prevention of child sexual abuse).

35. *See* Sgroi, *Introduction: A National Needs Assessment for Protecting Child Victims of Sexual Assault*, in SEXUAL ASSAULT OF CHILDREN AND ADOLESCENTS, at xi (1978). Dr. Sgroi classifies the sexual abuse of chidren as the "last remaining component of the maltreatment syndrome in children." Dr. Sgroi further indicates that this problem has yet to be addressed because society prevents proper detection. *See id.* at xv. The lack of detection results from society's unwillingness to believe that the problem exists. *See id.* at xvi.

36. *See* Mrazek, *Definition and Recognition of Sexual Abuses: Historical and Cultural Perspective*, in SEXUALLY ABUSED CHILDREN AND THEIR FAMILIES 8 (1981) (sexual relations with child viewed as psychopathological behavior). Sexual deviancy with children may involve either homosexual or heterosexual contacts. These acts include sex with a prepubertal child for sexual gratification, child rape and exhibitionism. *See id.*; *see also* A. Groth, *Patterns of Sexual Assault Against Children and Adolescents*, in SEXUAL ASSAULT OF CHILDREN AND

More importantly, the deviancy of the act prevents the offender and others from acknowledging the abusive behavior.[38]

Finally, the mechanics of the sexually abusive act are generally misunderstood.[39] Adults expect physical trauma to result from the offense, where in reality physical evidence is rarely present.[40] The offender often engages in a

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ADOLESCENTS 3 (1978) (adult instruction of child in sexual experiences is inappropriate and potentially traumatic).

37. *See* Spencer, *Father-Daughter Incest: A Clinical View From the Correction Field*, 57 CHILD WELFARE 581, 581 (1978) (statistics of courts do not reflect extent of incest). The juvenile court system often sees the manifestation of sexual abuse in the form of juveniles running away from home, drug abuse, and promiscuous behavior. The females exhibit an inability to disclose the abuse, fearing disbelief or blame for the abuse. As a result of their keeping the abuse a secret, the court system focuses on their behavior rather than the source of the problem. *See id.*; *see also* L. SCHULTZ, THE SEXUAL VICTIMOLOGY OF YOUTH 23 (1980) (taboo surrounding deviant sexual behavior discourages victim from reporting abuse).

38. *See* Wenck, *Sexual Child Abuse: An American Shame That Can be Changed*, 12 CAP. U.L. REV. 355, 358 (1983). Responses from child sexual offender often include: "she is a discipline problem and she is trying to have her own way;" "she is trying to get back at me because I punished her;" "I don't know why she would say such a thing, I do everything in the world for her." *See id.*; *see also* A. Groth, *Guidelines for the Assessment and Management of the Offender*, in SEXUAL ASSAULT OF CHILDREN AND ADOLESCENTS 32 (1978) (in 12-year period, no self-referral by child molester for consultation).

39. *See* F. RUSH, THE BEST KEPT SECRET: SEXUAL ABUSE OF CHILDREN 3-4 (1980) (when molester known to family, family has difficult time confronting abuser). Rush recites the following case history:

> Jill, my sister's daughter, is fourteen. Her stepfather has been feeling her up and going into her bedroom at night for the past six months. I know she's telling the truth because he did the same to me when I lived with them. Jill . . . finally told her teacher. The teacher told the school psychologist, who said that either the child was lying and very sick or the family was in great trouble. The father could go to jail. When confronted, the stepfather said Jill lied. Jill's mother believed her husband. . . . She pleaded with her daughter to 'confess,' otherwise, who would support them and her younger brothers? Jill tried to stick to her story, but with persistent pressures and increased guilt at depriving the family of support, she finally 'confessed' that she lied. She was denied a request to live with me and was placed under psychiatric care.

Id.; *see also* Wenck, *Sexual Child Abuse: An American Shame That Can be Changed*, 12 CAP. U.L. REV. 355, 358 (1983) (in majority of cases mother chooses to believe husband or boyfriend).

40. *See* Sgroi, *Child Sexual Assault: Some Guidelines for Intervention and Assessment*, in SEXUAL ASSAULT OF CHILDREN AND ADOLESCENTS 130-31 (1978) (type of sexual contact between child and adult is aspect of problem not understood). Dr. Sgroi explains that the sexual contact is usually nonviolent and rarely results in physical trauma. *See id.* at 131; *see also* Muncie v. Commonwealth, 213 S.W.2d 1019, 1021 (Ky. Ct. App. 1948) (defendant convicted of attempting to rape 5-year-old). The child testified that the defendant inserted two fingers into her vagina and that she bled afterwards. Upon physical examination dried blood was found on the vaginal area, but no signs of violence were noticed. *See id.*; *see also* Comment, *The Crime of Incest Against the Minor Child and the State's Statutory Responses*, 17 J. FAM. L. 93, 96 (1978-79) (few physical signs of sexual abuse in incest cases); *see also* Comment, *Libai's Child Courtroom: Is it Constitutional?*, 7 J. JUV. L. 31, 32 (1983) (failure to

host of non-penetrative sexual acts.[41] If penetration is attempted, however, it is usually only after the offender has "conditioned" the child to his advances.[42]

2. The Victim's Response

The victim's reaction to the abuse is another element making the sexual abuse of children the perfect crime.[43] In the majority of situations, the offender is known to the victim.[44] The status of being sexually abused by a

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convict offender due in part to lack of physical evidence). *But see* United States v. Nick, 604 F.2d 1199, 1201 (9th Cir. 1979) (3-year-old male showed signs of rectal penetration on physical exam).

41. *See* Sgroi, *Child Sexual Assault: Some Guidelines for Intervention and Assessment*, in SEXUAL ASSAULT OF CHILDREN AND ADOLESCENTS 131 (1978) (discussion of types of sexual contact between adult and child victim). Dr. Sgroi explains the various types of sexual contact that may occur between an adult and child victim. The types of contact include mutual masturbation, fondling and stroking, or rubbing of genitals. Most often vaginal or rectal penetration by the offender is digital. There is also genital-oral contact and the offender often masturbates and ejaculates on the child's abdomen or perenium. *See id.*; *see also* Burgess & Holstrom, *Accessory-to-Sex: Pressure, Sex and Secrecy*, in SEXUAL ASSAULT OF CHILDREN AND ADOLESCENTS 87 (1978) (sexual activity between child victim and adult includes visual and verbal contact, hand-genital contact, oral-genital contact, attempted penetration, and penetration).

42. *See* Spencer, *Father-Daughter Incest: A Clinical View From the Corrections Field*, 57 CHILD WELFARE 581, 583 (1978) (penetration not attempted until victim conditioned to accept offender's advances).

43. *See* Weiner v. State, 464 A.2d 1096, 1099 (Md. Ct. App. 1983) (defendant on trial for raping one stepdaughter and indicted for sexual abuse of two other stepdaughters). At trial, the twenty-year-old victim was allowed to testify as to a conversation with her younger sister. The state argued that the contents of the conversation were important to understand why the victim did not report the sexual abuse for five years. *See id.* at 1098-99. The victim stated that her younger sister, who had left home, came to visit her. *See id.* at 1099. When asked by the prosecutor how her sister looked, the victim replied, "[l]ike I did five years ago exactly." The victim then questioned her sister about possible sexual abuse by their stepfather. After the younger sister admitted that he had intercourse with her, the victim for the first time admitted that she too had been molested. When asked why she revealed the abuse, the victim replied: "Because I felt that since I never had said nothing, I felt bad about it that it happened to her and I wanted to let her know she wasn't the only one and not to be scared like I was." *Id.*

44. *See* D. FINKELHOR, SEXUALLY VICTIMIZED CHILDREN 155 (1979). In Table A-2 Finkelhor makes a comparison of studies regarding the relationship of the victim to the offender. Each of the following studies indicates what percentage of known offenders were related to their victim: Finkelhor - 76%; Landes - 34%; Gagnou - 42%; Benward - 100% (all incest cases); Burges - 100% (all incest cases); Queen's Bench - 65%; Peters - 78%; DeFrances - 75%; Weiss - 85%; and Mohr - 85%. *See id.* Case law illustrates this point. *See, e.g.*, Jones v. State, 445 N.E.2d 99, 99 (Ind. 1983) (defendant convicted of molesting his 11-year-old daughter); Commonwealth v. Sylvester, 433 N.E.2d 107, 108 (Mass. App. Ct. 1982) (male victims developed friendship with defendant before sexual assault); State v. Pignolet, 465 A.2d 176, 178 (R.I. 1983) (defendant convicted of second-degree sexual assault of stepdaughter).

known perpetrator evokes silence from the victim.[45] The offender accomplishes this concealment by employing either emotional pressure[46] or physical force on the victim.[47] If the child is old enough, he or she may understand the possible repercussions associated with revealing the abuse and, therefore, choose to remain silent.[48] Many victims also experience feel-

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45. *See* F. RUSH, THE BEST KEPT SECRET: SEXUAL ABUSE OF CHILDREN 8 (1980). The following is quoted from an adult who was sexually victimized as a child:

> Since I was a little ten-year-old child, I had to deceive and hide from all the world and my mother that my father took a sexual interest in me and initiated sexual activities with me. Remember how you taught me that art of deceit? First you put me in a situation that had to be kept secret (for your protection) and then you pledged me to secrecy . . . as a ten-year-old child, what was I supposed to do? You are an intelligent man—you figure out the options available to a ten-year-old in that position.

Id. at 8. It is more difficult for the child to reveal the abuse when the offender is known to the victim. *See* Burgess & Holmstrom, *Accessory-to-Sex: Pressure, Sex, and Secrecy*, in SEXUAL ASSAULT OF CHILDREN AND ADOLESCENTS 97 (1978) (when offender known to victim he may keep surveillance on child ensuring secrecy).

46. *See* A. Groth, *Patterns of Sexual Assault Against Children and Adolescents*, in SEXUAL ASSAULT OF CHILDREN AND ADOLESCENTS 11-14 (1978) (discussion of sex-pressure offenses). Dr. Groth explains that sex-pressure offenses entail enticement or entrapment of the child. The offender will try to get the victim to cooperate, acquiesce, or consent to the sexual abuse. The offender may bribe the child with "attention, affection, approval, money, gifts, treats, and good times." *See id.* at 11; *see also* Commonwealth v. King, 441 N.E.2d 248, 253 (Mass. 1982) (11-year-old victim told that defendant would molest her younger sister if she told anyone); People v. Chaten, 206 N.E.2d 697, 698 (Ill. 1965) (defendant offered victims dime for cooperation); Burgess & Holmstrom, *Accessory-to-Sex: Pressure, Sex, and Secrecy*, in SEXUAL ASSAULT OF CHILDREN AND ADOLESCENTS 88 (1978) (to ensure secrecy offender tells victim that act is secret between them or threatens harm to child if abuse revealed); State v. Pignolet, 465 A.2d 176, 178 (R.I. 1983) (defendant told victim that he would grant her privileges if she would acquiesce to abuse).

47. *See* A. Groth, *Patterns of Sexual Assault Against Children and Adolescents*, in SEXUAL ASSAULT OF CHILDREN AND ADOLESCENTS 11-14 (1978) (discussing sex-force offenses). Dr. Groth states that sex-force offenses involve the threat of harm or the use of physical force. Common methods employed are intimidation or physical aggression. *See id.* at 13; *see also* Fitzgerald v. United States, 443 A.2d 1295, 1298 (D.C. Cir. 1982) (victim alleges that defendant threatened to kill her if she told of attempted rape); Farris v. State, 643 S.W.2d 694, 695-96 (Tex. Crim. App. 1982) (young victim threatened with knife while children witnesses were told they and their parents would be killed if they told anyone).

48. *See* Schultz, *The Children Sex Victim: Social, Psychological and Legal Perspectives*, 52 CHILD WELFARE 147, 150 (1973) (victim of incest may refuse to press criminal charges fearing responsibility for parents' marital breakup or incarceration of father); *see also* Burgess & Holstrom, *Accessory-to-Sex: Pressure, Sex and Secrecy*, in SEXUAL ASSAULT OF CHILDREN AND ADOLESCENTS 89 (1978) (child fears catastrophic results such as separation from family if secret revealed); Elwell, *Sexually Assaulted Children and Their Families*, 1979 SOCIAL CASEWORK: THE JOURNAL OF CONTEMPORARY SOCIAL WORK 227, 230 (child feels responsible for trouble suffered by whole family after disclosure of sexual abuse). The disclosure of sexual abuse within a family often results in marital separation, removal of either the father or the child from the home, economic hardship for the family, and legal intervention. The child is often blamed for the abuse and thus feels responsible for these repercussions. *See id.*

ings of guilt,[49] fear of being blamed,[50] or fear of not being believed,[51] all of which further prevent the reporting of the abuse.

If the child chooses to reveal the abuse, he or she may be met with accusations of lying,[52] fantasizing,[53] or consenting[54] to the sexual abuse. Due to these negative responses or pressure from the family, the child may eventu-

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49. *See* Sgroi, *Child Sexual Abuse: Some Guidelines for Intervention and Assessment*, in SEXUAL ASSAULT OF CHILDREN AND ADOLESCENTS 135 (1978) (child may feel guilty over role in sexual abuse relationship). Impacting on the child's level of guilt are the reactions of others to the disclosure. If parents blame the child for the situation, then the child's guilt may occur on many levels. *See id.*; *see also Child Sexual Abuse: Incest, Assault and Sexual Exploitation*, 2 CHILD ABUSE AND NEGLECT 6 (1980) (guilt feeling may result from physical pleasure received from the sexual contact).

50. *See* D. FINKELHOR, SEXUALLY VICTIMIZED CHILDREN 143 (1979) (non-disclosure victims fear parents will blame them for abuse). Many children do not disclose the abuse for fear of being blamed for the abuse and a desire to avoid their parents' reaction. *See* Burgess & Holmstrom, *Accessory-to-Sex: Pressure, Sex and Secrecy*, in SEXUAL ASSAULT OF CHILDREN AND ADOLESCENTS 89 (1978).

51. *See* Burgess & Holmstrom, *Accessory-to-Sex: Pressure, Sex and Secrecy*, in SEXUAL ASSAULT OF CHILDREN AND ADOLESCENTS 88 (1978) (fear of not being believed binds victim to secrecy); *see also* Spencer, *Father-Daughter Incest: A Clinical View From the Corrections Field*, 57 CHILD WELFARE 581, 581 (1978) (victim certain no one will believe her and if they do victim fears being blamed).

52. *See Child Sexual Abuse: Incest, Assault and Sexual Exploitation*, 2 CHILD ABUSE & NEGLECT 6 (1980) (mother of incest victim may accuse child of lying while denying her own knowledge of the abuse); *see also* Prager, *"Sexual Psychopathy" and Child Molesters: The Experiment Fails*, 6 J. JUV. L. 49, 73 (1982) (at trial sexual offender almost always accuses child of lying); Wenck, *Sexual Child Abuse: An American Shame That Can be Changed*, 12 CAP. U.L. REV. 355, 365 (1983) (myths still exist that child fantasizes about sex with father or fabricates story). These myths exist not only in the general public, but also with professionals with whom the child comes into contact. *See, e.g.*, State v. Martin, 663 P.2d 236, 237 (Ariz. 1983) (defense alleged 11-year-old victim lied about abuse due to defendant interfering with victim's relationship with victim's mother and disrupting alleged lesbian relationship with friend); People v. Russell, 443 P.2d 794, 797 (Cal. 1968) (defense attorney alleged victim falsified abuse allegations due to defendant's strictness as parent); Jones v. State, 445 N.E.2d 98, 99 (Ind. 1983) (defendant testified that his daughters lied about abuse to get even for his acts of discipline).

53. *See* Wenck, *Sexual Child Abuse: An American Shame That Can be Changed*, 12 CAP. U.L. REV. 355, 357 (1983) (Freudian psychologist perceives child's disclosure of sexual abuse as fantasy); *see also* F. RUSH, THE BEST KEPT SECRET: SEXUAL ABUSE OF CHILDREN 7 (1980) (therapists may find it easier to classify sexual events as fantasy). Both professional and lay individuals prevent the detection of sexual abuse in children by claiming that the child imagined it. *See id.* at 7-8. The following cases illustrate allegations of children fabricating stories. *See, e.g.*, People v. King, 581 P.2d 739, 741 (Colo. Ct. App. 1978) (defendant requested that 10-year-old victim submit to psychological exam claiming that she had fantasies about sexual relationships); State v. Tuffree, 666 P.2d 912, 914 (Wash. Ct. App. 1983) (defendant wanted to introduce evidence that 4-year-old victim fabricated allegation of sexual abuse against him since victim allegedly engaged in sexual acts with neighborhood boys).

54. *See* Abel, Becker & Cunningham-Rathner, *Complications, Consent, and Cognition in Sex Between Children and Adults*, 7 INT'L J.L. & PSYCHIATRY 89, 94 (1984) (discussing

ally recant his or her statement of abuse.[55] Finally, because the child often waits for a "safe" time to reveal the abuse, the disclosure frequently occurs when parents separate or divorce,[56] assuming the offender is the parent leaving the home. Unfortunately, the judicial system often construes the disclosure at this time as a fabrication engineered by the parent for retaliatory purposes.[57]

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child's ability to consent to sexual activity with adult). There are four requirements for informed consent:

> (1) Does the child understand what he or she consents to; (2) is the child aware of the accepted sexual standards in his or her community; (3) does the child appreciate the eventual possible consequences of the decision; and (4) are the child and the adult equally powerful so that no coercion influences the child's decision.

Id.; *see also* Prager, *"Sexual Psychopathy" and Child Molesters: The Experiment Fails*, 6 J. JUV. L. 49, 58 (1982) (citizens group known as S.L.A.M. (Concerned Citizens for Stronger Legislation Against Child Molesters) proposed mandatory prison sentences be given to child molesters who engaged in certain conduct). Mandatory prison sentences are recommended where the child molester "utilized undue influence, intimidation or coercion to accomplish his aims." *See id.*; *see also* State v. Ricks, 239 S.E.2d 602, 603 (N.C. Ct. App. 1977) (conviction of rape of 12 year-old female reversed). At trial, the victim related the defendant offered her $2.00 to engage in intercourse with him. The child refused at that time but later removed her clothes when told. *See id.* at 602. The court reversed the rape conviction after finding that the child was not threatened or forced to have intercourse. *See id.* at 604. The child testified that the defendant whipped all the children, and that she did not want to have sex with the defendant. *See id.* at 603.

55. *See* Spencer, *Father-Daughter Incest: A Clinical View From the Corrections Field*, 57 CHILD WELFARE 581, 588 (1978). The child is often held fully responsible for any legal consequences that flow from the sexual abuse. She is therefore under a great deal of pressure due to the family's crisis and may alter her story if there is a long delay between arrest and trial. *See id.*; *see also* Gentry, *Incestuous Abuse of Children: 'The Need for an Objective View*, 57 CHILD WELFARE 356, 357 (1978). The victim may alter the details of her original outcry statement to please offender, family, social worker, or attorney. Once the crisis has passed and the child is faced with possible removal from the home, she may recant her story. *See id.*; *see also* Bryant v. State, 271 N.E.2d 127, 128 (Ind. 1971) (victim 9 years-old when abuse first started, 15 years-old at time of trial). At trial, the victim refused to testify against her stepfather. The trial court held the child in contempt, fining her $500 and three months in the juvenile center. On appeal, the Indiana Supreme Court noted that the pressure on the victim not to testify was great, since the mother took the stand on behalf of the defendant. *See id.* at 129.

56. *See* Schultz, *Sexually Abused Children*, 58 CHILD WELFARE 30, 35 (1979) (reasons why children disclose abuse). Frequently children do not report sexual abuse until they feel safe. A safe time for children is when the offender leaves the home, often due to marital discord. *See id.* At this time the child may reveal his secret, no longer fearing the offender. *See id.* at 30.

57. *See* Burton v. State, 111 N.E.2d 892, 899 (Ind. 1953) (10-year-old victim testified she remained silent due to threats of physical violence). The court expressed concern that the victim had remained silent until her parents separated. *See id.* at 895. The court stated that the record was silent as to whether the state had tried to determine if the child had fantasized or been programmed by her mother. *See id.* at 894; *see also* Commonwealth v. King, 441 N.E.2d 248, 249 (Mass. 1982) (11-year-old victim molested since she was 9 years-old). The sexual abuse allegations included fondling, anal-genital contact, and beastiality. *See id.* The

3. Offender Profile

The myths which surround the child sex offender camouflage his or her identity as a sexual offender.[58] The most prevelant myth held by society is that the sexual offender will externally exhibit signs of sexual deviancy.[59] Current research, however, indicates that few offenders exhibit any symptoms associated with mental illness.[60] Studies indicate that the sexual of-

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victim did not report that her mother was also sexually abusing her until after she had been in foster care for one month. *See id.* at 253.

58. *See* Groth, Burgess, Birnbaum & Gary, *A Study of the Child Molester: Myths and Realities*, 41 J. AMER. CRIM. JUST. A. 17, 17-20 (1978) (myths and misconceptions surrounding sexual offenders noted after study of 148 incarcerated sexual offenders). The findings from this study indicate that common beliefs held concerning sexual offenders are myths. *See id.* at 18. The following eight myths are discussed:

(1) The child offender is a dirty old man.
(2) The offender is a stranger to his victim.
(3) The child molester is retarded.
(4) The child offender is alcoholic or drug addicted.
(5) The child offender is a sexually frustrated person.
(6) The child molester is insane.
(7) Child offenders progress over time to increasingly violent acts.
(8) Children are at greater risk of sexual victimization from "gay" (homosexual) adults than from "straight" (heterosexual) adults.

Id. at 18-20; *see also* McBrayer v. State, 467 So.2d 647, 649 (Miss. 1985) (reversing conviction for statutory rape of 13-year-old female). The majority in *McBrayer* found that the victim consented to the sexual abuse and was not previously of chaste character. *See id.* at 648-49. The dissenting opinion noted that the defendant was a drunkard who had been sexually abusing the victim for a year. *See id.* at 649 (Walker, J., dissenting). The dissent described the defendant as fitting to a "T" the characterization of a "lustful and licentious dirty old man." *See id.*

59. *See* D. FINKELHOR, SEXUALLY VICTIMIZED CHILDREN 73 (1979) (discussing myths surrounding sexual offenders). In discussing society's view of child molesters, Finkelhor states:

> Child molesters were once pictured as sexually frustrated old men who loitered in public parks or outside of schoolyards in hopes of luring naive youngsters into their clutches with offers of candy or money. . . . Study after study has punctured this stereotype, so that if any vestige of it remains—as it certainly does—it is because the truth is more unpalatable than the myth.

Id.; *see also* Douglas v. United States, 386 A.2d 289, 295 (D.C. 1978) (defense tried to introduce psychological evidence that offender would not have committed sexual crime against child); Konvalinka v. United States, 162 A.2d 778, 780 (D.C. 1960) (wife of defendant testified that sexual relations with defendant were normal; ten character witnesses testified to defendant's good character; two psychiatrists testified that defendant had no deviant sexual tendencies).

60. *See* B. JUSTICE & R. JUSTICE, THE BROKEN TABOO 91 (1979) (incestuous fathers are not mentally deranged but are responsible for actions; only 39% of sexual offenders in incestuous relationships are psychotic); *see also* Groth, Burgess, Birnbaum & Gary, *A Study of the Child Molester: Myths and Realities*, 41 J. AMER. CRIM. JUST. A. 17, 19 (1978) (in study of 148 convicted sexual offenders only 5% had psychotic tendencies); Salholz, Contreras, Taylor,

fender has the ability to employ sophisticated thought processes to rationalize his or her behavior.[61] Years of mythical perceptions of the sexual offender of children are reflected in the number of victims per offender,[62] as well as in the rate of recidivism.[63]

Achiron & Young, *Beware of Child Molesters*, NEWSWEEK, Aug. 9, 1982, at 45-47 (citing UCLA psychiatry Professor Roland Summit as stating that pedophiles are no more mentally ill than someone who robs a bank). Professor Summit states that treatments for sexual offenses have been used to escape the responsibility of the crime. *See id.* at 46; *see also* State v. Daggett, 280 S.E.2d 545, 552-53 (W. Va. 1981) (expert witness testified that defendant was pedophile but this was not mental illness).

61. *See* Abel, Becker & Cunningham-Rathner, *Complications, Consent, and Cognitions in Sex Between Children and Adults*, 7 INT'L J. L. & PSYCHIATRY 89, 97 (1984) (adult sexual offenders develop certain cognitive beliefs that justify their sexual involvement with children). This article sets forth seven of the cognitive distortions commonly used by sexual offenders: (1) that the child wants to engage in sex with the offender; (2) that the offender believes that he or she is teaching the child about sex; (3) that the child does not tell because he or she enjoys the activity; (4) that the offender's actions are not really sexual in nature; (5) that society will soon realize that sex between adults and children is all right; (6) that when the child asks a sexual question, it means the child wants to engage in sex; and (7) that his or her sexual relationship with the child enhances their parent/child relationship. *See id.* at 98-100.

62. *See* Salholz, Contreras, Taylor, Achiron & Young, *Beware of Child Molesters*, NEWSWEEK, Aug. 9, 1982, at 45 (citing results of study on sex offenders). In a study of 238 sex offenders, Dr. Gene G. Abel, Director of the Sexual Behavior Institute, found that each offender had molested an average of 68.3 children. *See id.* The following cases are examples of multiple victims: *State v. Schlak*, 111 N.W.2d 289, 290-91 (Iowa 1961) (three other females 14 years-of-age testified to similar attacks by defendant); *State v. Jackson*, 81 N.E.2d 546, 548 (Ohio Ct. App. 1948) (at incest trial, two older daughters of defendant testified to sexual abuse by defendant).

63. *See* Sturgeon & Taylor, *Report of a Five-Year Follow-Up Study of Mentally Disordered Sex Offenders Released From Atascadero State Hospital in 1973*, 4 CRIM. JUST. J. 31, 46 (1980) (study of 260 child sexual offenders). A study was conducted for a five year time period on 260 sexual offenders released in 1973 from the Atascadero State Hospital, which houses and treats sexual offenders. *See id.* at 31. During that period, 29% of the offenders were convicted of another offense, excluding vehicle code offenses. *See id.* at 46. Sexual crimes were committed more frequently by these released offenders than any other type of crime. *See id.* at 47; *see also* Telephone interview with John Brodgen, Supervisor Tarrant County Sexual Abuse Unit, Department of Human Services, in Fort Worth, Texas (Jan. 22, 1986) (Mr. Brodgen was director of Knoxville Institute for Sexual Abuse Treatment and Training Project in Knoxville, Tennessee). Mr. Brodgen related that a sample of 28 child sexual offenders from the KISATT project, who had been in therapy for an average of three years, were studied. At the end of the five years, there was a 17% recidivism rate based upon the offender's admission, police records, and the child's statement. Mr. Brodgen cautions, however, that the problems in detecting repeated offenses is that professionals only know what the child or offender tell them; thus, many repeated offenses go unreported. *See id.*; *see also* State v. Wahrlich, 459 P.2d 727, 729 (Ariz. 1969) (psychiatrist testified that defendant, who was convicted of kidnapping 6-year-old for purposes of sexual molestation and who had twice previously been convicted for sexual acts with children, had revealed 10 or 15 other sexual offenses with children).

C. *Effects of Adult-Child Sexual Interaction*

The prosecutorial basis for action against the sexual offender of children is that his or her behavior denies the child the right to normal psychological development which often results in long term negative effects on the child.[64] The consequences of sexual abuse are affected by several significant factors.[65] One factor is the child's age at the time of the offense.[66] The age factor, in turn, indicates at what point the child's sexual, psychological, and developmental growth may have been interrupted and affected.[67] Also, the closer the child's relation to the offender, the greater the trauma.[68] Increased psychological trauma may ensue if the abuse continues over a long period of time,[69] and when force is used the victim may suffer even more trauma.[70]

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64. *See, e.g.*, Abel, Becker & Cunningham-Rathner, *Complications, Consent, and Cognitions in Sex Between Children and Adults*, 7 INT'L J. L. & PSYCHIATRY 89, 93-94 (1984) (explaining consequences of child sexual abuse); Greenberg, *The Epidemiology of Childhood Sexual Abuse*, PEDIATRIC ANNALS, May 1979, at 23-24 (discussing consequences of child sexual abuse); Spencer, *Father-Daughter Incest: A Clinical View From the Corrections Field*, 57 CHILD WELFARE 581, 582-83 (1978) (discussing impact of incestuous relationship on victim discussed).

65. *See* Sgroi, *Child Sexual Assault: Some Guidelines for Intervention and Assessment*, in SEXUAL ASSAULT OF CHILDREN AND ADOLESCENTS 134 (1978) (discussing factors bearing on child's reaction to sexual abuse); Schultz, *The Child Sex Victim: Social, Psychological and Legal Perspectives*, 52 CHILD WELFARE 147, 148-51 (1973) (discussing significant factors impacting on effects of victimization).

66. *See Child Sexual Abuse: Incest, Assault, and Sexual Exploitation*, 2 CHILD ABUSE & NEGLECT 5 (1980) (age of child is important factor in determining child's reaction to abuse); Greenberg, *The Epidemiology of Childhood Sexual Abuse*, PEDIATRIC ANNALS, May 1979, at 24 (seriousness of effects on child linked to age of child at time of abuse).

67. *See* Abel, Becker & Cunningham-Rathner, *Complications, Consent, and Cognitions in Sex Between Children and Adults*, 7 INT'L J. L. & PSYCHIATRY 89, 90 (1984). These authors relate that the maturity level of the child is a factor in assessing the negative consequences of child sexual abuse. A 15-year-old female may be more emotionally equipped to handle the sexual encounter than an 8-year-old female. *See id.*; *see also* Prager, *"Sexual Psychopathy" and Child Molesters: The Experiment Fails*, 6 J. JUV. L. 49, 63 (1982) (children more likely to be abused during a level of their psycho-sexual development which results in severe and long-term consequences).

68. *See, e.g., Child Sexual Abuse: Incest, Assault, and Sexual Exploitation*, 2 CHILD ABUSE & NEGLECT 5 (1980) (psychological trauma to victim greater when offender close to child); Schultz, *The Child Sex Victim: Social, Psychological and Legal Perspectives*, 52 CHILD WELFARE 147, 149 (1973) (relationship to offender important in assessing after-effects of abuse); Sgroi, *Child Sexual Assault: Some Guidelines for Intervention and Assessment*, in SEXUAL ASSAULT OF CHILDREN AND ADOLESCENTS 134 (1978) (emotional impact on child increases according to child's relationship with offender).

69. *See, e.g.*, Abel, Becker & Cunningham-Rathner, *Complications, Consent, and Cognitions in Sex Between Children and Adults*, 7 INT'L J. L. & PSYCHIATRY 89, 92 (1984) (research study indicates that duration of abuse is more likely to cause negative consequence for child); Greenberg, *The Epidemiology of Childhood Sexual Abuse*, PEDIATRIC ANNALS, May 1979, at 24 (effect on child victim linked to duration of abuse); Sgroi, *Child Sexual Assault: Some*

Finally, the reaction of the child's family, peers, and society to the abuse may be the most traumatic factor affecting the sexually abused child.[71]

The possible effects that sexual abuse may have on the victim are innumerable.[72] Specifically, bed wetting, nightmares, regressive behavior, and learning disabilities are noted on younger victims.[73] Additionally, there is a high correlation between sexual abuse, prostitution, and substance abuse.[74] Many victims often run away from home and are eventually placed in juvenile facilities.[75] A number of psychological and personality disorders are now being linked with victims of sexual abuse.[76] If penetration is attempted or completed, the child may experience severe physical trauma, venereal disease, or pregnancy.[77]

Guidelines for Intervention and Assessment, in SEXUAL ASSAULT OF CHILDREN AND ADOLESCENTS 135 (1978) (increased number of sexual incidents over long period of time have greater effect on child).

70. *See* D. FINKELHOR, SEXUALLY VICTIMIZED CHILDREN 144 (1979) (factor producing most trauma is force); R. GEISER, HIDDEN VICTIMS: THE SEXUAL ABUSE OF CHILDREN 27 (1979) (child rape victims termed "psychological time bomb").

71. *See* Burgess & Holmstrom, *Interviewing Young Victims*, in SEXUAL ASSAULT OF CHILDREN AND ADOLESCENTS 179 (1978); Schultz, *The Child Sex Victim: Social, Psychological and Legal Perspectives*, 52 CHILD WELFARE 147, 150 (1973) (greatest potential harm to child's personality is response of family and society to disclosure of abuse).

72. *See* P. MRAZEK & H. KEMPE, SEXUALLY ABUSED CHILDREN AND THEIR FAMILIES 242 (1981) (methodological considerations of child sexual abuse effects). Some possible effects are: problems in sexual adjustment, interpersonal problems, education problems, other psychological symptoms and research finding no ill effects. *See id.*

73. *See* F. RUSH, THE BEST KEPT SECRET: SEXUAL ABUSE OF CHILDREN 7 (1980) (effects of abuse seen in nightmares, bedwetting, resistance to go to school or play); Clark & Bingham, *The Play Technique: Diagnosing the Sexually Abused Child*, TARRANT COUNTY PHYSICIAN, Aug. 1984, at 54 (behavior resulting from sexual abuse of preschoolers).

74. *See, e.g.*, Prager, *"Sexual Psychopathy" and Child Molesters: The Experiment Fails*, 6 J. JUV. L. 49, 64 (1982) (studies reveal majority of prostitutes molested as children and thus often become drug abusers); Spencer, *Father-Daughter Incest: A Clinical View From the Corrections Field*, 52 CHILD WELFARE 581, 583 (1978) (high correlation between child sexual abuse, later drug abuse and promiscuity in females); Wenck, *Sexual Child Abuse: An American Shame That Can Be Changed*, 12 CAP. U.L. REV. 355, 356 (1983) (investigation of teenage prostitution reveals that 85% of prostitutes sexually abused at home as children).

75. *See* Spencer, *Father-Daughter Incest: A Clinical View From the Corrections Field*, 52 CHILD WELFARE 581, 581 (1978) (many victims run away and come to juvenile court's attention); Wenck, *Sexual Child Abuse: An American Shame That Can be Changed*, 12 CAP. U.L. REV. 355, 356 (1983) (juvenile court system deals with sexual abuse victims as runaways).

76. *See* Greenberg, *The Epidemiology of Childhood Sexual Abuse*, PEDIATRIC ANNALS, May 1979, at 24 (effects of trauma of sexual abuse seen in disorganized thought, phobias, depression, and psychosomatic symptoms); Prager, *"Sexual Psychopathy" and Child Molesters: The Experiment Fails*, 6 J. JUV. L. 49, 64 (1982) (molested children often exhibit hysterical seizures, multiple personality states, homicidal frenzies, schizophrenia, and affective disorders).

77. *See* Schultz, *The Child Sex Victim: Social, Psychological and Legal Perspectives*, 52 CHILD WELFARE 147, 149 (1973) (physical results of sexual abuses may be venereal disease,

The trauma of being victimized does not end in childhood.[78] Many victims who are now adults suffer from continued feelings of guilt and shame that result in depression, marital discord, and sexual dysfunctions.[79] The most frightening manifestation appearing in adulthood, however, is the propensity to molest a child.[80] Today, research indicates that many of the known sexual offenders were molested themselves as children.[81]

III. PROBLEMS ENCOUNTERED WHEN CHILDREN ENTER THE CRIMINAL JUSTICE SYSTEM

A. *The Structure and Setting of the Criminal Justice System*

The child faces many obstacles to becoming a credible witness,[82] many of which are attributable to the structure of the criminal justice system.[83] In

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pregnancy, sex-organ injury or rupture, and general bodily injuries). For a discussion of venereal disease in sexual abuse victims see, P. MRAZEK & H. KEMPE, SEXUALLY ABUSED CHILDREN AND THEIR FAMILIES 130 (1981).

78. *See* P. MRAZEK & H. KEMPE, SEXUALLY ABUSED CHILDREN AND THEIR FAMILIES 243 (1981) (reviewing long-term results of child sexual abuse).

79. *See* Greenberg, *The Epidemiology of Childhood Sexual Abuse*, PEDIATRIC ANNALS, May 1979, at 26-27 (consequences of child sexual abuse in later life often seen in marital problems, hostile feelings, low self-esteem, aggression, difficulties in eating, avoidance of adults, and abuse and neglect of own children). Victims of childhood rape may "explode" later in adult life. *See* R. GEISER, HIDDEN VICTIMS: THE SEXUAL ABUSE OF CHILDREN 28 (1979).

80. *See* L. SCHULTZ, THE SEXUAL VICTIMOLOGY OF YOUTH 23 (1980) (discussing repetitive cycle of child abuse). It is important to establish empirical data on the incidence of sexual abuse in young males to determine the possibility that these victims are at high risk to commit the offense themselves. *See id.* In incest cases it has been noted that the abusing parent was sexually abused as a child. *See generally* Comment, *The Crime of Incest Against the Minor Child and the States' Statutory Responses*, 17 J. FAM. LAW. 93 (1978) (discussing various states' incest laws).

81. *See* Prager, *"Sexual Psychopathy" and Child Molesters: The Experiment Fails*, 6 J. JUV. L. 49, 64-65 (1982) (most frightening consequence of being sexual abuse victim is potential to harm others). In one study, the majority of child sexual offenders reported being molested as children. *See id.* at 64. If statistics are correct, then the continued release of offenders into society "might actually guarantee an incessant increase, of geometric proportion, in the number of child molesters." *Id.* at 64-65.

82. *See* Stafford, *The Child As A Witness*, 37 WASH. L. REV. 303, 303 (1962) (discussing determination of child's competency to testify). For a discussion of problems incidental in the legal process, see Leaman, *Sexual Acts Against Children: Medical-Legal Aspects*, in SEXUAL ABUSE OF CHILDREN: SELECTED READINGS 31 (1980).

83. *See* Libai, *The Protection of The Child Victim of a Sexual Offense in The Criminal Justice System*, 15 WAYNE L. REV. 977, 978-79 (1969) (discussing obstacles facing sexual abuse victims as witnesses and proposing reform of criminal justice system). Libai discusses the need for specialized investigators to question the child in order to reduce the trauma and number of interviews. *See id.* at 995. Libai also proposes a "child courtroom" whereby the child could testify in a more relaxed atmosphere. *See id.* at 1014; *see also* Comment, *Libai's*

order to prosecute the sexual offender, the child's testimony is crucial.[84] By necessity, the child becomes the key to the prosecution and the details of the sexual abuse become the critical testimony.[85] The criminal justice system's structure is such that the child must repeat the story many times.[86] It is likely that the child will be interviewed by a social worker, police officer, physician, psychologist, and several attorneys.[87] The victim may also need to testify before the grand jury or at a preliminary hearing.[88] Often the time

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Child Courtroom: Is It Constitutional?, 7 J. JUV. L. 31, 33 (1983) (discussing proposals by Libia for child court).

84. *See, e.g.*, Hawkins v. State, 326 So.2d 229, 230 (Fla. Dist. Ct. App. 1976) (state's case based on testimony of child and incriminating statement by defendant); State v. Kim, 645 P.2d 1330, 1333 (Hawaii 1982) (victim only witness to crime); State v. Simerly, 463 S.W.2d 846, 848 (Mo. 1971) (unlikely that sexual abuse of child will have eyewitness). For a discussion of recent court cases liberalizing the traditional rules of evidence in the prosecution of child sexual offenders, see generally Curry & Crow, *Liberalization in the Admissibility of Evidence in Child Abuse and Molestation Cases*, 7 J. JUV. L. 205 (1983).

85. *See* Fitzgerald v. United States, 443 A.2d 1295, 1298 (D.C. 1982) (defense moved for acquittal where there was no physical evidence, there was delay in reporting, and only victim testified); *see also* People v. Nunes, 195 N.E.2d 706, 707 (Ill. 1964) (court concerned that alleged sexual offense not reported by victim until one week after incident).

86. *See* State v. Rodriguez, 657 P.2d 79 (Kan. Ct. App. 1983) (after allegations of sexual abuse child underwent both psychological and medical examination); State v. Harvey, 641 S.W.2d 792, 795 (Mo. Ct. App. 1982) (11-year-old victim of sodomy and rape interviewed on separate occasions by two different police officers and social worker); *see also* Leaman, *Sexual Acts Against Children: Medical-Legal Aspects*, in SEXUAL ABUSE OF CHILDREN: SELECTED READINGS 32 (1980) (child may be involved in criminal, civil, and family courts; may have repeated story to police and physicians; and may have also attended lineup, preliminary and pretrial hearings).

87. *See* State v. Martin, 663 P.2d 236, 237 (Ariz. 1983) (police officer, detective, psychologist, and pediatrician testified as to interviews with children); State v. Middleton, 657 P.2d 1215, 1216 (Or. 1983) (14-year-old victim repeated sexual abuse incident to friend's mother, social worker, police, grand jury, doctor, and prepared statement for police).

88. *See* B. MOROSCO, THE PROSECUTION AND DEFENSE OF SEX CRIMES § 9.09(3), (4) (1985) (discussing preliminary and grand jury hearing in child sexual abuse case). This author suggests that the child be called to testify at the preliminary hearing so that the prosecutor will have an opportunity to evaluate the child on the stand. *See id.* § 9.09(3). It is further suggested that since the defendant is not present at the grand jury hearing, the child will feel less pressured and be able to relate the sexually abusive situation. *See id.* § 9.09(4). *But see* AMERICAN LEGAL RESOURCE CENTER FOR CHILD ADVOCACY AND PROTECTION, RECOMMENDATIONS FOR IMPROVING LEGAL INTERVENTION IN INTRA-FAMILY CHILD SEXUAL ABUSE CASES § 1.4.4 (1982) (recommendations concerning child's testimony). The American Bar Association recommends that children be used in the preliminary hearing and grand jury hearing only if necessary. This recommendation is made in light of the traumatic effects the courtroom has on the child as a witness. *See id.* § 1.4.4; *see also* State v. Wahrlich, 459 P.2d 727, 730 (Ariz. 1969) (victim's testimony at trial contradicted testimony at preliminary hearing); People v. Edgar, 317 N.W.2d 675, 678 (Mich. Ct. App. 1982) (where child previously testified at preliminary hearing, she showed reluctance to testify at trial).

between reporting the abuse and trial is months or years.[89] The child's ability to testify after a prolonged delay may be affected[90] inasmuch as the child may forget the incident, repress the abuse,[91] or recant the prior statement.[92] By the time the case actually comes to trial the child will probably have made numerous court appearances.[93]

The courtroom setting is another initial obstacle for the child.[94] The traditional courtroom architecture is imposing and designed for the adult participant.[95] The child will find no playroom in which to play while wait-

89. *See* State v. Wahrlich, 459 P.2d 727, 728 (Ariz. 1969) (victim 6-years-old at time of offense; trial four years later); Commonwealth v. King, 441 N.E.2d 248 (Mass. 1982); *see also* Comment, *Libai's Child Courtroom: Is It Constitutional?*, 7 J. JUV. L. 31, 32 (1983) (many victims affected by repeated interviews and lengthy delays before trial).

90. *See* Wenck, *Sexual Child Abuse: An American Shame That Can Be Changed*, 12 CAP. U.L. REV. 355, 366 (1983) (once child reveals abuse, action should be taken quickly since child may be pressured into silence where there is prolonged delay); *see also* State v. Rodriguez, 657 P.2d 79, 81 (Kan. Ct. App. 1983) (4-year-old victim refused to answer questions at trial).

91. *See* Berliner & Stevens, *Advocating for Sexually Abused Children in the Criminal Justice System*, in SEXUAL ABUSE OF CHILDREN: SELECTED READINGS 49 (1980) (long delays limit child's ability to testify due to inability to recall); *see also* Clark & Bingham, *The Play Technique: Diagnosing the Sexually Abused Child*, TARRANT COUNTY PHYSICIAN, Aug. 1984, at 54 (preschool age child can easily repress sexual abuse incident).

92. *See* Peckinpaugh v. State, 447 N.E.2d 576, 578 (Ind. 1983) (child witness recanted previous statement, claiming it false; however, trial court allowed previous statement to be used to impeach child's current testimony). The Indiana Supreme Court, affirming the trial court's judgment after examining the conflicting testimony, stated that the child's out-of-court statement could have been found to be more credible than her in court testimony. *See id.* at 581; *see also* State v. Yates, 399 P.2d 161, 162 (Or. 1965) (victim's testimony impeached at trial by proof that day before victim told defense attorney that rape did not occur).

93. *See How Credible Are Children as Witnesses?*, JUDGES J., Fall 1984, at 1-2 (study by psychologists indicated that 60% of child sexual abuse cases studied actually went to court, and children involved in these cases made approximately seven court appearances); *see also* Leaman, *Sexual Acts Against Children: Medical-Legal Aspects*, in SEXUAL ABUSE OF CHILDREN: SELECTED READINGS 31, 32 (1980) (survey conducted by American Humane Association of 250 child sexual abuse cases revealed that of the cases that went to court, there was average of six court appearances).

94. *See* People v. Price, 226 N.Y.S.2d 460, 461-63 (Ct. Special Sessions 1962) (noting that when children are witnesses, court is confronted with its own inherent limitations in dealing with children because courtroom is not familiar and secure atmosphere with which children are accustomed); *see also* Berliner & Stevens, *Advocating for Sexually Abused Children in the Criminal Justice System*, in SEXUAL ABUSE OF CHILDREN: SELECTED READINGS 49-50 (1980) (child must testify while sitting alone and talking into microphone in front of defendant and spectators); Burgess & Holmstrom, *The Child and Family During the Court Process*, in SEXUAL ASSAULT OF CHILDREN AND ADOLESCENTS 205 (1978) (courtroom protocol unfamiliar to child).

95. *See Ways to Protect Child Victim in Court*, N. Y. Times, Jan. 22, 1986, at 10, col. 3 (citing Justice Department guide: "When children become victims or witnesses of violence . . . they are thrust into an adult system that traditionally does not differentiate between children

ing to testify, no age appropriate books to read, or child-size furniture. Likewise, unlike the other areas of the child's life, the child will find that there are no other children participating; instead, the child encounters a witness chair that may seem awesome in size and a judge who is dressed in black.[96] The child also often has difficulty testifying upon encountering adult strangers in front of whom he or she must repeat the details of the sexual abuse.[97] This setting seems contrary in almost all respects with society's more compassionate and understanding response to the needs of the children.[98]

B. *The Child's Inherent Limitations and Capabilities*

The court's expectation of a child as a witness should be based on that particular child's inherent limitations and capabilities.[99] This expectation therefore requires an understanding of child development by those who question the child in the courtroom.[100] At the preschool level, ages four to six, the child possesses greater verbal skills than ability to comprehend ver-

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and adults"); *see also* Leaman, *Sexual Acts Against Children: Medical-Legal Aspects*, in SEXUAL ABUSE OF CHILDREN: SELECTED READINGS 32 (1980) (adult-like behavior expected of children at trial).

96. *See* People v. Price, 226 N.Y.S.2d 460, 462-63 (Ct. Special Sessions 1962) (acknowledging that judge's appearance in black robe was unsettling to child witness); *Ways to Protect Child Victim in Court*, N. Y. Times, Jan. 22, 1986, at 10, col. 3 (size of witness chair can be intimidating to child); *see also* Wenck, *Sexual Child Abuse: An American Shame That Can be Changed*, 12 CAP. U.L. REV. 355, 366 (1983) (children concerned with identity of person in black robe and whether this person would send them to jail).

97. *See* People v. Russell, 443 P.2d 794, 797 (Cal. 1968) (child lied initially because embarrassed to admit frequency of intercourse with father); *see also* Burgess & Holmstrom, *The Child and Family During the Court Process*, in SEXUAL ASSAULT OF CHILDREN AND ADOLESCENTS 215-17 (1978) (observation of child sexual abuse victims in courtroom). The child's reaction to being in the courtroom can often be detected by their facial or bodily expressions; some children rock back and forth in the chair, move their legs up and down, pick at their fingernails, cry, become quiet, or talk excessively. *See id.* at 216-17.

98. *See* Libai, *The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System*, 15 WAYNE L. REV. 977, 978-79 (1969) (while juvenile offenders are provided with specialized system to meet their needs as non-adults, children witnesses receive same treatment as adult witnesses); *see also* Berliner & Stevens, *Advocating for Sexually Abused Children in the Criminal Justice System*, in SEXUAL ABUSE OF CHILDREN: SELECTED READINGS 47, 47 (1980) (only juvenile offenders given protective treatment in criminal justice system).

99. *See* Berliner & Stevens, *Advocating for Sexually Abused Children in the Criminal Justice System*, in SEXUAL ABUSE OF CHILDREN: SELECTED READINGS 47, 49 (1980) (attorneys' worst mistake is not interviewing children at their level of comprehension); *see also* Wenck, *Sexual Child Abuse: An American Shame That Can be Changed*, 12 CAP. U.L. REV. 355, 366 (1983) (child can clearly relate abuse to court if prosecutor educated about child's vocabulary).

100. *See* AMERICAN LEGAL CENTER FOR CHILD ADVOCACY AND PROTECTION, RECOMMENDATIONS FOR IMPROVING LEGAL INTERVENTION IN INTRA-FAMILY CHILD SEXUAL ABUSE CASES 1.5 (1982) (recommending that professional involved with child sexual abuse receive training in child development and interviewing techniques); *see also* B. MOROSCO, THE

bal language.[101] The preschooler is very concrete in his or her thought processes[102] and does not understand time, sequence, causation, or analogies.[103] The preschooler engages in fantasy, but with the ability to distinguish fantasy from reality.[104] The preschool age child is also egocentric when viewing the world and talks of those things which concern only the child's self.[105] In relating sexually abusive situations, preschoolers possess the verbal skills to relate the facts as to who abused them and where on their bodies they were abused.[106] Due to their preference for playing out their

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PROSECUTION AND DEFENSE OF SEX CRIMES § 9.09[1] (1985) (prosecutors should not expect child to function on prosecutor's level of intelligence).

101. *See* Berliner & Stevens, *Advocating for Sexually Abused Children in the Criminal Justice System*, in SEXUAL ABUSE OF CHILDREN: SELECTED READINGS 47, 48 (1980) (preschoolers talk well and have ability to memorize, but often do not understand concepts or comprehend what was memorized).

102. *See Handling Evidence and Testimony In Child Abuse Cases*, JUDGES J., Fall 1984, 2, 55 (testimony of young child seems self-contradictory when actually concrete). An example is given where the attorney in a case questioned a young boy about going to the defendant's house. The child responded that he had not been to the defendant's house, contradicting earlier testimony. In reality, the child meant he had not gone to the defendant's house, but to his apartment. *See id.*; *see also* F. RUSH, THE BEST KEPT SECRET: SEXUAL ABUSE OF CHILDREN 155 (1980) (children's perception of their world is concrete).

103. *See* People v. Edgar, 317 N.W.2d 675, 676 (Mich. Ct. App. 1982) (prosecution for sexual conduct with 4-year-old). The child, who was called to testify during the preliminary examination, stated that the offense occurred "right after Thanksgiving." On cross-examination, however, the child stated the offense occurred "last night." On redirect, the child then stated the offense occurred "last night, Thanksgiving." *See id.* Even though the Magistrate held that the child was competent to testify, the trial judge ruled she was not. *See id.* at 677. The trial court found that the child did not comprehend the difference between the truth and a lie and her answers were not responsive to the questions concerning the incident. *See id.*; *see also* People v. Miller, 373 N.E.2d 1077, 1078 (Ill. App. Ct. 1978) (4-year-old victim of sexual abuse ruled incompetent to testify because could not relate dates and times); Johnson v. United States, 364 A.2d 1198, 1200 (D.C. 1976) (on voir dire 6-year-old female did not know address or phone number and was unaware of difference between day and month).

104. *See* F. RUSH, THE BEST KEPT SECRET: SEXUAL ABUSE OF CHILDREN 155 (1980) (children distinguish between fantasy and reality better than adults); *see also* CLARK, THE EFFECT OF SEXUAL ABUSE AT VARIOUS STATES OF DEVELOPMENT (unpublished training handout, on file in St. Mary's Law Journal Office) (preschooler's fantasy based on reality but child can distinguish between fantasy and reality).

105. *See* S. WOLFF, CHILDREN UNDER STRESS 6 (1969). In an egocentric world the child is concerned and thinks only of himself. Preschoolers believe that what concerns them must be of concern to those around him. *See id.*; *see also* Berliner & Stevens, *Advocating for Sexually Abused Children in the Criminal Justice System*, in SEXUAL ABUSE OF CHILDREN: SELECTED READINGS 48 (1980) (preschooler's view of world egocentric).

106. *See* Clark & Bingham, *The Play Technique: Diagnosing the Sexually Abused Child*, TARRANT COUNTY PHYSICIAN, Aug. 1984, at 54 (preschooler has ability to tell who offender was, if they were hurt, and what was said to them); *see also* State v. Tuffree, 666 P.2d 912, 913 (Wash. Ct. App. 1983) (preschooler testified at trial that defendant put his "ding dong . . . [i]n

feelings,[107] preschoolers can often "role-play" the abusive situation using their own bodies or anatomical dolls.[108] Since, however, preschoolers are concrete in their thought processes, they cannot relate the time, date, or sequence of the abusive act.[109]

The school-aged child, ages six to eleven, possesses greater language skills than the preschooler.[110] Peer relationships have developed wherein the school-aged child employs a democratic and fair attitude.[111] The school-aged child now practices "concrete operational logic."[112] Abstract logic, the process of working things out logically in one's own mind, however, does not occur until after the age of twelve years.[113] School-aged children, therefore, can give a detailed verbal account of the sexual abuse.[114] Since the school-aged child is still limited by concrete thought, the ability to relate times or

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my mouth"); State v. Harris, 678 S.W.2d 473, 474 (Tenn. Ct. App. 1984) (child testified the stepfather rubbed his "paw paw" on her vaginal area).

107. *See* G. LANDRETH, PLAY THERAPY: DYNAMICS OF THE PROCESS OF COUNSELING WITH CHILDREN 45 (1982). Children cannot always express themselves verbally and, therefore, may resort to play for release. *See id.* Play can be used to obtain information from the child. *See* SCHAEFER & O'CONNOR, HANDBOOK OF PLAY THERAPY 13 (1983).

108. *See* Clark & Bingham, *The Play Technique: Diagnosing the Sexually Abused Child*, TARRANT COUNTY PHYSICIAN, Aug. 1984, at 55 (discussing aids for communicating with sexual abuse victim). While some preschool children will use the anatomically correct dolls to demonstrate the sexual abuse incident, others will prefer to use their own body. Due to the preschool-age child's concreteness, the concept of using the dolls is often too abstract. Many children will point to their own bodies to show where they were hurt due to a lack of inhibitions. *See id.*; *see also* State v. Tuffree, 666 P.2d 912, 913-14 (Wash. Ct. App. 1983) (anatomical dolls used with preschooler at trial whereby child indicated on doll where she was touched by defendant). *But see* Wenck, *Sexual Child Abuse: An American Shame That Can be Changed*, 12 CAP. U.L. REV. 355, 363 (1983) (task force rejected use of dolls due to fear that defense attorney could illustrate how child is merely pretending with doll and therefore pretending about abuse).

109. *See* Berliner & Stevens, *Advocating for Sexually Abused Children in the Criminal Justice System*, in SEXUAL ABUSE OF CHILDREN: SELECTED READINGS 47, 49 (1978) (4-year-old cannot be asked question on dates and time).

110. *See* S. WOLFF, CHILDREN UNDER STRESS 8 (1969) (after age of 7 years child can dissociate words and thought from objects); *see also* B. MOROSCO, THE PROSECUTION AND DEFENSE OF SEX CRIMES § 9.09 (1985) (school-age children have increased language skills).

111. *See* S. WOLFF, CHILDREN UNDER STRESS 8 (1980) (school-age child loses egocentric view of world and develops cooperative attitude in social relationships). The school-age child develops peer relationships where he practices a sense of justice and fairness. *See* Berliner & Stevens, *Advocating for Sexually Abused Children in the Criminal Justice System*, in SEXUAL ABUSE OF CHILDREN: SELECTED READINGS 48 (1980).

112. *See* S. WOLFF, CHILDREN UNDER STRESS 8 (1980) (school-age child can reach accurate conclusions concerning ongoing event which he observes).

113. *See id.* (with abstract logic child does not need object in front of him to work out problem). Until abstract logic is mastered, time is still a difficult concept for the school-age child. *See* State v. Nash, 272 S.W.2d 179, 181 (Mo. 1954) (during trial both victims testified and became confused when questioned about specific dates).

114. *See, e.g.*, State v. Martin, 663 P.2d 236, 237 (Ariz. 1983) (11-year-old victim testified

dates is still limited.[115]

C. *Establishing the Child's Competency and Credibility in the Courtroom*

1. Compentency

History indicates that courts have recognized the ability of children to testify in criminal prosecutions as early as 1779.[116] The leading case in America setting forth the policy regarding children as witnesses is *Wheeler v. United States*.[117] In holding that a five-year-old boy could testify, the United States Supreme Court stated that there was no precise age at which a child was competent to testify.[118] The Court stated that, in determining the child's competency as a witness, the child's capacity, intelligence, ability to tell the difference between the truth and a lie, and sense of obligation to be truthful should be considered.[119]

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at trial as to details of sexual abuse by her stepfather); Hall v. United States, 400 A.2d 1063, 1064 (D.C. 1979) (7-year-old male victim testified as to sexual molestation by his uncle).

115. *See* Clark & Bingham, *The Play Technique: Diagnosing the Sexually Abused Child*, TARRANT COUNTY PHYSICIAN, Aug. 1984, at 54 (school-age child cannot give date of offense); *see also* Posey v. United States, 41 A.2d 300, 301 (D.C. 1945) (defendant claimed 10-year-old not competent to testify). In discussing the competency of the child, the court in *Posey* considered the child's negative response to abstract questions. *See id.* The court recognized that while the child might not answer the abstract questions appropriately, he still had the capacity to recall and communicate so as to be a competent witness. *See id.* at 301-02. The court noted that the child is better able to answer questions of fact rather than abstract questions. *See id.* at 302; *see also* State v. Swallow, 350 N.W.2d 606, 608 (S.D. 1984) (defendant accused of sexual contact and exploitation of three young children). On appeal, the defendant in *Swallow* contended that since a specific time was not alleged as to when the offense occurred, the information was insufficient. *See id.* at 609. The trial judge noted that due to the nature of the offense and the fact that minor children do not immediately complain of the abuse, a specific time of the offense is difficult to ascertain. *See id.* at 608.

116. *See* King v. Brasier, 68 Eng. Rep. 202, 202-03 (1779) (child victim did not testify; however, court held that child under age of seven could testify if first examined by court). The court stated:

> There is no precise or fixed rule as to the time within which infants are excluded from giving evidence; but their admissibility depends upon the sense and reason they entertain of the danger and impiety of falsehood, which is to be collected from their answers to questions propounded by the court.

Id.; *see also* Note, *The Competency of Children as Witnesses*, 39 VA. L. REV. 358, 358 (1953) (discussing historical background of children as witnesses).

117. 159 U.S. 523 (1895).

118. *See id.* at 524. In *Wheeler*, the defendant contended that the lower court erred in allowing a 5-year-old boy to testify. *See id.* The lower court held that the trial court's voir dire of the child indicated that he was competent to testify. *See id.* at 526; *see also* Note, *The Competency of Children as Witnesses*, 39 VA. L. REV. 358, 360 (1953) (identifying *Wheeler* as leading case on topic).

119. *See* Wheeler v. United States, 159 U.S. 523, 524 (1895); *see also* 2 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 506 (Chadbourn rev. ed. 1979) (outlining competency requirements). Wigmore describes the three elements of competency as the ability to

Today, many states have established by statute that children under the age of ten years are incompetent to testify unless the court ascertains their competency after questioning.[120] Conversely, other states have no statutory provision setting an age at which a child is presumed to be competent to testify.[121] Based upon the facts as set forth in *Wheeler*, standard questions are posed to the child by the judge or attorneys to determine the child's competency.[122] The ultimate decision as to whether a child is competent to testify is made by the trial judge.[123]

2. Credibility

Once the child is found to be competent to testify by the trial court, the child must then testify while facing the same expectations of performance as an adult witness.[124] Unlike the adult, however, the credibility of the child witness is often totally dependent upon the person asking the questions.[125]

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observe, recall, and communicate. In order to have the capacity to communicate, the child must be able to understand the questions presented and have a moral responsibility to answer truthfully. *See id.*

120. *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-2202 (1982) (child under 10 years-of-age may not testify if incapable of understanding pertinent facts and relating facts truthfully); IND. CODE ANN. § 34-1-14-5 (Burns 1973) (child under 10 years-of-age is incompetent to testify unless he understands oath); MICH. STAT. ANN. § 27A-2163 (Callaghan 1976) (for child under 10 years-of-age to testify, court must first examine child regarding his competency as witness).

121. *See, e.g.*, GA. CODE ANN. § 24-9-5 (1982) (persons who do not understand oath are incompetent witnesses); IOWA CODE ANN. § 622.1 (West 1950) (anyone capable of understanding oath is competent witness); KY. REV. STAT. § 421.200 (1972) (witness competent to testify unless court finds they lack understanding of facts).

122. *See* B. MOROSCO, THE PROSECUTION AND DEFENSE OF SEX CRIMES § 9.04(3) (1985) (example of questions to be used by trial judge, district attorney and defense attorney); Note, *The Competency of Children as Witnesses*, 39 VA. L. REV. 358, 362 (1953) (listing examples of questions typically asked to ascertain child's competency).

123. *See, e.g.*, Cross v. Commonwealth, 77 S.E.2d 447, 449 (Va. 1953) (competency of child witness rests in sound discretion of trial court); State v. Daggett, 280 S.E.2d 545 (W. Va. 1981) (right to refuse or admit child's testimony is trial court's decision); Robinson v. United States, 357 A.2d 412, 417 (D.C. 1975) (competency of child is threshold question for trial court to decide); *see also* 2 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 507 (Chadbourn rev. ed. 1979) (trial court must determine if child competent).

124. *See* Bernstein, *Out of the Mouths of Babes: When Children Take the Witness Stand*, 4 CHILDREN'S LEGAL RIGHTS J. 11, 11 (1983) (child subject to same treatment in courtroom as adult). The child witness will be subject to both direct examination and cross-examination. *See id.*; *see also* Parker, *The Rights of Child Witnesses: Is The Court a Protector or Perpetrator?*, 17 NEW ENG. L. REV. 643, 647 (1982). The present judicial system is not equipped to handle children as witnesses. This inability to accommodate children seems even greater when the situation is an emotional one, and the child's participation in the court process may be harmful. *See id.*

125. *See* INTERVIEWING CHILD VICTIMS (1979) (available from Sexual Assault Center, Harborview Medical Center, 325 Ninth Avenue, Seattle, Washington 98104) (techniques to be used by personnel in criminal justice system when interviewing sexual abuse victims). This

Hence, the first problem encountered by the child during questioning is the skill level of the attorney presenting the questions.[126] If the attorney is unable to approach the child witness on the child's developmental level, the child's responses may appear inconsistent with prior statements.[127] The effects of repeated interviews may also result in the child's testimony sounding memorized and therefore not credible.[128] Similarly, leading questions pres-

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handout presents several issues which effect the child's ability to relate the sexual abuse incident and of which the person questioning the child should be aware. These issues include the child's developmental level, cognitive ability, emotional state, and behavior. Numerous interviewing techniques are also set forth. These techniques include being prepared for the interview with background information, providing a comfortable setting, and establishing a rapport with the child. Finally, suggestions are made as to how to obtain information from the victim by appropriate language and asking simple but direct questions. *See id.*; *see also* Goodman & Michelle, *Would You Believe A Child Witness?*, PSYCHOLOGY TODAY, Nov. 1981, at 82, 83 (indicating child can be good witness if attorneys not allowed to ask leading questions).

126. *See* Parker, *The Rights of Child Witnesses: Is The Court a Protector or Perpetrator?*, 17 NEW ENG. L. REV. 646, 665 (1982). Parker advocates that a "Child Hearing Officer," who would be an attorney trained specifically in child development and interviewing, be provided for the victim. *See id.* The role of the Child Hearing Officer would be to protect the child's interests. *See id.* at 666. Specifically, the Child Hearing Officer may question the child "at a special deposition." *See id.* at 668. If, however, the prosecutor and defense attorney question the child, the Child Hearing Officer may intervene when the questioning is inappropriate or rephrase questions to the child's level of understanding. *See id.*; *see also* B. MOROSCO, THE PROSECUTION AND DEFENSE OF SEX CRIMES § 9.09 (1985) (discussing decision to prosecute sexual offender and need to establish rapport with child witness before questioning attempted). Morosco further states that the attorney should be aware of the child's short attention span and present questions to the child that will elicit the maximum information. *See id.*

127. Berliner & Stevens, *Advocating for Sexually Abused Children in the Criminal Justice System*, in SEXUAL ABUSE OF CHILDREN: SELECTED READINGS 49 (1980) (issue of credibility of child witness stems from child's inability to understand and answer questions correctly); *see also* Leaman, *Sexual Acts Against Children: Medical-Legal Aspects*, in SEXUAL ABUSE OF CHILDREN: SELECTED READINGS 32 (1980) (inconsistencies in child's testimony result of confusion, not deceit); Parker, *The Rights of Child Witnesses: Is The Court a Protector or Perpetrator?*, 17 NEW ENG. L. REV. 643, 652 (1982). Parker relates a story of a five-year-old child called to testify at preliminary rape case hearing. The defense attorney, after questioning the child, contended the child's story was contradictory because the child stated at one point that her pants were pulled off and later stated that her pants had stayed on. It seems the inconsistency revolved around the child meaning that her pants were pulled down but not off. The judge dismissed the case despite the fact that the child was treated for vaginal bleeding. *See id.*

128. *See* Cross v. Commonwealth, 77 S.E.2d 447, 450 (Va. 1953) (defendant's conviction for rape of 6-year-old female reversed). On cross-examination, the defense attorney continuously questioned the child about memorizing her testimony. *See id.* at 449-50. The defense attorney used leading questions to which the child consistently responded affirmatively. In the end, the defense attorney questioned the child as to whether she had memorized her testimony so as to remember it for the last two years; she responded "yes." *See id.* at 450. For points on how to attack a child's testimony that is so rehearsed that the testimony seems memorized, see F. BAILEY & H. ROTHBLATT, CRIMES OF VIOLENCE, RAPE AND OTHER SEX CRIMES 337 (1973).

ent a major problem for children.[129] Insofar as children are susceptible to suggestion, leading questions are an excellent method used to impeach the child's credibility.[130] Unfortunately, authority exists which allows broad latitude in leading a child on the witness stand.[131] Today, however, authorities who study children as witnesses agree that a child's testimony is more credible when solicited through non-leading questions.[132]

The adversarial nature of the criminal justice system is perhaps the greatest obstacle confronting the child witness.[133] First, the defendant is given the constitutional right to confront the opposing witnesses at trial.[134] Traditionally, this confrontation has meant that the defendant has the right to have face-to-face contact with the witness.[135] For the child victim of sexual abuse, this confrontation may be an extremely traumatic event which can

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129. *See* United States v. Iron Shell, 633 F.2d 77, 80-82 (8th Cir. 1980) (court cautioned attorney to refrain from unnecessary leading questions).

130. *See* Goodman & Michelli, *Would You Believe a Child Witness?*, PSYCHOLOGY TODAY, Nov. 1981, at 83. For years, studies have shown that children are highly susceptible to suggestion. In view of this knowledge, it seems inconsistent that lawyers are allowed to ask a child leading questions. *See id.*; *see also* Note, *The Problem of the Child Witness*, 10 WYO. L.J. 214, 220 (1955-56). The author reports a psychologist's findings regarding child witnesses and the use of suggestion. The psychologist reported that when seven-year-olds are faced with a picture and then asked suggestive questions, the children accepted 50% of the suggestions. In contrast, when the same procedure was used on eighteen-year-olds they accepted only 10% of the suggestions. *See id.*

131. *See* State v. Davis, 147 P.2d 940, 942 (Wash. 1944) (father convicted of incest with daughter). The *Davis* court recognized that there was an exception to the general rule of not asking leading questions on direct examination. The court cited Wharton's *Treatise on Evidence* stating that leading questions may be used with children unaccustomed to judicial proceedings. *See id.*; *see also* Stafford, *The Child as a Witness*, 37 WASH. L. REV. 303, 320 (1962) (leading questions may occasionally be necessary when questioning child; wide latitude allowed).

132. Goodman & Michelli, *Would You Believe a Child Witness?*, PSYCHOLOGY TODAY, Nov. 1981, at 83 (discussing various studies of child witnesses). The authors suggest that children can be excellent witnesses if the courtroom atmosphere is supportive, if parents do not interject their views on the child, and if attorneys refrain from asking children leading questions. In conclusion, the authors state that there is no reason to believe that the child's testimony is not valid. *See id.*; *see also* Note, *The Problem of the Child Witness*, 10 WYO. L.J. 214, 220 (1955-56) (child's accurate testimony may be discredited by trier of fact if obtained through leading questions).

133. *See* Schultz, *The Child Sex Victim: Social, Psychological and Legal Perspectives*, 52 CHILD WELFARE 147, 153 (1973) (adversarial nature of court process poses greatest potential for trauma); *see also* Goodman & Michelli, *Would You Believe a Child Witness?*, PSYCHOLOGY TODAY, Nov. 1981, at 82, 91 (courtroom experience which encompasses testifying in front of strangers and being cross-examined are emotionally traumatic for child).

134. *See* U.S. CONST. amend. VI. ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him").

135. *See* Dowdell v. United States, 221 U.S. 325, 330 (1911) (sixth amendment secures right to confront witness); Mattox v. United States, 156 U.S. 237, 244 (1895) (substance of sixth amendment preserved when defendant confronts and cross-examines witness).

affect their ability to testify.[136] If the child is related to the offender, the child may resist testifying altogether.[137] The child witness is also subject to cross-examination by the defense counsel who attempts to impeach the child's credibility.[138] To avoid sympathy for the child, the defense attorney may prefer to attack the child's credibility indirectly.[139] One prominent defense attorney suggests that the child be led into "traps" with the use of facial expressions and leading questions.[140] Other defense attorneys may prefer a more direct attack by employing sophisticated intimidation tactics on the child.[141] Whatever the method, the result is often a diminution in the

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136. *See* Libai, *The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System*, 15 WAYNE L. REV. 977, 984 (1969) (discussing trauma for child witness). Libai, citing various psychiatrists, identifies aspects of the legal system that may place the child under mental distress, one of which is facing the perpetrator in the legal proceedings. Other aspects identified are the atmosphere of the court, cross-examination, and repeated interrogation. *See id.*; *see also Ways to Protect Child Victims in Court*, N. Y. Times, Jan. 22, 1986, at 10, col. 3. In a study by the Justice Department on how to alleviate the problems children face in the courtroom, the results indicated that the children's most common fear was facing the offender. *See id.*

137. *See* Spencer, *Father-Daughter Incest: A Clinical View From the Corrections Field*, 57 CHILD WELFARE 581, 599 (1978) (child may feel responsible at trial for sending father to jail); *see also* Gentry, *Incestuous Abuse of Children: The Need for an Objective View*, 57 CHILD WELFARE 356, 357 (1978) (child seldom wants to testify, but rather salvage relationship); McIntyre v. State, 460 N.E.2d 162, 165 (Ind. Ct. App. 1984) (11-year-old refused to testify against grandfather until held in contempt).

138. *See, e.g.*, Curry, *Tactics When the Child Molestation Victim Is a Poor Witness*, 8 J. JUV. L. 255, 256 (1984) (due to age, child victims easily discredited on cross-examination); *Ways to Protect Child Victims in Court*, N. Y. TIMES, Jan. 22, 1986, at 10, col. 3 (defense attorney can easily discredit child's testimony by exploiting child's uncertainty about questions); Spencer, *Father-Daughter Incest: A Clinical View From the Corrections Field*, 57 CHILD WELFARE 581, 588 (1978) (defense attorney will do whatever possible to discredit child as witness).

139. *See* F. BAILEY & H. ROTHBLATT, CRIMES OF VIOLENCE, RAPE AND OTHER SEX CRIMES § 333 (1973) (young children should be discredited indirectly); B. MOROSCO, THE PROSECUTION AND DEFENSE OF SEX CRIMES § 9.09(8) (1985) (on cross-examination, child witness should not be made to cry in front of jury).

140. *See* F. BAILEY & H. ROTHBLATT, CRIMES OF VIOLENCE, RAPE AND OTHER SEX CRIMES § 335 (1973). These authors suggest that the attorney assess the child's reaction by asking unimportant questions. It is noted that children are highly prone to suggestion and can easily be led into traps. One tactic suggested is that when the defense attorney anticipates that the child will answer all questions negatively, the attorney should phrase the question so that a negative response is elicited. The use of facial expressions to indicate disappointment in the child's responses will often encourage continued negative answers. *See id.* Finally, leading questions with the desired answer within them often provide responses favorable to the defense. *See id.* § 336.

141. *See* Krause, *Videotape, CCTV Help Child Abuse Victims Tell Their Story But Legal Problems Remain*, LAW ENFORCEMENT TECH., Nov. 1984, at 17-18 (discussing Minnesota sexual abuse case in which 24 adults were accused of abusing six children). The media reported that the defense attorneys accused the children of lying and badgered them regarding

child's credibility as a witness.[142]

IV. LEGISLATIVE RESPONSE IN TEXAS TO DIFFICULTIES CHILDREN ENCOUNTER AS WITNESSES

A. *Article 38.071 of the Texas Code of Criminal Procedure*

The movement to videotape sexual abuse victims began in 1982 with the Tarrant County Sexual Abuse Unit in Fort Worth, Texas.[143] Initially, the rationale for videotaping sexually abused children was to prevent multiple interviews.[144] The concept was so well received by the community that, as sexual abuse referrals increased,[145] the uses of the videotapes expanded.[146]

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dates and places of the offenses. *See id.* at 17. The prosecutor stated, that after her experience in the trial, she realized that society has not responded to the child in the courtroom; rather, the treatment the children received was worse than that which any adult had ever received. *See id.* at 18; *see also* State v. Shtemme, 158 N.W. 48, 49 (Minn. 1916) (defense accused victim of having venereal disease). The defense contended that since the defendant did not have a venereal disease, the defendant could not have had sexual relations with the victim. The court noted, however, that there was no offer of proof, only an allegation by the defense, that the victim had a venereal disease. *See id.*

142. *See* Berliner & Stevens, *Advocating for Sexually Abused Children in the Criminal Justice System*, in SEXUAL ABUSE OF CHILDREN: SELECTED READINGS 50 (1980). Cross-examination is usually unsympathic and aimed at discrediting the child's testimony. Both the prosecutor and judge often hesitate to interfere for fear of appearing too protective or, in the judge's situation, swaying the jury. *See id.*; *see also* State v. Daggett, 280 S.E.2d 545, 555 (W. Va. 1981) (6-year-old male victim appered confused and was easily led during questioning). *But see* State v. Beishir, 646 S.W.2d 74, 80 (Mo. 1983) (use of leading questions unsuccessful).

143. *See* Telephone interview with Ann Clark, Supervisor Tarrant County Sexual Abuse Unit (Jan. 10, 1986). Ms. Clark relates that the Tarrant County Sexual Abuse Unit, formed in 1981, began experimenting with videotaped interviews with sexually abused children. Ms. Clark states that the idea for the videotaped interviews came from her positive experience with videotaping interviews of children who were to be adopted. The videotape of the children discussing their thoughts about adoption was a creative tool utilized to share the children's feelings with others. This same concept was adapted to sexual abuse victims.

144. *See* Krause, *Videotape, CCTV Help Child Abuse Victims Tell Their Story But Legal Problems Remain*, LAW ENFORCEMENT TECH., Nov. 1984, at 16, 17 (sexual abuse unit concerned about children going from agency to agency and being reinterviewed); *see also* S. CHANEY, A. CLARK, & B. MCALLISTER, VIDEOTAPING IN SEXUAL ABUSE CASES 6 (training material on file in St. Mary's Law Journal Office) (initially, videotaped interviews conducted to reduce number of times child had to relate abusive story).

145. *Compare Statistical Overview of Tarrant County Child Protective Services 1981 Through 1983* (on file in St. Mary's Law Journal Office) (statistical accounting of numbers of sexual abuse referrals per year) *with 1984 Annual Report Tarrant County Child Protective Services* (on file in St. Mary's Law Journal Office) (accounting of sexual abuse referrals in 1984). This statistical overview indicates that Tarrant County received three hundred and eleven sexual abuse referrals in 1981, three hundred eighty-one in 1982, and four hundred thirty-seven in 1983. *See Statistical Overview of Tarrant County Child Protective Services 1981 Through 1983* (on file in St. Mary's Law Journal Office). In 1984, there were a total of seven hundred and sixty-one referrals of sexually abused children to Tarrant County Protective Services. *See 1984*

Rapidly, the videotaped interviews began to be used to confront the alleged offender[147] and confirm the abuse for non-offending parents,[148] as well as for police investigations,[149] grand jury testimony[150] and training,[151] professional training, and public education.[152] The overwhelming response by both professional and lay individuals who viewed a child's videotaped interview was "[w]hy can't these videotapes be used in court?"[153] In response, the Tarrant County Sexual Abuse Advisory Board requested that Steve Chaney, Assis-

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Annual Report Tarrant County Child Protective Services (on file in St. Mary's Law Journal Office); *see also 1979 Yearly Report, Tarrant County Child Welfare Service Report* (on file in St. Mary's Law Journal Office) (one hundred and sixty referrals of sexual abuse in 1969).

146. *See* N. DEWEES & A. CLARK, USES OF VIDEOTAPED INTERVIEWS BY TARRANT COUNTY SEXUAL ABUSE UNIT (unpublished training material on file in St. Mary's Law Journal Office) (listing possible uses of videotaped interviews).

147. *See* S. CHANEY, VIDEOTAPED INTERVIEW WITH CHILD ABUSE VICTIM: THE SEARCH FOR TRUTH UNDER A TEXAS PROCEDURE, at B(2) (unpublished training material on file in St. Mary's Law Journal Office) (reviewing videotaping procedures and uses). The videotape has been helpful in outlining the offender's confession. Often, if the child is able to effectively relate the abuse on the videotape, the defendant will plea bargain. *See id.*

148. *See* N. DEWEES & A. CLARK, USES OF VIDEOTAPED INTERVIEWS BY TARRANT COUNTY SEXUAL ABUSE UNIT (unpublished training material on file in St. Mary's Law Journal Office) (videotape used to confirm abuse for mothers, siblings, and other family members).

149. *See* S. CHANEY, A. CLARK, & B. MCALLISTER, VIDEOTAPING IN SEXUAL ABUSE CASES 7 (unpublished training material on file in St. Mary's Law Journal Office) (discussing procedure developed with law enforcement personnel). The caseworker generally interviews the child on videotape and this tape is shared with the investigating officer. *See id.*

150. *See id.* (discussing use of videotapes in grand jury). In the past, the child was called to testify before the grand jury because the prosecutor wanted to determine if the child could testify in court at a later date. Unfortunately, due to the prosecutor's inability to establish rapport with the child before the hearing, many children were unsuccessful in testifying before the grand jury. The prosecutor also failed to recognize how harmful it was for the child to repeatedly tell her story; therefore, instead of allowing the child to testify at the grand jury hearing, the videotaped interview is used. *See id.*

151. *See* Telephone interview with Ann Clark, Supervisor Tarrant County Sexual Abuse Unit (Jan. 10, 1986). As more sexual abuse cases were investigated, a greater number were being sent to the grand jury. When the district attorney's office developed a training seminar for grand jury members, the sexual abuse unit became a part of the seminar.

152. *See* S. CHANEY, A. CLARK, & B. MCALLISTER, VIDEOTAPING IN SEXUAL ABUSE CASES 7 (unpublished training material on file in St. Mary's Law Journal Office) (discussing use of videotapes in community and development of cohesive community program). Such videotapes were instrumental in overcoming the obstacles of admitting that sexual abuse exists and that children can discuss it. *See id.*

153. *See* Telephone interview with Ann Clark, Supervisor Tarrant County Sexual Abuse Unit (Jan. 10, 1986). After the Sexual Abuse Unit was developed, the Unit's members received numerous requests to speak to civic and professional groups. During these speaking engagements, the question arose repeatedly as to why the videotapes were not used in court. Ms. Clark responded to these questions by requesting coordination with the district attorney's office in order to incorporate the videotaped interviews into the criminal justice system. *See* Letter from Ann Clark, Supervisor, Tarrant County Sexual Abuse Unit, to Tim Curry, Tarrant County District Attorney (Mar. 15, 1982) (on file in St. Mary's Law Journal Office).

tant District Attorney, draft a bill that would allow the use of these videotapes in criminal trials.[154] The bill initially drafted by Mr. Chaney was expanded and, eventually, enacted as article 38.071 of the Texas Code of Criminal Procedure.[155]

1. Videotaped Pre-Trial Interviews

Article 38.071 "applies only to a proceeding of an offense, . . . alleged to have been committed against a child 12 years of age or younger, and applies only to the statement or testimony of that child."[156] Section 2 allows a videotaped interview to be made before the criminal proceeding begins.[157] This pre-trial interview is then admissible at trial if eight criteria are met:[158] The interview must be conducted outside the presence of both the prosecuting attorney and defense counsel.[159] The recording must be both aural and visual and recorded by some electronic means.[160] The recording equipment must be capable of accurately recording the interview, the operator must be competent, and the recording accurate and unaltered.[161] The child's statement cannot be made in response to questions that are calculated to lead the child to a particular statement.[162] All voices on the tape must be identified.[163] The interviewer must be present at trial and available to testify.[164]

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154. *See* Letter from Steve Chaney, Assistant District Attorney, to Ed Moughon, Secretary, Tarrant County Sexual Abuse Advisory Board (Nov. 4, 1982) (on file in St. Mary's Law Journal Office) (proposed draft for allowing videotapes in court).

155. *Compare Use as Evidence of Electronic Recording of Victim of Child Abuse* (on file in St. Mary's Law Journal Office) (proposing alleged victim of sexual abuse be videotaped outside presence of defendant) *with* TEX. CRIM. PROC. CODE ANN. art. 38.071 (Vernon Supp. 1986) (article 38.071 includes videotaped interview, videotaped deposition, and closed circuit television alternatives).

156. *See* TEX. CRIM. PROC. CODE ANN. art. 38.071, § 1 (Vernon Supp. 1986).

157. *See id.* § 2(a). Texas courts have been petitioned to interpret the phrase "before the proceeding begins." *See* Jolly v. State, 681 S.W.2d 689, 696-97 (Tex. App.—Houston [14th Dist.] 1984, pet. granted) (appellant objected to videotaped interview made after complaint filed). The *Jolly* court interpreted this phrase as meaning any time before *the trial* begins. *See id.* at 697. This phrase, however, has been interpreted to mean before *the initiation of any criminal action*. *See* Lawson v. State, 697 S.W.2d 799, 802 (Tex. App.—Houston [1st Dist.] 1985, no pet.) (discussing legislative history pertaining to application of article 38.071). The *Lawson* court noted that the purpose of section 2 is to record the child's initial statement before any judicial action. *See id.*

158. *See* TEX. CRIM. PROC. CODE ANN. art. 38.071, § 2(a) (Vernon Supp. 1986).

159. *See id.* § 2(a)(1).

160. *See id.* § 2(a)(2).

161. *See id.* § 2(a)(3).

162. *See id.* § 2(a)(4). Even though leading questions have been used by interviewers, some courts have still allowed videotapes to be admissible. *See* Jolly v. State, 681 S.W.2d 689, 696 (Tex. App.—Houston [14th Dist.] 1984, pet. granted) (percentage of leading questions minuscule).

163. *See* TEX. CRIM. PROC. CODE ANN. art. 38.071, § 2(a)(5) (Vernon Supp. 1986).

The defendant and the defendant's attorney are afforded an opportunity to view the videotape before the prosecution offers the videotape into evidence,[165] and the child must be available to testify.[166] Additionally, either party has the right to call the child to the witness stand and the opposing party has the right to cross-examine the child.[167]

While the statute sets forth the necessary criteria for admission into evidence, it does not address who should conduct the interview or how the interview should be conducted.[168] Currently, the interviews are primarily conducted by the child protective service staff.[169] The videotape interviewing procedure, utilized with child sexual abuse victims, was developed by the Tarrant County Sexual Abuse Unit.[170] The component elements of a videotaped interview established by this unit are preparation,[171] pre-interview,[172] setting,[173] props,[174] and interview.[175] The interview is conducted as a di-

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164. *See id.* § 2(a)(6).

165. *See id.* § 2(a)(7).

166. *See id.* § 2(a)(8).

167. *See id.* § 2(b).

168. *See id.* § 2.

169. *See* S. CHANEY, VIDEOTAPED INTERVIEW WITH CHILD ABUSE VICTIMS: THE SEARCH FOR TRUTH UNDER A TEXAS PROCEDURE A(1) (unpublished training material on file in St. Mary's Law Journal Office) (no requirement by article 38.071 as to who makes videotape, but usually made by Department of Human Resources Sexual Abuse caseworkers).

170. *See* S. CHANEY, A. CLARK, & B. MCALLISTER, VIDEOTAPING IN SEXUAL ABUSE CASES 1 (unpublished training material on file in St. Mary's Law Journal Office) (discussing development of videotaping technique as departure from traditional interviewing methods). Initial attempts at interviewing children on videotape were marginally successful; however, these interviews soon became refined and sophisticated. *See id.*; *see also* Testimony by Ann French Clark Before the Criminal Jurisprudence Committee on House Bill 1705, April 19, 1983 (on file in St. Mary's Law Journal Office) (describing to Committee how videotaped interview conducted).

171. *See* S. CHANEY, A. CLARK, & B. MCALLISTER, VIDEOTAPING IN SEXUAL ABUSE CASES 4 (unpublished training material on file in St. Mary's Law Journal Office) (discussing preparation for videotaped interview). The caseworker should obtain as much information before the interview as possible. Additionally, the caseworker may want to talk to the victim's relatives; however, the alleged victim should not be approached before the interview. When victims are approached before videotaping, the caseworker then has expectations of what the child will say during videotaping. If the child refuses to repeat the story on videotape, both the caseworker and child may be frustrated. *See id.*

172. *See id.* After the interview procedure has been explained to the parent, the child should be given an explanation of the caseworker's role and the proceeding to follow; however, initially no details about the abuse should be addressed. *See id.* The videotaping equipment should be explained to the child to avoid any disruptions about equipment's purpose. *See id.* at 4-5. The child should be comfortable during the interview; for example, many younger children prefer to sit on the floor. *See id.* at 8.

173. *See id.* at 4. The videotaping room should be sterile and void of any stimulation. *See id.* A one-way mirror is also helpful to allow the interview to be monitored by others. *See* S. CHANEY, VIDEOTAPED INTERVIEW WITH CHILD ABUSE VICTIMS: THE SEARCH FOR

rected play interview, and the child is allowed to play while the interviewer remains direct in soliciting information about the alleged abuse.[176]

To date, the preference has been to use section 2 of article 38.071 over the other two alternatives provided by article 38.071.[177] The rationale for utlizing videotapes of pre-trial interviews over the other two methods has been

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TRUTH UNDER A TEXAS PROCEDURE, at A(1) (unpublished training material on file in St. Mary's Law Journal Office) (discussing how to make section 2 videotape).

174. *See* S. CHANEY, A. CLARK, & B. MCALLISTER, VIDEOTAPING IN SEXUAL ABUSE CASES 4 (unpublished training material on file in St. Mary's Law Journal Office) (explaining use of props in videotaped interview). The most commonly used prop is the anatomically-correct doll. Since children are easily distracted by toys it is not suggested that any unnecessary items be in the room. Since it is painful to discuss the sexual abuse, children will often use unnecessary toys as a distraction from the discussion. If it is discovered that a particular object was utilized during the sexual abuse incident, the caseworker may want to use a similar object in the interview. *See id.* at 3. For example, in a case where the accused would make obscene phone calls to the emergency room of a hospital while he sexually abused his six-year-old niece, the child was provided with a phone and phone book in the interview. The child then reenacted how her uncle looked through the phone book for a hospital phone number and phoned the hospital while she was in bed with him. *See id.* at 4.

175. *See id.* at 5 (interview's purpose to obtain information from child). The interviewer should seek specific information from the child without contaminating that information. *See* S. CHANEY, VIDEOTAPED INTERVIEW WITH CHILD ABUSE VICTIMS: THE SEARCH FOR TRUTH UNDER A TEXAS PROCEDURE, at A(4) (unpublished training material on file in St. Mary's Law Journal Office). The interviewer needs to be aware of what information is necessary for a criminal offense, since the purpose of the tape is to answer questions that will be needed to establish the offense. *See id.*

176. *See* S. CHANEY, A. CLARK, & B. MCALLISTER, VIDEOTAPING IN SEXUAL ABUSE CASES 5 (unpublished training material on file in St. Mary's Law Journal Office) (direct approach needed because child often will not spontaneously describe abuse). Obtaining information from the child requires a balance between obtaining the needed specific information and not asking questions "calculated to lead the child to make a particular statement," as required by article 38.071. *See* S. CHANEY, VIDEOTAPED INTERVIEW WITH CHILD ABUSE VICTIMS: THE SEARCH FOR TRUTH UNDER A TEXAS PROCEDURE, at A(4) (unpublished training material on file in St. Mary's Law Journal Office). A child's testimony is not convincing if obtained through leading questions and such testimony may not be admissible in court. The goal is to ask questions that present the child with an option. "For example, to ask a child, 'Did John pull your pants down?' is leading however it is better than 'John pulled your pants down didn't he?' The best question however is, 'Did John pull your pants down or did you pull them down—what happened?' " Finally, the interviewer should refrain from showing emotional responses to the child's answers. These are appropriate after the interview is completed, but not appropriate on a videotape that may be played at a criminal trial. *See id.*

177. *Compare* Long v. State, 694 S.W.2d 185, 186 (Tex. App.—Dallas 1985, pet. granted) (section 2 videptape) *and* Alexander v. State, 692 S.W.2d 563, 564 (Tex. App.—Eastland 1985, pet. granted) (section 2 videotape) *and* Tolbert v. State, 697 S.W.2d 795, 797 (Tex. App.—Houston [1st Dist.] 1985, no pet.) (section 2 videotape) *and* Lawson v. State, 697 S.W.2d 799, 805 (Tex. App.—Houston [1st Dist.] 1985, no pet.) (section 2 videotape) *and* Jolly v. State, 681 S.W.2d 689, 695 (Tex. App.—Houston [14th Dist.] 1984, pet. granted) (section 2 videotape) *with* Powell v. State, 694 S.W.2d 416, 417 (Tex. App.—Dallas 1985, pet. granted) (sections 4 and 5 videotape).

based upon the findings of these early videotapes.[178] The videotapes demonstrate that if the interview is conducted well it is influential in establishing the child's credibility.[179] In the initial interview the child is unaware of any adult expectations and, therefore, responds in a spontaneous and detailed manner.[180] The videotape procedure is able to capture the child's own terminology, facial expressions, and emotional response.[181] As a result, the pre-trial videotape is crucial in establishing the child's credibility.[182] Often the child's story deteriorates over time and prosecution becomes difficult, if not impossible; thus, when the videotape procedure is utilized, the child's story is preserved.[183]

2. Testimony by Closed Circuit Television and Videotaped Depositions

Section 3 of article 38.071 provides for the child's testimony to be taken in a room separate from the courtroom.[184] This testimony is then transmitted into the courtroom by closed circuit television.[185] Section 4 of article 38.071 provides for a videotaped deposition to be taken prior to trial and used in the court proceeding at a later date.[186] Both sections 3 and 4 allow the defendant to see and hear the child but the child shall not see or hear the defendant.[187] Section 5 of this article prohibits requiring the child to testify in the courtroom proceeding if the child's testimony has been secured by either

178. *See* Testimony by Ann French Clark Before the Criminal Jurisprudence Committee on House Bill 1705, April 19, 1983 (on file in St. Mary's Law Journal Office). Since the Tarrant County Sexual Abuse Unit began to videotape sexually abused children in 1981, over one hundred tapes have been made. The interviews are conducted during the initial questioning since the clearest information can be obtained at this time and the others will not have had the opportunity to pressure the child into altering her story. Also, the office environment provides a neutral setting for the child.

179. *See* S. CHANEY, A. CLARK, & B. MCALLISTER, VIDEOTAPING IN SEXUAL ABUSE CASES 2 (unpublished training material on file in St. Mary's Law Journal Office) (discussing results of videotaped interviews).

180. *See id.* (detailed information revealed when child questioned by trained interviewer).

181. *See id.* (initial interview provides opportunity to release suppressed feelings and information).

182. *See id.* (after repeated interviews, child knows what is expected and tends to repeat previous statements).

183. *See* S. CHANEY, VIDEOTAPED INTERVIEW WITH CHILD ABUSE VICTIMS: THE SEARCH FOR TRUTH UNDER A TEXAS PROCEDURE, at B(1) (unpublished training material on file in St. Mary's Law Journal Office) (discussing preservation of testimony on videotape). After repeatedly relating the abuse, the child's story becomes less reliable. The child may suppress the information, embellish the story, or answer how he thinks the interviewer desires him to answer. *See id.*

184. *See* TEX. CRIM. PROC. CODE ANN. art. 38.071, § 3 (Vernon Supp. 1986).

185. *See id.*

186. *See id.* § 4.

187. *See id.* §§ 3, 4.

section 3 or 4.[188] To date, sections 3 and 4 have rarely been used.[189]

V. THE CONSTITUTIONAL ISSUES OF ARTICLE 38.071

A. *Sixth Amendment Confrontation Clause*

Whether article 38.071 is held to be constitutional will depend upon the interpretation of the confrontation clause by the Texas Court of Criminal Appeals.[190] Both the United States Constitution[191] and the Texas Constitution[192] guarantee the defendant the right to confront those witnesses against him or her at trial. In *California v. Green*,[193] the United States Supreme Court identified three requirements necessary to satisfy the confrontation clause.[194] Specifically, the *Green* court stated that the witness must testify under oath, that the defendant has the right to cross-examine all witnesses at trial, and that the jury must have the opportunity to observe the witness' demeanor.[195] Various courts have held these three elements essential in testing the truthfulness of those witnesses testifying against the defendant.[196] In cases pending before the Texas Court of Criminal Appeals challenging the constitutionality of article 38.071, the state has contended that the essential elements of the confrontation clause have been preserved.[197] In opposition,

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188. *See id.* § 5.

189. *See* S. CHANEY, VIDEOTAPED INTERVIEW WITH CHILD ABUSE VICTIMS: THE SEARCH FOR TRUTH UNDER A TEXAS PROCEDURE, at C (unpublished training material on file in St. Mary's Law Journal Office) (sections 3 and 4 rarely used because section 2 has many applications and routinely used).

190. *Compare* Jolly v. State, 681 S.W.2d 689, 695 (Tex. App.—Houston [14th Dist.] 1984, pet. granted) (article 38.071 does not violate right to confrontation) *with* Long v. State, 694 S.W.2d 185, 188 (Tex. App.—Dallas 1985, pet. granted) (article 38.071 denied defendant protections afforded by confrontation clause).

191. *See* U.S. CONST. amend. VI. ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him").

192. TEX. CONST. art. I, § 10 ("In all criminal prosecutions the accused . . . shall be confronted by the witnesses against him").

193. 399 U.S. 149 (1970).

194. *See id.* at 158. In *Green*, a witness' prior inconsistent statement was admitted into evidence even though the witness was not cross-examined when the statement was made. *See id.* at 150. The appellant objected to the use of the prior statement as a violation of his sixth amendment rights. *See id.* at 153.

195. *See id.* at 158.

196. *See, e.g.*, Davis v. Alaska, 415 U.S. 308, 316 (1974) (cross-examination principle way to test believability of witness); California v. Green, 399 U.S. 149, 158 (1970) (confrontation permits jury to test credibility of witness); Mattox v. United States, 156 U.S. 237, 242-43 (1895) (confrontation right allows jury and judge to assess whether witness worthy of belief); *see also* Davenport, *The Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions: A Functional Analysis*, 85 HARV. L. REV. 1378, 1378 (1972) (when hearsay statements used, witness' truthfulness cannot be tested).

197. *See* Amicus Curiae Brief for Appellant at 4, State v. Powell, 694 S.W.2d 416 (Tex.

the defense has urged that the elements of the confrontation clause are violated by article 38.071.[198]

1. Oath

Article 38.071 does not specifically address the administering of an oath to the child witness.[199] Therefore, when section 2 of Article 38.071 is utilized, the interviewer is not required to administer an oath before the videotaping begins.[200] In *Jolly v. State,*[201] the court held that it was not error to admit the videotape even though no oath was given prior to the videotaping.[202] The *Jolly* court noted that the interviewer questioned the child regarding her appreciation of the difference between the truth and a lie.[203] On the videotape the child promised to relate the truth to the interviewer.[204] In contrast, the appellate court in *Long v. State*[205] held that the defendant was denied the protections afforded by the confrontation clause since the child did not testify under oath,[206] despite the interviewer questioning the child on the videotape regarding telling the truth.[207] Failing to address the issue further, the *Long* court apparently considered this questioning to be insufficient to meet the requirements of an oath.[208]

It is also argued by the defense that a different standard should apply to videotape testimony.[209] The contention is that the videotape provided for by

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App.—Dallas 1985, pet. granted) (addressing each element of confrontation clause and concluding article 38.071 does not infringe on sixth amendment); *see also* State's Motion for Rehearing at 3, Long v. State, 694 S.W.2d 185 (Tex. App.—Dallas 1985, pet. granted) (defendant's confrontation right not violated by article 38.071).

198. *See* Petition for Review for Appellant at 18, Jolly v. State, 681 S.W.2d 689 (Tex. App.—Houston [14th Dist.] 1984, pet. granted).

199. *See* TEX. CRIM. PROC. CODE ANN. art. 38.071 (Vernon Supp. 1986).

200. *See* S. Chaney, *Recommended Procedure for Videotaping a Child Who is a Victim of an Offense to Comply with Art. 38.071, Sec. 2, Code of Criminal Procedure*, in TEXAS DEPARTMENT OF HUMAN RESOURCES, THE VIDEOTAPED INTERVIEW IN INVESTIGATION OF CHILD ABUSE 5 (1983). It is recommended that the interviewer ask the child if he will promise to tell the truth and ask what will happen if they tell a lie. This procedure is done to illustrate the child's ability to take an oath. *See id.*

201. 681 S.W. 689 (Tex. App.—Houston [14th Dist] 1984, pet. granted).

202. *See id.* at 697 (noting statute does not require oath be taken by child).

203. *See id.*

204. *See id.*

205. 694 S.W.2d 185, 188 (Tex. App.—Dallas 1985, pet. granted).

206. *See id.* The *Long* court applied the four factors of the confrontation clause to the case and concluded that none of the factors were met. The unsworn testimony was one factor listed by the *Long* court. *See id.*

207. *See id.* at 188 n.2.

208. *See id.* at 188. The *Long* court went on to discuss the other factors; however, the court did not specifically readdress the issue of the oath. *See id.*

209. *See* Petition for Review for Appellant at 30, Jolly v. State, 681 S.W.2d 689 (Tex.

section 2 of article 38.071 should be treated in the same manner as a videotape deposition.[210] Article 39.04 of the Texas Code of Criminal Procedure,[211] together with Rule 105 of the Texas Rules of Civil Procedure, would require the witness to be sworn before being deposed in a criminal case.[212] By this standard, the child's unsworn videotaped testimoy would be incompetent to prove any abuse.[213] Texas case law, however, indicates that it is not necessary for a child to be given a formal oath before testifying.[214] If the child can relate the difference between the truth and a lie and demonstrate an obligation for telling the truth his or her testimony will be admissible.[215] If the interviewer sufficiently questions the child to establish the child's ability to be truthful and belief in doing so, the standards required by the Texas courts would be fulfilled.[216]

2. Demeanor

The underlying purpose for requiring that the fact-finder observe the wit-

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App.—Houston [14th Dist.] 1984, pet. granted) (challenging unsworn testimony of child on videotape interview).

210. *See id.*

211. *See* TEX. CRIM. PROC. CODE ANN. art. 39.04 (1979). Article 39.04 states: "The rules prescribed in civil cases for . . . taking the deposition of witnesses and all other formalities governing depositions shall, as to the manner and form of taking and returning the same and other formalities to the taking of the same, govern in criminal actions, when not in conflict with this law." *Id.*

212. *See* TEX. R. CIV. P. 204(2) ("Every person whose deposition is taken upon oral examination shall be first cautioned and sworn to testify to the truth, the whole truth, and nothing but the truth").

213. *See* Petition for Review for Appellant at 31, Jolly v. State, 681 S.W.2d 689 (Tex. App.—Houston [14th Dist.] 1984, pet. granted). Since article 38.071 does not address the taking of an oath, it has been urged article 39.04 should apply. Therefore, Rule 205 (now Rule 204(2)) would require that the child be sworn before being interviewed. *See* O'Byrne v. Oak Park Trust & Sav. Bank, 450 S.W.2d 411, 416 (Tex. Civ. App.—Beaumont 1970, writ ref'd n.r.e.) (individual's unsworn deposition incompetent to prove anything).

214. *See, e.g.*, D.L.N. v. State, 590 S.W.2d 820, 824 (Tex. Civ. App.—Dallas 1979, no writ) (3-year-old allowed to testify even though she could not understand oath but understood difference between truth and lie); Powell v. State, 271 S.W. 915, 917 (Tex. Crim. App. 1925) (court allowed 7-year-old to testify since she understood it was wrong to lie); Smith v. State, 164 S.W. 838, 838 (Tex. Crim. App. 1913) (child demonstrated she understood nature of oath by answering questions about telling truth).

215. *See* Fields v. State, 500 S.W.2d 500, 502 (Tex. Crim. App. 1973) (court allowed 4-year-old to testify). The *Fields* court stated that "even though a child states he does not know the meaning of an oath or what it means to swear, he may nevertheless be a competent witness if he knows it is wrong to lie and that he will be punished if he does so." *Id.*; *see also* Provost v. State, 514 S.W.2d 269, 270 (Tex. Crim. App. 1974) (child allowed to testify when she did not understand oath but understood difference between falsehood and truth).

216. *See* TEX. CRIM. PROC. CODE ANN. art. 38.06 (Vernon 1979) (children may not testify in criminal proceeding unless they "possess sufficient intellect to relate transactions with respect to which they are interrogated, or who do not understand the obligation of an oath").

ness' demeanor is to assist the fact-finder in assessing the witness' credibility.[217] Article 38.071 does not prescribe standards to govern the technical quality of the videotape.[218] In *Long v. State*,[219] the court expressed concern that the fact-finder's view of the witness would be only that which the camera provided.[220] Due to possible angle, lighting, and color variation, the court stated that the witness' demeanor may be distorted.[221]

When section 2 or 4 is utilized, however, the parties have the opportunity to review the videotape before trial.[222] In these situations, any inadequacies could be pointed out to the court before the videotape is offered into evidence.[223] When section 3 is used at trial, the quality of the projection should be assessed by the court and both parties before the witness testifies.[224] The resulting assessment would allow the parties to reach an agreement as to the technical quality of the projection.[225] If no inadequacies are noted, the videotape procedure preserves the defendant's right to have the jury assess

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217. *See* 5 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1395(2), at 153 (Chadbourn rev. ed. 1974) (discussing confrontation). Wigmore states that the witness' personal appearance in court secures a secondary advantage by allowing the judge and jury to obtain incommunicable evidence of the witness' demeanor while testifying. *See id.*; *see also* Mattox v. United States, 156 U.S. 237, 242 (1895) (face-to-face contact with jury and judge allows assessment of witness' demeanor and truthfulness).

218. *See* TEX. CRIM. PROC. CODE ANN. art. 38.071 (Vernon Supp. 1986) (no requirements in statute for technical quality).

219. 694 S.W.2d 185 (Tex. App.—Dallas 1985, pet. granted).

220. *See id.* at 189 (describing videotaped interview under article 38.071 as hearsay because tape lacks indicia of reliability which is critical element of hearsay rule).

221. *See id.* at 189-90; *see also* Comment, *The Criminal Videotape Trial: Serious Constitutional Questions*, 55 OR. L. REV. 567, 574-75 (1976) (camera becomes jurors' eyes). It is possible to distort the evidence when using a witness' videotape testimony because the projection of the witness may be influential as to how the juror feels about the defendant's guilt or the witness' believability. The lens or angle of the camera may make the witness look strong and large or weak and small and the lighting can alter demeanor. *See id.* at 575.

222. *See* TEX. CRIM. PROC. CODE ANN. art. 38.091, §§ 2(7), 4(4) (Vernon Supp. 1986).

223. *See* Amicus Curiae Brief for Appellant at 6, Powell v. State, 694 S.W.2d 416 (Tex. App.—Dallas 1985, pet. granted) (advocating that right to observe witness' demeanor preserved by article 38.071); *see also* German, Merin, & Rolfe, *Videotape Evidence at Trial*, 6 AM. J. TRIAL ADVOC. 209, 215 (1982) (discussing uses of videotapes at trial). When a videotape is offered into evidence, a pretrial review is crucial in determining whether the videotape contains serious distortion which could bar its use. *See id.* Otherwise, a verdict may be based on the level of skill of the videotape operator rather than the evidence. *See id.* at 216.

224. *See.* Tolbert v. State, 697 S.W.2d 795, 799 (Tex. App.—Houston [1st Dist.] 1985, no pet.) (procedures employed in the videotaping procedure must ensure fundamental fairness). The *Tolbert* court noted that the statute lacks provisions for establishing the reliability of the procedures used. *See id.* at 799 n.4. The court stated, however, that these voids are not fatal to the statute but require the trial court "to carefully review the propriety of the procedures when determining the admissibility of the videotape." *Id.*

225. *See id.*

the witness' demeanor for credibility purposes.[226]

3. Cross-Examination

The essential element of the confrontation clause is the right to cross-examine witnesses.[227] Article 38.071 raises two critical issues to be resolved with regard to the defendant's right to cross-examine the child witness.[228] The first issue is whether the subsequent right to cross-examine the witness as provided in section 2 violates the confrontation clause.[229] In *Tolbert v. State*,[230] the court allowed the videotaped interview into evidence after the child testified.[231] The defendant objected to the admission of the videotape on the grounds that there was no contemporaneous cross-examination of the child witness.[232] The *Tolbert* court held that the belated right to cross-examine the child is not a *prima facie* violation of the sixth amendment.[233] The *Tolbert* court relied on the United States Supreme Court's holding in *California v. Green*.[234] In *California v. Green*,[235] the Court concluded that the confrontation clause is not violated when a declarant's out-of-court statement is admitted if the declarant testifies and is subject to cross-examination.[236] More importantly, the *Green* Court noted that the out-of-court

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226. *See id.*

227. *See* Pointer v. Texas, 380 U.S. 400, 406-07 (1965) (underlying reason for confrontation clause is defendant's right to cross-examine witnesses); Kirby v. United States, 174 U.S. 47, 55 (1899) (defendant entitled to cross-examine and impeach witnesses). The essential purpose of the confrontation clause is to secure for the opponent the opportunity to cross-examine the witness. *See* 5 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1395(1), at 150 (Chadbourn rev. ed. 1974) (discussing of purpose and theory of confrontation clause).

228. *See* Powell v. State, 694 S.W.2d 416, 420 (Tex. App.—Dallas 1985, pet. granted) (sections 4 and 5 of article 38.071 do not give defendant opportunity to personally participate in cross-examination of child). Section 2 of article 38.071 raises the issue of whether contemporaneous cross-examination of the out-of-court statement is required. *See* Tolbert v. State, 697 S.W.2d 795, 798 (Tex. App.—Houston [1st Dist.] 1985, no pet.) (holding confrontation clause not violated where defendant afforded belated right to cross examine child).

229. *See* Tolbert v. State, 697 S.W.2d 795, 798 (Tex. App.—Houston [1st Dist.] 1985, no pet.) (discussing belated cross-examination). *See generally* Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 HARV. L. REV. 567, 567 (1978) (discussing defendant's rights under confrontation clause).

230. 697 S.W.2d 795 (Tex. App.—Houston [1st Dist.] 1985, no pet.).

231. *See id.* at 797. The child witness was eleven years old at the time of trial. It is unclear from the record whether the defendant was the child's father or stepfather. *See id.*

232. *See id.* at 798.

233. *See id.* at 799.

234. *See id.* at 798.

235. 399 U.S. 149 (1970).

236. *See id.* at 158. In *Green*, the witness testified, at the preliminary hearing, that the defendant was his supplier of marihuana. The witness was subjected to extensive cross-examination at the preliminary hearing. *See id.* at 151. At the defendant's trial, however, the witness claimed he was unable to recall what really took place due to being on drugs at the time.

statement was probably not subjected to either an oath, assessment of witness' demeanor, or cross-examination.[237]

In *Long v. State*,[238] however, the court attempted to distinguish *Green* during its analysis of a section 2 videotaped interview.[239] The *Long* court noted that section 2 does not require the child's simultaneous in-court testimony as a condition to the admissibility of the videotape.[240] In *Long*, the court objected to section 2 because the statute does not guarantee the defendant the right to cross-examine the child when the videotaped statement is made or when it is admitted into evidence.[241] The right to cross-examine the child, however, would appear to be implied from the language of the statute.[242] Section 2 of article 38.071 specifically provides that the child be available to testify as a condition to admission of the tape.[243] Either party may call the child to testify and the opposing party may cross-examine the child.[244] This language seems to parallel the requirement set forth by the United States Supreme Court in *Green*.[245]

The second issue to be addressed by the Texas Court of Criminal Appeals is whether section 2 of article 38.071 denies the defendant the opportunity to participate in the cross-examination of the witness.[246] In order for the defendant to participate during cross-examination he must be able to confer with his counsel.[247] When section 3 or 4 is used, article 38.071 does not specifically create a technical system for the defendant and his counsel to

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See id. at 152. During direct examination the prosecutor read from the witness' preliminary hearing testimony. The California Supreme Court held that the statute which permitted the admission of the prior inconsistent statement was unconstitutional. *See id.* at 153.

237. *See id.* at 158.

238. 694 S.W.2d 185 (Tex. App.—Dallas 1985, pet. granted).

239. *See id.* at 191.

240. *See id.*

241. *See id.*

242. *See* TEX. CRIM. PROC. CODE ANN. art. 38.071, § 2(a)(8) (Vernon Supp. 1986).

243. *See id.* § 2(a)(8).

244. *See id.* § 2(b).

245. *See* Tolbert v. State, 697 S.W.2d 795, 799 (Tex. App.—Houston [1st Dist.] 1985, no pet.) (under rule of *Green* section 2 not violative of sixth amendment).

246. *See* Powell v. State, 694 S.W.2d 416, 420 (Tex. App.—Dallas 1985, pet. granted) (procedure in sections 4 and 5 of article 38.071 do not allow defendant opportunity to personally participate in cross-examination of child).

247. *See* Faretta v. California, 422 U.S. 806, 819 (1975) (sixth amendment includes defendant's right to personally participate in his defense, be informed of charges, confront witnesses, and compel witnesses to testify in his behalf). The right to represent one's self and make one's own defense are implied in the sixth amendment. *See id.* Defendant must have a sufficient present ability to confer with his attorney. *See* Baltierra v. State, 586 S.W.2d 553, 556 (Tex. Crim. App. 1979) (defendant could not speak English and court found confrontation rights infringed where no interpretation provided); *see also* TEX. CONST. art. I, § 10 ("In all criminal prosecutions the accused . . . shall have the right of being heard by himself or counsel, or both. . . .").

converse.[248] While the sixth amendment grants the defendant the right to personally participate in his or her defense, the statute appears to ignore this right.[249]

It has been urged, however, that the statute be construed in view of the law in existence at the time the statute was enacted.[250] Article 38.071 should therefore be interpreted as encompassing the defendant's right to confer with counsel. The statute specifically states that the defendant will be permitted to "observe and hear the testimony of the child."[251] This requirement would indicate that the defendant has the opportunity to converse with counsel during cross-examination of the child. Otherwise, there would be no reason for the defendant to observe the child's testimony.[252] Consequently, it has been argued that the statute be interpreted to include a technical method for the defendant to converse with his or her counsel such as a two-way microphone.[253] If this requirement can be inferred from the language of the statute, the defendant's right to personally participate in his or her defense is not infringed.[254]

B. *Legitimate State Interest*

The most critical issue to be resolved is whether the state's interest in protecting sexually abused children in the courtroom can be balanced with

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248. *See* TEX. CRIM. PROC. CODE ANN. art. 38.071, §§ 4, 5 (no procedures set forth for defendant to converse with attorney during cross-examination of child under section 4).

249. *See* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defense").

250. *See* Amicus Curiae for Appellant at 7, Powell v. State, 694 S.W.2d 416 (Tex. App.—Dallas 1985, pet. granted) (arguing that article 38.071 is constitutional when read in light of present law); *see also In re* Carrigan's Estate, 517 S.W.2d 817, 819 (Tex. Civ. App.—Tyler 1974, no writ) (statutes interpreted in light of entire body of law in existence at time of enactment to ascertain and effectuate legislative intent).

251. *See* TEX. CRIM. PROC. CODE ANN. art. 38.071, § 4 (defendant personally permitted to observe and hear child's testimony).

252. *See* Amicus Curiae for Appellant at 10, Powell v. State, 694 S.W.2d 416 (Tex. App.—Dallas 1985, pet. granted) (interpretation by *Powell* court would render meaningful defendant's right to consult with counsel); *see also* McDonald v. Thompson, 305 U.S. 263, 266 (1938) (act is to be liberally construed and definitions read in harmony with underlying purpose).

253. *See* Amicus Curiae for Appellant at 8, Powell v. State, 694 S.W.2d 416 (Tex. App.—Dallas 1985, pet. granted) (article 38.071 can be saved if requirement for defendant to converse with attorney, such as with a two-way microphone, is read into statute).

254. *See id.* at 10. It is argued that the statute is to be given an interpretation that effectuates the purpose of the statute, which is to save the child victim of sexual abuse from the trauma of face-to-face confrontation with the alleged offender. *See id.* at 10-11. This purpose would not be disturbed by interpreting the statute to include communication between the defendant and his attorney during trial. *See id.* at 11.

the defendant's right to confrontation.[255] Undeniably, the United States Supreme Court has repeatedly interpreted the sixth amendment right to confrontation as including the physical presence of the witness in court.[256] The witness' physical presence is required to ensure the truthfulness of their testimony.[257] Today, however, in view of the numerous hearsay exceptions, the courts have asserted that the right to face-to-face confrontation is not absolute.[258] As early as 1895, the United States Supreme Court, in reference to the confrontation clause, stated that "general rules of law of this type however beneficient in their operation and valuable to the accused, must occasionally give way to considerations of public policy and necessities of the case."[259] Therefore, while the preference for face-to-face confrontation is desired, closely examined competing interests may justify excusing confrontation at trial.[260]

The United States Supreme Court has acknowledged that the victim's psychological and physical well-being may be adversely affected by having to

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255. *See* Long v. State, 694 S.W.2d 185, 190-91 (Tex. App.—Dallas 1985, pet. granted) (holding state's interest in protecting child did not compel limitation on defendant's rights); *see also* Powell v. State, 694 S.W.2d 416, 420 (Tex. App.—Dallas 1985, pet. granted) (refusing to find that child's emotional well-being outweighed defendant's right to face-to-face contact). *But see* State's Motion for Rehearing at 19, Long v. State, 694 S.W.2d 185 (Tex. App.—Dallas 1985, pet. granted) (legitimate state interest in protecting child witness can be balanced with defendant's sixth amendment rights); *see also* Amicus Curiae Brief for Appellant at 11-15, Powell v. State, 694 S.W.2d 416 (Tex. App.—Dallas 1985, pet. granted) (article 38.071 balances defendant's and state's interests).

256. *See* Kirby v. United States, 174 U.S. 47, 55 (1899) (defendant being able to look upon witnesses who confront defendant at trial); Mattox v. United States, 156 U.S. 237, 244 (1895) (constitutional rights protected when defendant stands face-to-face with witness and witness subjected to cross-examination).

257. *See* Dutton v. Evans, 400 U.S. 74, 89 (1970) (purpose of confrontation clause to secure accuracy of truth-determining process); *see also* United States v. Benfield, 393 F.2d 815, 821 (8th Cir. 1979) (defendant's conviction reversed due to violation of sixth amendment rights). The *Benfield* court states that the witness' recall, veracity, and communications are influenced by face-to-face confrontation. *See id.* For a discussion of the confrontation clause in criminal cases, see Western, *Confrontation and Compulsory Process: A Unifed Theory of Evidence for Criminal Cases*, 91 HARV. L. REV. 567, 567 (1978).

258. *See* Dutton v. Evans, 400 U.S. 74, 89 (1970) (allowing state to introduce declaration by co-conspirator as exception to hearsay rule). Before the state will be allowed to admit an unavailable witness' testimony, there must be a showing that a good faith effort was made to produce the witness. *See* Barber v. Page, 390 U.S. 719, 725 (1968). *See generally* Lilly, *Notes on the Confrontation Clause and Ohio v. Roberts*, 36 U. FLA. L. REV. 207, 207 (1984) (discussing historical development of hearsay exceptions).

259. *See* Mattox v. United States, 156 U.S. 237, 242 (1895).

260. *See* Ohio v. Roberts, 448 U.S. 56, 64 (1980) (defining right of confrontation). The court acknowledged that there is a preference for face-to-face confrontation. *See id.* at 65. In balancing competing interests, the court stated that they had based their conclusions on past decisions, new experience, and a response to changing conditions. *See id.* at 64.

testify at trial.[261] In *Globe Newspaper Co. v. Superior Court*,[262] the Court addressed the constitutionality of a state statute that barred the press and the public from the courtroom when a minor testified in the trial of a sexual offense.[263] While the Court held that the state's interest was not compelling enough to warrant a total infringement on first amendment rights by enacting a "mandatory" exclusion rule, it acknowledged that the trial courts may ban the press or public on a case-by-case basis.[264] More importantly, the Supreme Court noted that the trial court should consider such factors as the child's age, level of psychological maturity, the child's desires, and the nature of the crime when determining whether a sexual offense trial should be closed to the public and press.[265] The Court's ruling in *Globe* is significant in that it indicates that the Supreme Court is willing to allow an infringement upon constitutional rights when the psychological well-being of a child witness who has been sexually abused will be adversely affected by the strict enforcement of constitutional rights.[266] Also, the federal courts have recognized the special problems confronting the sexual abuse victim in the courtroom. In *United States v. Iron Shell*[267] and *United States v. Nick*,[268] the courts allowed statements that the child made to others to be admitted where the child was available to testify and the statements showed evidence of being reliable and trustworthy.[269]

Undeniably, the State of Texas has a legitimate interest in protecting child witnesses given the vast number of sexual abuse victims in Texas. The

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261. *See* Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 608 (1982) (constitutionality of state statutes at issue).

262. *See id.* at 596.

263. *See id.* at 598.

264. *See id.* at 608.

265. *See id.*

266. *See id.* at 607-09. *See generally* Note, *Criminal Procedure—Child Witnesses - The Constitutionality of Admitting the Videotape Testimony at Trial of Sexually Abused Children*, 7 WHITTIER L. REV. 639, 655-56 (1985) (*Globe* ruling presents points of comparison for videotape statutes). Since there is no mandatory requirement that the videotape interview be used in court, the defendant is not completely deprived of his sixth amendment rights. *See id.* at 656.

267. 633 F.2d 77, 92 (8th Cir. 1980).

268. 604 F.2d 1199, 1204 (9th Cir. 1979).

269. *See* United States v. Iron Shell, 633 F.2d 77, 87 (8th Cir. 1980) (defendant convicted of molesting 9-year-old female). At trial, the victim was unable to testify as to statements she had previously made to others. The court, however, allowed the statements which the child made to the police officer, physician, and her mother to be admitted into evidence. The court found that the defendant's right to confrontation was not violated when the child was available to testify, but was too young to be thoroughly cross-examined. *See id.* The availability of cross-examination, however, is not the sole criteria to admitting hearsay. *See* United States v. Nick, 604 F.2d 1199, 1203 (9th Cir. 1979) (allowing mother to testify to statement made by child). The ultimate question remaining is whether the statement has a high degree of trustworthiness and reliability. *See id.*

number of confirmed reports of sexually abused children by the Texas Department of Human Services increased from 4,041 in 1981 to 9,422 in 1985.[270] These figures indicate that more children will be participating in the criminal justice system. For years, research findings have indicated that the treatment the sexually abused child receives in the courtroom is perhaps the most traumatic aspect of the sexual abuse episode.[271] Having to repeat the details of the abuse, undergo cross-examination, and come face-to-face with the defendant are all potentially traumatic.[272]

The enactment of article 38.071 is an attempt to "provide a balance between the defendant's rights to be tried on reliable, credible evidence and the abused child's right to receive protection from the state and a right to be heard in a setting that does not produce additional trauma to the child."[273] The court in *Powell v. State*,[274] however, rejected this balancing approach, relying on the 1942 case of *Vasquez v. State*.[275] In *Vasquez*, the Texas Court of Criminal Appeals declined to excuse the child from testifying, holding that the emotional state of the witness was not sufficient to diminish the

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270. *See* Interview with Kathy Campbell, Management Information Specialist, Protective Service for Family and Children Branch, Texas Department of Human Services (Jan. 22, 1986). The statistics reflected by the Texas Department of Human Services only reveal those cases handled by the agency. The Texas Department of Human Services is only responsible for in home and child care facility referrals.

271. *See* Libai, *The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System*, 15 WYO. L. REV. 977, 980-84 (1969) (discussing psychological effects on children due to criminal justice system). Libai cites studies by others indicating that child victims who have participated in the court process have exhibited a greater number of behavioral problems and disturbances. *See id.* at 982; *see also* Bohmer & Blumberg, *Twice Traumatized: The Rape Victim and the Court*, 58 JUDICATURE 391, 398-99 (1975) (research project studying the rape victims role as prosecutrix). The results of this project indicated that the attitude of the personnel in the criminal justice system is the determining factor of how extensively the victims will be traumatized by the judicial process. *See id.* at 398-99; *see also* Schultz, *The Child Sex Victim: Social, Psychological and Legal Perspectives*, 52 CHILD WELFARE 147, 153 (1973) (fact that 50% of sexual abuse victims do not report abuse to legal authorities indicates view that criminal justice system is damaging).

272. *See* Schultz, *The Child Sex Victim: Social, Psychological and Legal Perspectives*, 52 CHILD WELFARE 147, 150 (1973) (greatest potential harm to child victim of sexual abuse is response by society and parents). The administration of justice which requires confrontation and cross-examination pose the greatest threat to the child's emotional well-being. The child is subject to prosecuting attorneys who are not trained to question them and to defense attorneys who will do whatever is necessary to defend their client. *See id.*; *see also* Parker, *The Rights of Child Witnesses: Is the Court a Protector or Perpetrator?* 17 N. ENG. L. REV. 643, 648 (1982) (discussing child victim witness).

273. S. CHANEY, VIDEOTAPED INTERVIEWS WITH CHILD ABUSE VICTIMS: THE SEARCH FOR TRUTH UNDER A TEXAS PROCEDURE (unpublished training material on file in St. Mary's Law Journal Office).

274. 694 S.W.2d 416 (Tex. App.—Dallas 1985, pet. granted).

275. *See id.* at 420 (citing *Vasquez v. State*, 145 Tex. Crim 376, 167 S.W.2d 1030 (Tex. Crim. App. 1942)).

defendant's right to confrontation.[276] The reliance on *Vasquez* seems ill-placed in light of the fact that article 38.071 now provides for the child's testimony in court,[277] and *Vasquez* was decided prior to the erosion of the right to confrontation by numerous hearsay exceptions.[278]

The courts' reluctance to uphold the constitutionality of article 38.071 is primarily based on the traditional notion that the witness' physical presence at trial is necessary in order to assess and ensure veracity.[279] This reluctance is exacerbated by several other factors: First, the criminal justice system has generally resisted departing from traditional adult courtroom approaches and has been slow to establish specialized techniques to be utilized when children are called as witnesses.[280] The decisions holding article 38.071 unconstitutional demonstrate the courts' inability to focus on the complexities created when children are used as witnesses. Furthermore, any change in the present system is often viewed as a prosecutorial advantage, rather than as a method to balance the defendant's rights with the child's need to testify in a less traumatic atmosphere.[281] Courts have traditionally responded to allegations of sexual offenses in a skeptical manner,[282] and this suspicion is

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276. *See* Vasquez v. State, 145 Tex. Crim. 376, 378, 167 S.W.2d 1030, 1032 (Tex. Crim. App. 1942) (defendant's right to confrontation will not yield to emotional state of child rape victim). The court stated that while they had sympathy for the child, it would be dangerous to set a precedent which would permit the child not to testify. The court stated that the guilty should go free before the confrontation provision of the constitution is ignored. *See id.* at 1032.

277. *See* TEX. CRIM. PROC. CODE ANN. art. 38.071, §§ 2, 3, 4.

278. *See* Lilly, *Notes on the Confrontation Clause and Ohio v. Roberts*, 36 U. FLA. L. REV. 207, 219 (1984) (shift towards allowing greater hearsay exceptions). In the 1970's, the United States Supreme Court began to shift from a vigorous application of the confrontation clause to a more moderate reading of the clause. *See id.* The *Roberts* decision indicated that a more flexible interpretation was to be given to the confrontation clause. *See id.* at 220; *see also* Ohio v. Roberts, 448 U.S. 56 (1980).

279. *See, e.g.*, Long v. State, 694 S.W.2d 185, 188 (Tex. App.—Dallas 1985, pet. granted).

280. *See generally* Parker, *The Rights of Child Witnesses: Is the Court a Protector or Perpetrator?*, 17 NEW ENG. L. REV. 643 (1982).

281. *See* Note, *The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations*, 98 HARV. L. REV. 806, 824 (1985). When the videotaping statutes are utilized, the prosecution has the added advantage in plea bargaining situations. The need, however, to obtain the facts of the abuse from the child while they are fresh in his or her mind, outweighs any disadvantages the defendant may incur. *See id.* at 824; *see also* Telephone interview with Tom Hill, attorney (Jan. 20, 1986) (Mr. Hill successfully defended a defendant utilizing section three of article 38.071). While the state may contend that the purpose of article 38.071 is to protect the emotional health of the child, there is an underlying prosecutorial reason, and strategy. Mr. Hill contends that the reason why some children don't want to come face-to-face with the defendant is because they have fabricated the sexual abuse. It is Mr. Hill's recommendation that article 38.071 be used on a case-by-case basis.

282. *See* Fitzgerald v. United States, 443 A.2d 1295, 1299 (D.C. 1982) (courts skeptical of sexual abuse allegations by children). The court in *Fitzgerald* stated that the jury must find beyond a reasonable doubt that the child did not fabricate the allegations. *See id.* at 1299; *see*

enhanced when the complainant is a child.[283]

Further complicating the decision-making process is the fact that the area of child sexual abuse is only clearly understood by those who work with the sexually abused child on a regular basis.[284] The opinion rendered in *State v. Sheppard*[285] demonstrates the value of understanding all the vital components involved when a videotaped interview is utilized in the prosecution for the sexual abuse of a child. The court in *Sheppard*, after hearing the testimony of several witnesses,[286] addressing the extent of the problem of sexual abuse of children,[287] and analyzing the constitutional issues presented,[288] allowed the use of a videotape interview of the victim. The *Sheppard* court stated: "Truth is the ultimate quest. This is the proper interest of the prosecution, the defense, the jury, the judge, and all of our society in all judicial proceedings."[289] Unfortunately, the Texas courts, in interpreting article 38.071, have failed to address all aspects of the issue,[290] thus demonstrating

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also Brenen, *A Question of Credibility: John Henry Wigmore's Use of Scientific Authority in Section 924a of the Treatise on Evidence*, 19 CAL. W. L. REV. 235, 235-36 (1983) (legal system unwilling to recognize offense of child sexual abuse). For a discussion of society's view of rape and the rape laws, see Simon, *Rape, and Rape Laws: Sexism in Society and Law*, 61 CAL. L. REV. 919 (1973). *See generally* Neale, *Court Ordered Psychiatric Examination of a Rape Victim in a Criminal Rape Prosecution—Or How Many Times Must a Woman be Raped?*, 18 SANTA CLARA L. REV. 119, 119 (1978) (discussing the different treatment rape victims receive in the legal process).

283. *See* Goodman & Michelli, *Would You Believe a Child Witness?*, PSYCHOLOGY TODAY, Nov. 1980, at 82, 90. In an experiment in which an adult's testimony was pitted against that of a child, the findings indicated that when the sole eyewitness is a child, his or her statements are not influential. Given a choice between believing a child or an adult, the jurors chose the adult. *See id.* at 90.

284. *See* Wenck, *Sexual Abuse: An American Shame That Can be Changed*, 12 CAP. U.L. REV. 355, 361 (1983) (people not working with sexual abuse on daily basis found it difficult to believe).

285. 484 A.2d 1330 (N.J. Super. Ct. Law Div. 1984).

286. *See id.* at 1332. First, a forensic psychiatrist testified as to his opinion as to whether the child was competent to testify and would do so truthfully. *See id.* The psychiatrist also gave testimony about the potential trauma that the child faces in testifying in open court. *See id.* at 1332-33. Next, two attorneys testified regarding the difficulty encountered when child victims must testify. Most sexual offense cases were dismissed because the child could not withstand the trauma of testifying. *See id.* at 1333. Finally, a video expert testified as to the procedure to be utilized. *See id.* at 1333-34.

287. *See id.* at 1334-37. The court acknowledged the extent of sexual abuse in this country and then addressed what actions other states were taking to assist child sexual abuse victims in the courtroom. *See id.* The *Sheppard* court stated that "Texas appears to be the only state with a complete statutory solution to the confrontation problem." *See id.* at 1336.

288. *See id.* at 1337. The *Sheppard* court concluded that the constitutional demands are met in the videotape procedure and, if not, the procedure was a deserved exception. *See id.* at 1343.

289. *Id.*

290. *See* Powell v. State, 694 S.W.2d 416, 420 (Tex. App.—Dallas 1985, pet. granted)

a lack of understanding regarding the true extent of the problem of obtaining reliable and credible testimony from a child victim of sexual abuse.[291]

VI. CONCLUSION

Today, the realization that an increasing number of children are being sexually abused has caused the need for a change in our criminal justice system when these children attempt to participate as witnesses. Even though there is an obvious inequality manifested when children are held to adult standards, previous attempts to change these inequalities have been resisted since change would disturb established standards. However, while the sixth amendment confrontation clause should not be lightly infringed upon, the courts have indicated that a competing interest may justify dispensing with confrontation at trial. Recently, the Texas Court of Criminal Appeals has been presented with an opportunity to balance the needs of a child witness with the rights of a defendant by holding article 38.071 constitutional.

With an understanding of the problems sexually abused children encounter as witnesses, article 38.071 ensures greater reliability regarding a child's testimony. When section 2 is utilized, the child is interviewed in an atmosphere in which the child is free to express himself and by an interviewer who is trained in child development. All three alternative methods prohibit the child from having to confront the defendant face-to-face. This lack of physical contact reduces the emotional trauma that the child might otherwise experience. At the same time, the defendant's confrontation rights are preserved. The child's ability to be truthful is determined by the interviewer on videotape; the fact-finder can then view the child's demeanor and the defendant has the right to cross-examine the child. Any possible infringe-

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(refusing to follow decision in *Sheppard* case). While the court declined to find the emotional well-being of the child significant enough to outweigh the defendant's constitutional rights, it failed to address the issue of obtaining truthful testimony from the child. *See id.* at 420. The following cases also failed to either address the state's legitimate interest in protecting child sexual abuse victims in the courtroom or the veracity of their testimony. *See, e.g.*, Alexander v. State, 692 S.W.2d 563 (Tex. App.—Eastland 1985, pet. granted); Tolbert v. State, 697 S.W.2d 795 (Tex. App.—Houston [1st Dist.] 1985, no pet.); Jolly v. State, 681 S.W.2d 689 (Tex. App.—Houston [14th Dist.], pet. granted).

291. *See* Long v. State, 694 S.W.2d 185, 191 (Tex. App.—Dallas 1985, pet. granted) (addressing state interest of protecting children in courtroom). In response to the state's argument for providing protection to the child in the courtroom, the court stated:

> Thus, although authorities recognize the potential trauma of in-court testimony, neither our record nor the legislation history contains evidence that the child was, or that sex-abuse victims generally are, emotionally disturbed, reluctant to testify, or intimidated by the accused, or evidence that the videotape procedure was more likely than in-court testimony to elicit a reliable response.

Id.

ment upon the defendant's sixth amendment rights is, therefore, effectively balanced with the child victim's right to testify without being further traumatized.

Until the passage of article 38.071, the Texas criminal justice system was void of any procedure to deal with child witnesses. With the vast number of sexually abused children in Texas, a legitimate state interest exists to protect the psychological well-being of these children. Article 38.071 was enacted in an effort to obtain credible and reliable testimony from child witnesses regarding an offense which thus far has been the perfect crime. The courts should be mindful that much of the legal precedent on which those opposed to the use of videotaped testimony rely was decided before technology would have permitted such testimony. It is doubtful that the early courts could have perceived the judicial problems created by the proliferation of child sexual abuse in modern society. Faced with these problems, it is the duty of contemporary courts to take cognizance of the legitimate state interest at stake in protecting child witnesses.