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A Decade of International Legal Reform Regarding Child Abuse Investigation and Litigation: Steps Toward a Child Witness Code

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A Decade of International Legal Reform Regarding Child Abuse Investigation and Litigation: Steps Toward a Child Witness Code*

John E.B. Myers**

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CONCLUSION

CHILD WITNESS CODE

INTRODUCTION

Children are no strangers to the courtroom, although courtrooms must certainly be strange to them. Not only are the courtroom trappings formal and intimidating, but, in the words of one youngster, “some of the grownups aren’t nice.” Outside the legal arena, children’s interaction with adults is largely positive. Teachers, doctors, therapists, coaches, and others are supportive and concerned. In court, by contrast, at least one adult—the defense attorney—may be incredulous of everything the child says, portraying the child as incompetent, coached, or confused. Many observers believe the adversarial atmosphere of the courtroom undermines some children’s capacity to provide accurate testimony\(^1\) and inflicts unnecessary anxiety.\(^2\)

The 1980s witnessed a significant increase in the prosecution of child abuse, particularly sexual abuse.\(^3\) As more and more children took the long walk to the witness stand, prosecutors and children’s advocates called for reforms of the adversary trial process. Legislators and judges in several Western countries took up the call for reform and amended time-honored rules of evidence and procedure to facilitate children’s testimony and make the court process less trying for young witnesses.\(^4\)

As prosecutors focused increased attention on child witnesses, so did academic psychologists. The 1980s ushered in a new era of psychological research on investigative interviewing, the psychological effects of testifying, and children’s suggestibility.\(^5\) Findings from this research supported many of the legal reforms

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1. See infra note 3 and accompanying text (listing sources).
2. See infra note 3 and accompanying text (identifying sources).
4. See INTERNATIONAL PERSPECTIVES ON CHILD ABUSE AND CHILDREN’S TESTIMONY, supra note *. For additional information, the most complete compilation of American reforms regarding child abuse and child witnesses is available from the National Center for Prosecution of Child Abuse, a Division of the American Prosecutors Research Institute, which is part of the National District Attorneys Association. The address for the National Center is 99 Canal Center Plaza, Suite 510, Alexandria, Virginia 22314.

The author wrote:

Today's burst of research on psychology and law can be traced to several factors. The activism of the 1960s, the courts' changing attitudes toward civil and criminal rights, and an increased openness of the courts to testimony of psychological experts all contributed to the revival. The reawakening of research in psychology and law inevitably fosters a reemergence of research on child witnesses. But
designed to improve the investigation of child abuse—particularly in the interviewing of young children—and the accommodation of child witnesses in court.6

Improving investigative interviewing is a priority in all nations. When it comes to improving the treatment of children in court, however, reform occurred primarily in countries that followed the common law tradition with its emphasis on adversarial trial procedure. The pressure for courtroom reform is greater in common law countries than in nations that employ the "inquisitorial" procedures of the civil law. Part I of this Article explains why this is so by describing a major procedural difference between the adversarial and inquisitorial systems. Part II describes legal reforms in countries that adhere to the adversarial model, including Australia, Canada, England, Ireland, New Zealand, Scotland, and the United States.

Much has been accomplished during the past decade to improve investigative practices and accommodate children in court. To date, however, few efforts have been made to distill the patchwork of reforms into a comprehensive Child Witness Code.7 The proposed code at the end of this Article marks a step toward such a code.

I. THE DIFFICULTY OF COURTROOM REFORM IN COUNTRIES THAT EMPLOY THE SYSTEM OF ADVERSARIAL TRIAL PRACTICE

An article discussing legal reforms to accommodate young witnesses should not ignore an important procedural distinction between the two legal systems that dominate the Western World: the common law and the civil law. The distinction

society's increased concern with children's rights and protecting children from abuse also spurs this endeavor. Moreover, advances in developmental theory should enable researchers to approach the study from a more enlightened perspective. Id. at 23; see also John E.B. Myers, Karen J. Saywitz & Gail S. Goodman, Psychological Research on Children as Witnesses: Practical Implications for Forensic Interviews and Courtroom Testimony, 28 PAC. LJ. 3 (1996).

6. See, e.g., Maryland v. Craig, 497 U.S. 836 (1990). Mental health professionals who are experts on child witnesses occasionally suggest that implementation of legal change should await empirical validation. See Julie A. Lipovsky, The Impact of Court on Children: Research Findings and Practical Recommendations, 9 J. INTERPERSONAL VIOLENCE 238, 248 (1994). Although empirical study plays an important role in reforming the legal system, scientific validation has never been, nor is it likely to become, a condition precedent to law reform. Oliver Wendell Holmes, Jr., observed long ago that:

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.

OLIVER W. HOLMES, JR., THE COMMON LAW 1 (1951) (n.p. 1881). The reform movement to accommodate child witnesses was driven not so much by science as by the felt necessity of our time to respond to the reality of child abuse, and to reform a legal system that sometimes traumatizes children and impairs their ability to testify. Although psychological research played only a subsidiary role in the reform movement, such research is important and deserves the attention of the bench, bar, and legislature.

helps explain why reform is more important yet more difficult in the former than the latter.

Most European countries are traditionally classified as following the civil law system. The civil law system traces its origins to Roman law, with major contributions over the centuries from France, Germany, and other countries. The common law originated in England and was received or adopted by English colonies.

In terms of accommodating children in court, the most important difference between the civil and common law systems concerns trial procedure rather than substantive law. Although the procedural distinction between the two systems is far from pure, it is a distinction with a difference. Common law countries generally follow the adversarial or, as it is sometimes called, accusatorial system of justice. Civil law countries, by contrast, employ an inquisitorial trial procedure. John Spencer and Rhona Flin described the difference:

It is generally accepted that there are two main systems of trial in the civilized world: the accusatorial (alias adversarial) and the inquisitorial. In an accusatorial system each side presents a case before a court the function of which is limited to deciding who has won. The judges have nothing to do with the preliminary investigations, give no help to either side in presenting its case, and take no active steps to discover the truth, which emerges—or so the theory goes—from the clash of conflicting accounts. . . . In an inquisitorial system, on the other hand, the court is viewed as a public agency appointed to get to the bottom of the disputed matter. The court takes the initiative in gathering information as soon as it has notice of the dispute, builds up a file on the matter by questioning all those it thinks may have useful information to offer—including, in a criminal case, the defendant—and then applies its reasoning powers to the material it has collected in order to determine where the truth lies.8

In common law countries, tremendous significance is placed on adversarial cross-examination and face-to-face confrontation between witnesses and the accused. By contrast, in the inquisitorial system, less significance is attributed to cross-examination and confrontation. Moreover, in the inquisitorial system, the judge often takes an active or leading role in questioning witnesses. The inquisitorial system lowers the rhetorical volume to a level that is more manageable for children.

Common law countries are so deeply wedded to adversarial cross-examination and face-to-face confrontation that reforms to accommodate children are difficult in

such countries. Indeed, in the United States, cross-examination and confrontation are guaranteed by the Sixth Amendment to the U.S. Constitution, and the constitutional stature of these rights makes reform particularly difficult.

II. THE MOVEMENT TO IMPROVE INVESTIGATIVE INTERVIEWING AND ACCOMMODATE CHILDREN IN COURT

This Part describes reforms that have taken place in three arenas: (1) Investigative interviewing, (2) preparing children for court, and (3) courtroom accommodations.

A. Investigative Interviews

The way children are interviewed by police officers, social workers, and other professionals has a direct bearing on children's credibility. In the late 1980s, defense attorneys began assailing the questioning techniques used to interview children. Defense counsel argue that improper interviewing renders children's testimony unreliable.

9. See Testifying in Criminal Court, supra note 3, at 3 (where the authors observe that "[t]he court system, established with adult defendants and witnesses in mind, does not easily accommodate children's special needs").

10. The Sixth Amendment provides in part that "]In all criminal proceedings, the accused shall... be confronted with the witnesses against him." U.S. CONST. amend. VI. The U.S. Supreme Court has made clear that the defendant's right to cross-examine prosecution witnesses is protected by the Confrontation Clause of the Sixth Amendment. See Delaware v. Van Arsdall, 475 U.S. 673, 678 (1986); Davis v. Alaska, 415 U.S. 308, 316-17 (1974); see also Barber v. Page, 390 U.S. 719, 725 (1968) ("The right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness.").


12. See, e.g., Idaho v. Wright, 497 U.S. 805, 809 (1990) (pediatrician asked leading questions of two-year-old); United State v. Boyles, 57 F.3d 535 (7th Cir. 1995); Doe v. Johnson, 52 F.3d 1448 (7th Cir. 1995); Guam v. Ignacio, 10 F.3d 608, 612 (9th Cir. 1993) (child's hearsay not sufficiently reliable because social worker and mother discussed abuse in child's presence); United States v. Dorian, 803 F.2d 1439 (8th Cir. 1986) (interlocutors were careful to avoid too much leading); Wilkinson v. Balsam, 885 F. Supp. 651, 654 (D. Vt. 1995); United States v. Banks, 36 M.J. 150, 152 (C.M.A. 1992) (theory of defense case was that the idea of abuse was planted through improper interviews); United States v. Cox, 42 M.J. 647, 650 (A.F. Ct. Crim. App. 1995) (doctor appeared as a defense expert in 'investigative evaluations and in child sexual abuse'); United States v. Geiss, 30 M.J. 678, 680 (A.F.C.M.R. 1990) (interview questioning was overly complex and suggestive, and did not comport with recommended procedures outlined in regulations); State v. Ford, 626 So. 2d 1338, 1345-48 (Fla. 1993); State v. Malamey, 617 So. 2d 739 (Fla. Ct. App. 1993) (reversal because of trial court's exclusion of defense expert testimony challenging conduct of interviews); State v. Poole, 859 P.2d 944, 945-46 (Idaho 1993); Hulbert v. State, 529 N.W.2d 632, 635-36 (Iowa Ct. App. 1993); People v. Zwart, 600 N.E.2d 1169, 1171-74 (Ill. 1992) (under child hearsay exception, state failed to establish that suggestive interviews did not occur); State v. Mazereolle, 614 A.2d 68, 71-72 (Me. 1992) (not error to reject defense expert testimony on suggestibility; there was no evidence the children had been interviewed suggestively); Commonwealth v. Clements, 629 N.E.2d 361, 364-65 (Mass. Ct. App. 1994) (defendant sought unsuccessfully on appeal to argue that trial counsel was ineffective in failing to offer expert testimony to attack interviews); State v. Huss, 506 N.W.2d 290, 292-93 (Minn. 1993) (repetitious pretrial use with child of highly suggestive book, along with child's contradictory testimony, led to conclusion that evidence was insufficient to support conviction); Felix v. State, 849 P.2d 220 (Nev. 1993) (interviewing is the central issue in the case); In re Troy P., 842 P.2d 742, 745-46 (N.M. Ct. App. 1992) (under residual hearsay exception, court
expresses concern about impact of suggestive questions on reliability); State v. Robertson, 444 S.E.2d 643 (N.C. Ct. App. 1994) (court did not err in excluding defense expert testimony on general phenomenon of suggestibility; expert had not examined child); In re W.S., 899 S.W.2d 772 (Tex. Ct. App. 1995); In re Dunbar, 647 A.2d 316, 319-321 (Vt. 1994) (defendant argued his trial counsel was ineffective for not more aggressively pursuing a coaching defense; held: trial counsel was not ineffectve; there was no hard evidence of coaching); State v. Swan, 790 P.2d 610 (Wash. 1990) (court saw no evidence of improper interviewing); L.H. v. L.H., 465 S.E.2d 841, 854 (W. Va. 1995); State v. Kirschbaum, 535 N.W.2d 462 (Wis. Ct. App. 1995) ("Many jurisdictions also recognize the utility of expert testimony on the suggestive interview techniques used with a young child and how suggestive techniques can shape a young child witness’s answers.").

13. See supra note 12 (citing authorities); see also 1 JOHN E.B. MYERS, EVIDENCE IN CHILD ABUSE AND NEGLECT CASES § 4.5 (1996) (describing defense attack on interviewer) [hereinafter MYERS, EVIDENCE IN CHILD ABUSE].


15. Wright, 497 U.S. at 819.


[A social worker usually has a plethora of information from doctors, relatives, teachers, neighbors, etc., which would cause him or her to be biased and to have a set of preconceived notions as to what to expect from a child suspected to have been abused . . . .

Paul F. Herzog, Child Sexual Abuse Defense: Pre-Trial Investigation, Experts, and Proxy Testimony, 11 CHAMPION 10, 12 (1987); Richard G. Lubin, The Trial of a Child Sexual Abuse Case, 14 CHAMPION 18 (1990) ("[I]nvestigators ask the children leading questions or send subliminal signals to the child through body language or words spoken . . . ."); Ralph Underwager & Hollida Wakefield, Interviewing the Alleged Victim in Cases of Child Sex Abuse: The Role of the Psychologist, 11 CHAMPION 17, 18 (1987) ("[T]he way children are currently interviewed may not result in the obtaining the truth about what really happened. The story that is told often is the one the interviewer wants to hear . . . ."); Hollida Wakefield & Ralph Underwager, Effective Use of a Mental Health Expert in Child Sexual Abuse Cases, 14 CHAMPION 20 (1990) ("It is through adult social influence that a child can make untrue statements of sexual abuse. Therefore, you must obtain as much information as possible about all contacts the child has had with adults who believe the abuse is real . . . .").

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New Jersey Supreme Court’s 1994 decision in State v. Michaels. In Michaels, the court ruled that egregiously defective pretrial interviews can violate a defendant’s right to a fair trial. The Michaels court reviewed the psychological literature on interviewing and children’s suggestibility and determined that

a sufficient consensus exists within the academic, professional, and law enforcement communities, confirmed in varying degrees by courts, to warrant the conclusion that the use of coercive or highly suggestive interrogation techniques can create a significant risk that the interrogation itself will distort the child’s recollection of events, thereby undermining the reliability of the statements and subsequent testimony concerning such events.

The New Jersey court held that a defendant in a criminal case may request a pretrial hearing—called a “taint hearing”—to determine whether improper interviewing so far undermined the reliability of children’s memories that their out-of-court statements or trial testimony should be excluded. Defense counsel in other jurisdictions are picking up the Michaels ball and seeking taint hearings with child witnesses.

There is no gainsaying that defective interviewing exists. Indeed, some of the interviews in the Michaels case are textbook examples of how not to talk to children. Despite the assertions of some critics, however, there is no concrete

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18. 642 A.2d at 1380. The court ruled that pretrial use of unnecessarily suggestive interview methods “implicates principles of constitutional due process.” Id.
19. Id. at 1379.
20. See id. at 1380. The Michaels court concluded on the facts before it that: “[A] hearing must be held to determine whether those clearly improper interrogations so infected the ability of the children to recall the alleged abusive events that their pretrial statements and in-court testimony based on that recollection are unreliable and should not be admitted into evidence.” Id. For an argument against taint hearings, see John E.B. Myers, *Taint Hearings for Child Witnesses? A Step in the Wrong Direction*, 46 BAYLOR L. REV. 875 (1994).
22. Much remains to be done to train interviewers. One of the most serious problems is the high turnover rate of professionals—particularly social workers—who interview children.
23. See Michaels, 642 A.2d at 1372 app.
evidence that defective interviewing is the norm. Moreover, serious efforts are underway in the United States and elsewhere to improve the skills of the police officers, social workers, and others who interview children. Books and articles on interviewing proliferated after 1990. Interviewing is a regular topic at national and regional child abuse conferences. Many state and local child welfare agencies


27. There are several national yearly meetings devoted to child abuse and neglect. The “San Diego Conference” is sponsored every year by the Child Protection Center of Children’s Hospital in San Diego. Interviewing is a regular topic at the “San Diego Conference.” The annual Midwest Conference on Child Sexual Abuse and Incest is sponsored by the University of Wisconsin-Madison. At the November 1995 Midwest Conference, two workshops were devoted to interviewing. The National Symposium on Child Sexual Abuse is held each spring in Huntsville, Alabama, by the National Resource Center on Child Sexual Abuse. Interviewing is a routine topic. The American Professional Society on the Abuse of Children holds an annual training colloquium at a selected city, and interviewing is invariably on the program.

28. The University of California at Davis sponsors an annual child abuse conference that draws professionals from northern California. Since 1991, interviewing children has been a major topic at the conference. See Telephone Interview with Marilyn Peterson, Director of the University of California, Davis, Davis Medical Center, Child Protection Center (July 20, 1994) (notes on file with author).

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have increased efforts to train social workers. Tennessee, for example, has a program to certify child protection workers in a broad range of topics including interviewing young children. Certification and specialized training programs are also underway in other states, including Alabama, California, Florida, New York, Ohio, Mississippi, and Washington. Michigan has a child welfare training institute. Illinois has a consortium of social work schools training child welfare workers. Law enforcement agencies improved training for interviewers. The Federal Government provides funds to improve investigation of child abuse. Training curricula have been produced and distributed by organizations such as the National Resource Center on Child Sexual Abuse and the Children’s Division of the American Humane Association. Pat Schene, the former director of American Humane’s Children’s Division, observes that during the past ten years “numerous forces have moved the training agenda forward.” John Doris, Rosaleen Mazur, and Marney Thomas point out that although much remains to be accomplished on the training front, “[t]he history of [child protective services] training over the past ten to fifteen years exhibits impressive expansion, development, and adaptation to new

29. In Oregon, for example, the Child Abuse Response and Evaluation Services Program (CARES), associated with Emanual Hospital in Portland, contracts with the State Department of Social Services to provide training for new protective services social workers. This training includes information on physical abuse, sexual abuse, and interviewing. See Telephone Interview with Jan Bays, M.D., Director of the CARES Program (July 20, 1994) (notes on file with author). In 1994, in San Jose, California, the Santa Clara County Department of Social Services, in cooperation with the School of Social Work at California State University, San Jose, began a program to certify social workers in Forensic Child Welfare Practice. See generally Jennifer Miller & Martha M. Dore, Innovations in Child Protective Services Inservice Training: Commitment to Excellence, 70 CHILD WELFARE 437 (1991).

30. See Telephone Interview with Charles Wilson, former Director of Child Welfare, Tennessee Department of Human Services (July 20, 1994) (notes on file with author).


32. See Telephone Interview with Kathleen Coulborn Faller, School of Social Work, University of Michigan (July 21, 1994) (notes on file with author).

33. See id.

34. Federal, state, and local law enforcement agencies have greatly increased training on child abuse and on proper interviewing techniques. See Telephone Interview with Sergeant Rick Cage, Montgomery County, Maryland, Police Department (July 22, 1994) (notes on file with author).


36. The National Resource Center is located in Huntsville, Alabama.

37. The American Humane Association is located in Denver, Colorado.

38. Telephone Interview with Pat Schene, former Director, Children’s Division, American Humane Association (July 20, 1994) (notes on file with author).
The concerted effort to train interviewers is among the most laudable and important reforms of the child protection system.

State legislatures have supported improvements in interviewing and investigation in child abuse cases. Thirty-three states have legislation that requires or encourages joint investigation and cooperation between law enforcement and child protective services. An equal number of states have laws authorizing multidisciplinary child protection teams. In cases investigated by federal law enforcement officials, "[a] multi-disciplinary child abuse team shall be used when it is feasible to do so."

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The organized and formal training of child protective services (CPS) workers is relatively recent and is constantly undergoing rapid expansion and development, driven by the increasing number of reports of child maltreatment and by public and professional concern for the effectiveness of our CPS systems . . . .

*Id.* at 479.

. . . Beginning in the 1980s, however, and in response to the growing sense of crisis in child protection, many agencies began to reorganize the delivery of services and develop more formal programs of training, with the latter being facilitated by uniform statewide curricula and training facilities.

*Id.* at 482.

Present-day sexual abuse training programs with which we are familiar typically reflect the latest information from the steady stream of critical research outlining the issues in interviewing children. Information on the suggestibility of children, their accuracy in recounting events, the development of their memory, and the many useful protocols and instruments for conducting a forensically adequate interview are made available to the trainee. Most child protective workers who have attended training in the last few years have been exposed to this information.

*Id.* at 490.

40. In California, for example, the legislature in 1986 created the Child Victim Witness Judicial Advisory Committee “to study investigative and judicial practices and procedures as they pertain to child victims and witnesses . . . . Specifically, the Committee was asked to make recommendations for: Minimizing or reducing unnecessary repetitive interviews and court appearances of child victim witnesses . . . .” *CALIFORNIA ATTORNEY GENERAL’S OFFICE, CALIFORNIA CHILD VICTIM WITNESS JUDICIAL ADVISORY COMMITTEE FINAL REPORT* iii (1988). The Committee made 53 recommendations to improve the investigation and litigation of child abuse cases. *Id.* at 106-15. The California Legislature responded to the Committee’s recommendations with legislative reforms and with the enactment in 1989 of the California Child Victim Witness Pilot and Demonstration Program. This legislation “required the Attorney General to establish up to three pilot projects to implement and evaluate multi disciplinary interview centers.” *CALIFORNIA ATTORNEY GENERAL’S OFFICE, CHILD VICTIM WITNESS INVESTIGATIVE PILOT PROJECTS: RESEARCH AND EVALUATION FINAL REPORT* (1994) [hereinafter FINAL REPORT]. Three year pilot projects were established in Orange and Sacramento counties to evaluate the use of multidisciplinary interview centers. A research and evaluation advisory panel evaluated the pilot projects and reported its findings in the Final Report cited above. The effort to improve investigation continues apace in California. In 1993, a Multidisciplinary State Task Force on Children’s Justice was established under the aegis of the Office of Criminal Justice Planning. This task force allocated funds to create two training centers in California to train professionals in the multidisciplinary investigation of child abuse.


42. *See generally id.* at tab. 17, p.1 (surveying all states).

Alabama and West Virginia have statutes that authorize judges to limit the number of investigative interviews of children.\(^4\)

One of the more controversial issues in the realm of interviewing is whether investigative interviews should be videotaped.\(^4\) Arguments in favor of videotaping fall into four overlapping categories.\(^4\) First, videotaping may reduce trauma to children by reducing the number of interviews during which the child must describe abuse. Second, videotaping preserves the child's early description of abuse—while memory of the incident is fresh. Third, the videotaped interview is often powerful evidence that may be admissible in later legal proceedings. Fourth, videotaping is likely to increase the quality of interviews because interviewers realize their performance will be preserved for later critique.

Opponents of videotaping raise three principle objections. First, opponents argue that videotaping gives the defense "too much ammunition" to attack the child's credibility. Using the videotape, defense counsel places exaggerated emphasis on minor, and inevitable, inconsistencies between videotaped statements and the child's other statements describing abuse. Second, opponents charge that the videotape assumes exaggerated importance in the trial, forcing other important evidence into

\(^4\) Section 15-1-2 of the Code of Alabama states:
The presiding judge of a judicial circuit, after consultation with the district attorney for the judicial circuit may provide for reasonable limits on the number of interviews a victim of sexual abuse or exploitation, who is under 12 years of age, must submit to for law enforcement or other purposes. The judge shall, to the extent possible, protect the victim from the psychological damage of repeated interrogation while preserving the rights of the public, the victim, and the person charged with the violation.

**ALA. CODE § 15-1-2(a) (Supp. 1994).**

Similarly, section 61-8-13(a) of the West Virginia Code reads as follows:

In any prosecution under the provisions of section twelve [§ 61-8-12] of this article, the court may provide by rule for reasonable limits on the number of interviews to which a victim who is eleven years old or less must submit for law-enforcement or discovery purposes. To the extent possible the rule shall protect the mental and emotional health of the child from the psychological damage of repeated interrogation and at the same time preserve the rights of the public and the defendant.

**W. VA. CODE § 61-8-13(a) (1992).**

\(^4\) Compare Paul Stern, Videotaping Child Interviews: A Detriment to an Accurate Determination of Guilt, 7 J. INTERPERSONAL VIOLENCE 278 (1992) with Catherine Stephenson, Videotaping and How It Works Well in San Diego, 7 J. INTERPERSONAL VIOLENCE 284 (1992). The arguments for and against videotaping are discussed in John E.B. Myers, Investigative Interviews of Children: Should They Be Videotaped?, 7 NOTRE DAME J. L. ETHICS & PUB. POL'Y 371 (1993) [hereinafter Myers, Investigative Interviews]. At least one proponent of videotaping investigative interviews goes too far in her zeal to tape. In an appendix to her otherwise thoughtful book titled CHILD WITNESSES: FRAGILE VOICES IN THE AMERICAN LEGAL SYSTEM (1994), Lucy S. McCough proposed a statute that would bar any child under the age of twelve from testifying in a criminal case unless the child was interviewed on videotape according to procedures that are so detailed, numerous, and strict that very few investigative interviews would ever measure up. *Id.* at 271. McCough's proposal would result in the routine loss of reliable evidence.

\(^4\) In addition to the advantages of videotaping mentioned in the text, videotaping may: discourage recantation; convince a nonoffending parent that abuse occurred; encourage the defendant to confess; refresh a child's memory prior to testifying; or assist an expert witness in assessing whether a child was abused.
the background. Finally, opponents assert that defense attorneys and their experts exaggerate or invent errors committed by interviewers.\footnote{47}

Research conducted under the auspices of the California Attorney General’s Office provides support for videotaping investigative interviews.\footnote{48} Pilot projects in Sacramento and Orange Counties evaluated the use of multidisciplinary interview centers—including videotaping—in child abuse cases. At each interview center a predetermined number of investigative interviews (100) were conducted without videotaping. When the nonvideotape portion of the evaluation was complete, an equal number of interviews were videotaped. Professionals involved in the investigative process were questioned about videotaping at the beginning of the pilot projects (1991), before they had experience with videotaping.\footnote{49} Two years later (1993), professionals were questioned again, after amassing considerable experience with videotaped interviews. The Final Report on the pilot projects states:

The videotape surveys distributed in 1991 and 1993 provide powerful evidence supporting the utility of videotaping interviews conducted at multidisciplinary interview centers. . . . Many professionals believe videotaping has both positive and negative effects. In the present evaluation, however, the number of individuals mentioning helpful effects of videotaping far outweights the number mentioning harmful effects. In 1993, eighty-three percent of Sacramento and Orange Counties respondents indicated that videotaping has helpful effects on the investigation. Only 30% of respondents mentioned harmful effects of videotaping. Among professionals who mentioned harmful effects of videotaping, the existence of harmful effects generally does not translate into blanket opposition to videotaping.\footnote{50}

. . . In Sacramento and Orange Counties 63% of respondents favor routine videotaping, 26% favor selective [videotaping], and only 5% of respondents expressed the view that interviews should not be videotaped in the future.\footnote{51}

\begin{footnotes}
\item[47] Another drawback to videotaping is that recording everything a child says is impossible; yet, if videotaping becomes the norm, children’s statements that are not on tape may be viewed with undue suspicion. Also, videotaping can cause stage fright, poor tape quality may cast doubt on the child’s disclosure, and videotapes may fall into the wrong hands. For a discussion of these arguments, see Myers, Investigative Interviews, supra note 45.
\item[48] See Final Report, supra note 40.
\item[49] Survey questionnaires were distributed in 1991, at the beginning of the pilot projects, and again in 1993, at the end, to law enforcement officers, prosecutors, social workers, interviewers, and a small number of judges.
\item[50] Final Report, supra note 40, at 69-70.
\item[51] Id. at 70. The actual number of individuals who said interviews should not be videotaped was two in Sacramento County and two in Orange County. Id.
\end{footnotes}
Most professionals surveyed "felt that videotaping contributed to lower trauma for children."\textsuperscript{52} Moreover, most professionals stated that "videotaping improves the investigative process."\textsuperscript{53}

The Final Report concludes that "[t]he pilot projects provide clear support for videotaping interviews that occur at well run multidisciplinary interview centers. Moreover, most professionals involved in the pilots believe videotaping should be routine. In Sacramento and Orange Counties, the specter of injustice that is feared by opponents of videotaping did not materialize. What emerged instead is a clear consensus that videotaping helps lower trauma for children and contributes to the search for truth."\textsuperscript{54}

In England, the government devoted considerable attention to videotaping investigative interviews and improving the skills of interviewers. The 1991 Criminal Justice Act allows videotaped interviews to be admitted in evidence "as a substitute for the child's evidence-in-chief at trial."\textsuperscript{55} In 1992 the Home Office and the Department of Health issued a \textit{Memorandum of Good Practice}\textsuperscript{56} "to help those making a video recording of an interview with a child witness where it is intended the result should be acceptable in criminal proceedings."\textsuperscript{57} Research by Graham Davies and his colleagues reveals that professionals in England are generally enthusiastic about videotaping and the \textit{Memorandum of Good Practice}.

The Child Witness Code at the end of this Article includes provisions on investigative interviews.

\textbf{B. Preparing Children to Testify}

\textsuperscript{52} \textit{Id.} at 69.
\textsuperscript{53} \textit{Id.} Many professionals felt that videotaping improves the quality of interviewing. \textit{Final Report, supra} note 40, stated:

\textit{Professionals involved in the pilot projects support the argument that videotaping elicits good interviewing. One of the child interview specialists put it bluntly when she wrote that videotapes are "insurance for interviewers." The same interview specialist adds that "when there is no videotape, the interview (which is the foundation of the case) is left wide open for criticism. Nothing defends the interview more than the videotape." Another interview specialist opines that videotaping "keeps the interviewer accountable [and] protects the interviewer from attack." A third interview specialist points out that with videotaping there are "no hidden outcomes." A juvenile court referee adds that "taping helps demonstrate whether manipulation or influence are present" during the interview. A sheriff's deputy states that the videotape "eliminates questions as to exactly what was said." A Deputy District Attorney writes that the videotape "eliminates entirely the implication that kids are 'coached' or told what to say."}

\textit{Id.} at 72.

\textsuperscript{54} \textit{Id.} at 79.
\textsuperscript{55} \textit{Graham Davies, Clare Wilson, Rebecca Mitchell & John Milsom, Videotaping Children's Evidence: An Evaluation I (1995) [hereinafter Videotaping Children's Evidence].}
\textsuperscript{56} \textit{Home Office and Department of Health, Memorandum of Good Practice on Video Recorded Interviews with Child Witnesses for Criminal Proceedings (1992).}
\textsuperscript{57} \textit{Id.} at 1.
\textsuperscript{58} \textit{See Videotaping Children's Evidence, supra} note 55.
Testifying in court is difficult for child witnesses, and professionals owe it to children to prepare them for the experience. Karen Saywitz and Lynn Snyder remind us that "[p]reparation of children for painful medical procedures has proven successful in lowering children's perceptions of pain and raising their level of cooperation. Children facing similarly stressful forensic procedures deserve no less." Research by Louise Dezwirek Sas and her colleagues at the Child Witness Project of the London Family Court Clinic in London, Ontario, and Canada, demonstrated the utility of preparation. Dezwirek Sas wrote:

[T]he court preparation offered by the Child Witness Project benefitted the child witnesses in four distinct ways:

1. By educating them about court procedures
2. By helping them deal with their stress and anxieties related to the abuse and to testifying
3. By helping them tell their story competently on the stand in court


60. Rhona Flin, Children's Testimony: Psychology on Trial, In MEMORY AND TESTIMONY IN THE CHILD WITNESS 240, 249 (Maria S. Zaragoza, John R. Graham, Gordon C.N. Hall, Richard Hirschman & Yossef S. Ben-Porath eds., 1995). I know of no research on the percent of American children who are prepared for the courtroom or on the quality of such preparation. A study of English child witnesses revealed that fully 30% received no preparation at all. VIDEOTAPING CHILDREN'S EVIDENCE, supra note 55, at 29. Professor Davies described preparation of English children who testify via live link video technology:

Prior to attending the trial, 60% of child witnesses were given a guided tour of the court, of which 94% saw the live link. However, only 43% of those children taken on a court tour were allowed to practice on the live link prior to giving evidence. Thus, only 25% of all children attending live link/ videotape trials in the present study had practiced using the link prior to the trial. Approximately 30% of child witnesses had no preparation prior to attending court.

Id.


When attorneys prepare children for court, they typically provide a tour of the courtroom and perhaps a cursory review of the facts of the case. Despite the lack of empirical evidence, these steps are assumed to decrease anxiety and improve performance on the stand. Attorneys usually feel they have done their job after escorting a young witness through the courtroom and saying, for example, "There's the jury box. That's where the judge sits." This is only the beginning. Such an introduction addresses neither an explanation of the investigative or judicial process nor the challenges child witnesses face within the legal system.

Id. at 123.


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4. By providing an advocacy role on their behalf with the other mandated agencies in the criminal justice system.63

Court preparation programs operate in a number of communities, including Huntsville, Alabama,64 San Diego, California,65 and Seattle, Washington.66 Empirical research suggests that preparation can increase children’s memory retention, reduce suggestibility, and lower stress.67

The Child Witness Code proposed at the end of this Article contains a section regarding preparation.

C. Courtroom Testimony

Considerable legislative and judicial effort has focused on reforming criminal courtroom procedures to better accommodate child witnesses, and progress has been impressive.68 Less energy has been devoted to reforming noncriminal procedures, such as those in family and juvenile court. The paucity of reform in noncriminal forums is likely due to two factors. First, judges feel greater flexibility to accommodate children in noncriminal proceedings: Thus, the need for reform is less compelling. Second, although noncriminal proceedings are extremely important for children, disproportionate attention is focused on the more highly visible and contentious criminal justice system.

For purposes of discussion, it is convenient to place courtroom reforms into twelve categories, with the twelfth serving as a catchall for reforms that do not fit conveniently elsewhere. The categories are:

63. See ADJUSTMENT OF CHILD WITNESSES, supra note 62, at 195-96.
65. See Telephone Interview with C. Tamamariello, Project Coordinator, Kids in Court Program, Center for Child Protection, Children’s Hospital, San Diego, California (July 20, 1995) (notes on file with author).
66. See Telephone Interview with D. Belin, Executive Director, King County, Washington, Kids’ Court Program (August 9, 1995) (notes on file with author).
67. See REDUCING TRAUMA, supra note 62; KAREN J. SAYWITZ, REBECCA NATHANSON, LYNN SNYDER & VIVIAN LAMPHEAR, PREPARING CHILDREN FOR THE INVESTIGATIVE AND JUDICIAL PROCESS: IMPROVING COMMUNICATION, MEMORY AND EMOTIONAL RESILIENCE: FINAL REPORT TO THE NATIONAL CENTER ON CHILD ABUSE AND NEGLECT (1993); Saywitz & Snyder, supra note 61, at 117.
68. See VIDEOTAPEING CHILDREN’S EVIDENCE, supra note 55; McGough, supra note 16; KATHLEEN MURRAY, LIVE TELEVISION LINK: AN EVALUATION OF ITS USE BY CHILD WITNESSES IN SCOTTISH CRIMINAL TRIALS (1995) (The Scottish Office, Central Research Unit); MYERS, EVIDENCE IN CHILD ABUSE, supra note 13; SPENCER & FLIN, supra note 8; Graham Davies & Clare Wilson, The Videotaping of Children Evidence: Issues of Research and Practice, in PRACTITIONER’S CHILD L. BULL. 68, 68 (1994) ("The past five years have seen more changes to the law and procedure governing child witnesses in England and Wales in criminal cases than the last half-century . . . ."); Note, The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations, 98 HARV. L. REV. 806 (1985) [hereinafter Two Legislative Innovations]. One of, if not the earliest, calls for reform is David Libai, The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System, 15 WAYNE L. REV. 977 (1969).
1. Admissibility of children's hearsay statements.
2. Competence to testify as a witness, and administration and understanding of the oath.
3. Altering the courtroom to accommodate child witnesses.
4. Judicial control of the proceedings and questioning.
5. Support persons for child witnesses.
6. Sequestration or exclusion of witnesses during the child's testimony.
7. Closing the courtroom to the public and the press.
8. Video-link technology and other modifications that impact the accused's right to confront the child.
9. Counsel or guardian ad litem for the child.
12. The residual category.

These reforms are discussed in the remainder of this Article.

1. **Children's Hearsay Statements**

Children disclose sexual abuse to parents, teachers, medical and mental health professionals, friends, and others. In many cases, children's disclosures are powerful evidence of abuse. Yet, such out-of-court statements are hearsay, and hearsay is disallowed in Anglo-American legal proceedings unless the statement meets the requirements of an exception to the rule against hearsay. In civil law countries, hearsay is generally admissible.

Children's hearsay statements are critical for three reasons. First, these statements are often the most compelling evidence of abuse. As one court put it, "[i]n such cases, the need for the victim's out-of-court statements about the crime is likely to be great."\(^6^9\) Second, in many cases the need for the child's hearsay is magnified by the paucity of medical and corroborating evidence.\(^7^0\) As the Supreme Court observed, "[c]hild abuse is one of the most difficult crimes to detect and prosecute, in large part because there often are no witnesses except for the victim."\(^7^1\) Finally, although most children possess the capacity to testify in court, some are ineffective witnesses, and others are too frightened or traumatized to take the stand. For a child

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69. \textit{Guam v. Ignacio}, 10 F.3d 608, 612 (9th Cir. 1993).

70. Medical and laboratory evidence exists in only a small fraction of child sexual abuse cases. \textit{See Ellen Gray, Unequal Justice: The Prosecution of Child Sexual Abuse} 91 (1993) ("In the majority of the cases, there was no medical evidence . . . ."); Jan Bays & David Chadwick, \textit{Medical Diagnosis of the Sexually Abused Child}, 17 \textit{Child Abuse \\& Neglect} 91, 92 (1993) ("A normal physical exam is common in child sexual abuse . . . ."); Martin A. Finkel & Allan R. DeJong, \textit{Medical Findings in Child Sexual Abuse, in Child Abuse: Medical Diagnosis and Management} 185, 201 (Robert M. Reece ed., 1994) ("Acute genital and anal injuries are infrequent . . . .").

who cannot testify, out-of-court statements are the child's only way to communicate with the judge or jury. For a child who testifies but performs poorly, earlier disclosures—although usually hearsay—may bolster the child's credibility.

Although numerous exceptions exist to the hearsay rule, only a handful play a major role in criminal child abuse litigation. The "excited utterance" exception allows hearsay statements made shortly following startling events. All U.S. jurisdictions, England, Scotland, and other common law countries recognize the excited utterance exception. Another important exception is the medical diagnosis or treatment exception that allows admission of certain hearsay statements made to medical personnel. Most U.S. jurisdictions have a version of the medical exception. A majority of the United States also has residual or catchall exceptions that allow admission of reliable hearsay that does not meet the requirements of one of the more traditional exceptions, such as excited utterance. The residual exceptions play an important role in child abuse litigation.

Until 1982, hearsay exceptions did not, for the most part, draw lines based on age. An excited utterance was an excited utterance whether spoken by a child or an adult. Beginning in Washington State in 1982, however, an increasing number of U.S. states adopted hearsay exceptions for children's statements describing sexual abuse. Today, a small majority of American states have special "child hearsay exceptions." With the Criminal Evidence Act of 1992, Ireland's Oireachtas enacted a child hearsay exception for certain video recorded statements.

72. See FED. R. EVID. 803(2).
73. See SCOTTISH LAW COMMISSION, THE EVIDENCE OF CHILDREN AND OTHER POTENTIALLY VULNERABLE WITNESSES (1988); SPENCER & FLIN, supra note 8, at 131-32.
74. See FED. R. EVID. 803(4).
76. See FED. R. EVID. 803(24), 805(b)(5).
77. See cases collected in MYERS, EVIDENCE IN CHILD ABUSE, supra note 13, §§ 7.43-7.45.
78. Prior to 1982, at least one state, Michigan, had a common law hearsay exception for the out-of-court statements of young sexual assault victims. This so-called "tender years exception" had its origins in People v. Gage, 28 N.W. 835 (1886). However, when Michigan adopted its version of the Federal Rules of Evidence, the tender years exception was not included, and, in People v. Kreiner, 329 N.W.2d 716 (1982), the Michigan Supreme Court held that the tender years exception was no longer part of Michigan law.
79. In deciding on the admissibility of hearsay, judges do not ignore age differences. See MYERS, EVIDENCE IN CHILD ABUSE, supra note 13, §§ 7.30, 7.31, 7.36, 7.44.
80. See WASH. REV. CODE ANN. § 9A.44.120 (West Supp. 1996).
81. See IV NATIONAL CENTER ON CHILD ABUSE AND NEGLECT CLEARINGHOUSE, supra note 41, at Child Witnesses tab. 22. In 1994, the California Legislature enacted a child hearsay exception for criminal cases. See CAL. EVID. CODE § 1228 (West 1995). Also in 1994, the California Court of Appeal created a child hearsay exception for dependency cases in juvenile court. See In re Carmen O., 28 Cal. App. 4th 908, 33 Cal. Rptr. 2d 848 (1994).
82. Section 16 of the Ireland Criminal Evidence Act provides:
(1) Subject to subsection (2)—
(a) a videorecording of any evidence given by a person under 17 years of age through a
  live television link at the preliminary examination of an offense to which this Part applies [sex offenses], and

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Code at the end of this Article contains an exception modeled on the Washington child hearsay provision.

In the United States, the hearsay rule applies in noncriminal as well as criminal proceedings. With this in mind, some American states have special hearsay exceptions that allow the admission of hearsay in juvenile court protective proceedings. In England, “any civil court that is concerned with the welfare of a child may now receive and act on hearsay evidence.” In Scotland, the Civil Evidence Act of 1988 “abolished the hearsay rule in relation to civil cases.”

2. Competence to Testify and the Oath

To testify as a witness a person must possess the cognitive and moral capacities that comprise testimonial competence. In addition, the person must take a religious oath or a secular affirmation. Although it is common to speak in one breath of competence and the oath, as though they were a single requirement, they are separate and distinct.

Ireland Criminal Evidence Act § 16 (1992).

83. See, e.g., In re Carmen O., 28 Cal. App. 4th 908, 33 Cal. Rptr. 2d 848 (1994).
84. SPENCER & FLIN, supra note 8, at 146.
85. See Rhona Flin, Brian Kearney & Kathleen Murray, Children’s Evidence: Scottish Research and Law, in INTERNATIONAL PERSPECTIVES ON CHILD ABUSE AND CHILDREN’S TESTIMONY, supra note *, at 114, 120 [hereinafter Flin et al., Children’s Evidence].
86. See generally MYERS, EVIDENCE IN CHILD ABUSE, supra note 13, §§ 2.10-2.15; 3 JACK B. WEINSTEIN, MARGARET A. BERGER & JOSEPH M. McLAUGHLIN, WEINSTEIN’S EVIDENCE ¶ 601[04] (1995).
87. See FED. R. EVID. 603.
a. Testimonial Competence

A prospective witness—child or adult—must be testimonially competent. The individual must have sufficient memory to recall events, must be able to communicate intelligibly, must apprehend the difference between truth and lies, and must comprehend the duty to testify truthfully.

The law of children's testimonial competence has an interesting history in common law countries. As long ago as 1779, an English court ruled that there is no arbitrary age below which children are automatically incompetent to testify. In 1895, the U.S. Supreme Court ruled on the competence of a five-year-old who watched his father shotgunned to death before his eyes. The Court stated:

That the boy was not by reason of his youth, as a matter of law, absolutely disqualified as a witness, is clear. While no one would think of calling as a witness an infant only two or three years old, there is no precise age which determines the question of competency. This depends on the capacity and intelligence of the child, his appreciation of the difference between truth and falsehood, as well as of his duty to tell the former.

Although in 1895 the Supreme Court dismissed the idea of two- or three-year-old witnesses, today, a century later, a few children this young are found competent. Certainly, by age five, most children possess the cognitive and moral capacity to testify.

In the United States there are three approaches to determining children's testimonial competence. First, a diminishing number of states adhere to what may be called the traditional approach, in which children below a specified age—typically

88. For general discussion of children's testimonial competence, see Myers, Evidence in Child Abuse, supra note 13, at 59-136.
89. See id. § 2.11; Gary B. Melton, Children's Competence to Testify, 5 L. & Hum. Behavior 73, 75 (1981).
90. See Myers, Evidence in Child Abuse, supra note 13, § 2.12.
91. See Ricketts v. State, 488 A.2d 856, 857 (Del. 1985) (six-year-old did not understand concept of perjury, but knew the difference between truth and falsehood; child competent); see also Myers, supra note 13, § 2.14 (listing authorities).
93. See Spencer & Flin, supra note 8, at 46-74; see also Myers, supra note 13, § 2.2.
95. See Wheeler v. United States, 159 U.S. 523 (1895).
96. Wheeler, 159 U.S. at 524.
97. See State v. Hussey, 521 A.2d 278, 281 (Me. 1987); State v. Hunsaker, 693 P.2d 724, 726 (Wash. Ct. App. 1984); see also Myers, Evidence in Child Abuse, supra note 13, § 2.1 n.2 (collecting competence cases by age).

10, 12, or 14—are presumed incompetent. Before a presumptively incompetent child may testify, the judge conducts a competency examination, during which the judge questions the youngster to assess memory, comprehension of the difference between truth and lies, and appreciation of the duty to testify truthfully. If the judge is persuaded that the child possesses the necessary capacity, the child is permitted to testify.

The second approach to testimonial competence abandons arbitrary age limits and holds that “[e]very person is competent to be a witness.” Under this approach—which now predominates in the United States—many children are permitted to testify without a preliminary competency examination. Despite the apparently all-inclusive “every person is competent” language of prevailing law, however, judges continue holding competency examinations when legitimate questions arise about individual children.

The third approach to testimonial competence is evidenced in a small number of American states that have laws designed to ensure that victims of child abuse testify without preliminary examination. For example, Alabama’s statute states that “[n]otwithstanding any other provision of law or rule of evidence, a child victim of a physical offense, sexual offense, or sexual exploitation, shall be considered a competent witness and shall be allowed to testify without prior qualification in any judicial proceeding.”

In England, the law regarding testimonial competence has been relaxed, and most children are permitted to testify in criminal and noncriminal proceedings. “The modern Scottish rule . . . is that all persons capable of making themselves intelligible to the tribunal are competent as witnesses, oaths being required of those who have sufficient understanding, and dispensed with for those who do not.” In Canada, “a child who cannot swear an oath, but who is able to communicate the evidence [is permitted] to testify on a 'promise to tell the truth.'” In Australia, a child who cannot take an oath may nevertheless testify. In Ireland, “the evidence of a person under 14 years of age may be received otherwise than on oath or affir-

98. See MYERS, EVIDENCE IN CHILD ABUSE, supra note 13, § 2.8.
99. For a discussion of the competency examination, see MYERS, EVIDENCE IN CHILD ABUSE, supra note 13, § 2.18.
100. FED. R. EVID. 601.
101. See State v. Eldredge, 773 P.2d 29 (Utah 1989); see also MYERS, EVIDENCE IN CHILD ABUSE, supra note 13, §§ 2.3 - 2.4.
102. See MYERS, EVIDENCE IN CHILD ABUSE, supra note 13, § 2.9.
103. ALA. CODE § 15-25-3(c) (1994).
104. See SPENCER & FLIN, supra note 8, at 50-54, 58-70.
105. Id. at 66.
106. Louise Dezwirek Sas, David A. Wolfe & Kevin Gowdey, Children and the Courts in Canada, in INTERNATIONAL PERSPECTIVES ON CHILD ABUSE AND CHILDREN’S TESTIMONY, supra note *, at 77, 81 [hereinafter Sas et al., Children and the Courts in Canada].
In addition to possessing the cognitive and moral capacity to testify, a witness in the United States must take an oath or affirmation. The oath is religious, and before a witness can meaningfully answer the question, "Do you solemnly swear to tell the truth, the whole truth, and nothing but the truth, so help you God?" the witness must appreciate the divine penalty awaiting perjurers. As an alternative to a religious oath, a witness may make an affirmation, which is a secular declaration that the witness will testify truthfully.

Needless to say, few young children fully grasp the religious implications of the traditional oath. To appreciate children's developing comprehension of religious teachings, consider the following conversation between brothers aged four and six:

4-year-old: You know, if you die you go up to heaven.

6-year-old: I wouldn’t want to go up to heaven.

4-year-old: Why? Are you afraid of heights?

Although children do not fully comprehend the religious oath, they do understand promises. Moreover, children appreciate the duty to tell the truth in court. Increasingly today, judges in the United States take the sensible approach of simply asking young witnesses to promise to tell the truth. In England, Ireland, Scotland, and civil law countries, children may testify unsworn.

3. Altering the Courtroom to Accommodate Child Witnesses

The courtroom is a forbidding place to children. Is it permissible to tinker with the solemn halls of justice to accommodate young witnesses? Elsewhere I have traced the historical origins of the physical layout of today's courtroom and have concluded that "the configuration of the modern courtroom is not cast in stone. If altering the furnishings or formalities of the courtroom will make children more comfortable and improve their testimony, nothing in law or the Constitution forbids..."
circumspect modification that does not compromise the seriousness of the proceeding.”112 The law does not preordain that courtrooms be configured in a particular way, and, as long as the defendant’s right to a fair trial is protected, alterations to accommodate children are proper.113

Judges have inherent authority to accommodate child witnesses.114 The Alaska Supreme Court observed that “the rules of evidence were not developed to handle the problems presented by the child witness. Therefore our courts must be free to adapt these rules, where appropriate, to accommodate these unique cases.” In an enlightened decision, the Massachusetts Supreme Judicial Court considered a trial judge’s decision to alter the courtroom for young witnesses in a day care sexual abuse case.116 The court wrote:

At trial, the judge allowed the child witnesses to testify from a child-sized table and chair placed in front of the jury box. The judge and questioning attorneys sat around the table. The defendant sat at counsel table. The child was allowed to bring a toy into the courtroom and had a parent sit behind him or her. The judge instructed the attorneys to make objections quietly into a microphone during a child’s testimony. The judge ruled on the objections immediately and heard arguments based on the objections after the testimony.

On appeal, the defendant makes a broad objection to the inability of counsel effectively to register valid objections and the prejudicial nature of the courtroom set-up, and argues that he was thereby deprived of his rights to effective assistance of counsel and to a fair trial. . . . We find no error.

A judge is afforded wide discretion in fashioning procedures and modifying standard trial practices to accommodate the special needs of child witnesses. . . . We have recognized the plight of child sexual abuse victims, and the difficulties a particular child may face in trying to testify in a traditional courtroom setting. . . . “[A] judge may require that the environment in which a witness is to give testimony be made less formal and intimidating. . . .”

The judge here protected the child witnesses to the extent possible while also safeguarding the defendant’s rights. The judge permitted defense counsel to confer with each other and with the defendant and then to return to the

114. See State v. Ford, 626 So. 2d 1338, 1345 (Fla. 1993).
witness with additional questions following the conferences. Furthermore, the judge explained the special practices to the jury to avoid any possible prejudice to the defendant. The defendant’s right to a fair trial and assistance of counsel were not compromised.\textsuperscript{117}

American judges have approved a variety of accommodations for children.\textsuperscript{118} Thus, the witness chair may be turned slightly away from the defendant, provided the defendant can observe the child testify.\textsuperscript{119} In \textit{United States v. Romey},\textsuperscript{120} a child witness was allowed to whisper her answers to her mother, who repeated them aloud. In another case "the prosecutor positioned herself in the courtroom so that one of the young victim witnesses, Tammy G., did not have to look at [the defendant] while testifying about his acts of sexual molestation. . . . [T]he prosecutor sat or stood next to the witness stand so Tammy could look away from the defense table while she was testifying."\textsuperscript{121} The defendant complained that this procedure violated his right under the Confrontation Clause of the U.S. Constitution to confront the child, but the California Court of Appeal disagreed, writing that:

\begin{quote}
[t]he mere fact that the prosecutor facilitated Tammy’s decision to look away from [defendant] does not transform this innocuous act into a violation of the confrontation clause.

. . . .

A contrary holding would border on the absurd. Surely, [defendant] cannot be claiming a constitutional right to stare down or otherwise subtly intimidate a young child who would dare to testify against him. Nor can he claim a right to a particular seating arrangement in the courtroom.\textsuperscript{122}
\end{quote}

Legislators as well as judges have been active regarding courtroom accommodations for children.\textsuperscript{123} For example, Connecticut has a statute that authorizes the

\begin{quote}
\textbf{If the court does not find under (a)(2) of this section that the testimony by the child victim or witness under normal court procedures will result in the child’s inability to effectively communicate, the court may, after taking into consideration the factors specified in (b) of this section, supervise the spatial arrangements of the courtroom and the location, movement, and deportment of all persons in attendance so as to safeguard the child from emotional harm or stress. In addition to other procedures it finds appropriate, the court may}

(1) allow the child to testify while sitting on the floor or on an appropriately sized chair;

(2) schedule the procedure in a room that provides adequate privacy, freedom from distractions,
\end{quote}
judge to prohibit people from entering or leaving the courtroom during a child's testimony. Another Connecticut law states that the judge may require attorneys to remain seated during questioning and may instruct attorneys to make objections "in a manner which is not intimidating to the child." A California law states that "the taking of the child's testimony may be limited to the hours during which the child is normally in school." Another California statute states that a child "may be allowed reasonable periods of relief from examination and cross-examination during which he or she may retire from the courtroom." Iowa law states that "[a] court may, upon its own motion or upon the motion of a party, order the court testimony of a child to be limited in duration in accordance with the developmental maturity of the child." A California statute provides that "[i]n the court's discretion the judge, parties, witnesses, support person, and court personnel may be relocated within the courtroom to facilitate a more comfortable and personal environment for the child witness." West Virginia law states that "the court may permit a child who is eleven years old or less to use anatomically correct dolls, mannequins or drawings to assist such child in testifying." An Alabama statute provides that "the court may allow

informality, and comfort appropriate to the child's developmental age; and

(3) order a recess when the energy, comfort, or attention span of the child warrants.

Id.; see CAL. PENAL CODE § 868.8 (West Supp. 1996) ("[T]he court shall take special precautions to provide for the comfort and support of the minor and to protect the minor from coercion, intimidation, or undue influence as a witness ...."); id. § 868.8(b) (West Supp. 1996) ("[I]n his or her discretion, the judge may remove his or her robe if the judge believes that this formal attire intimidates the minor ...."); id. § 868.8(c) (West Supp. 1996) ("In the court's discretion, the judge, parties, witnesses, support persons, and court personnel may be relocated within the courtroom to facilitate a more comfortable and personal environment for the child witness ...."); IDAHO CODE § 19-110 (1994) (limiting continuances and requiring court to "consider and give weight to any adverse impact that the requested delay or continuance may have on the well-being of a child victim or witness"); N.Y. EXEC. LAW § 642-a4 (McKinney 1996) ("The judge presiding should be sensitive to the psychological and emotional stress a child witness may undergo when testifying."); S.C. CODE ANN. § 16-3-1530(B)(3) (Law Co-op. 1993) ("The court shall provide the victim or witness courthouse waiting areas that are separate from those that will be used by the defendant, his or her family, or friends."); WASH. REV. CODE ANN. § 10.46.085 (West 1994) (limiting continuances).

124. See CONN. GEN. STAT. ANN. § 54-86G(b)(1) (West 1994), which provides that in criminal child abuse cases "persons shall be prohibited from entering or leaving the courtroom during the child's testimony."

125. See CONN. GEN. STAT. ANN. § 54-86G(b)(4) (West 1994), which provides that in criminal child abuse cases "the attorneys for the defendant and for the state shall question the child while seated at a table positioned in front of the child, shall remain seated while posing objections and shall ask questions and pose objections in a manner which is not intimidating to the child."


127. Id. § 868.8(a) (West Supp. 1996).

128. IOWA CODE ANN. § 910A.144 (West 1994). The statute goes on to state:
The court may consider or hear expert testimony in order to determine the appropriate limitation on the duration of a child's testimony. However, the court shall, upon motion, limit the duration of a child's uninterrupted testimony to one hour, at which time the court shall allow the child to rest before continuing to testify.

Id.

129. CAL. PENAL CODE § 868.8(c) (West Supp. 1995).

130. W. VA. CODE § 61-8-13(b) (1995); see CONN. GEN. STAT. ANN. § 54-86g(b)(3) (West 1994) ("[T]he use of anatomically correct dolls by the child shall be permitted ...."); N.Y. EXEC. LAW § 642-a7 (McKinney 1994) ("A child witness should be permitted in the discretion of the court to use anatomically correct dolls and drawings..."
leading questions at trial by the prosecution or defense of any victim or witness in a case who is under the age of 10.\textsuperscript{131} Although a judge would have inherent judicial authority to implement all the accommodations listed above and more, a legislative pronouncement gives judges guidance and confidence to approve accommodations.

There are limits, of course, to accommodating children, particularly in criminal cases. In \textit{Duffitt v. State},\textsuperscript{132} for example, the Indiana Supreme Court disapproved a trial judge's decision to put posters on the courtroom walls. The Indiana court wrote that "the practice of decorating in deference to [a] certain witness is altogether inappropriate."\textsuperscript{133} In \textit{State v. Michaels},\textsuperscript{134} the trial judge went too far when he allowed young children to sit on his knee while they testified. And in \textit{State v. R.W.},\textsuperscript{135} the trial judge told the child witness she would receive ice cream if she told what was "real." At the conclusion of her direct examination, the youngster refused to be cross-examined until she received the promised treat. The ice cream was delivered in the presence of the jury, and the New Jersey Supreme Court stated "without hesitation that the trial judge abused his discretion by promising the child ice cream and in subsequently giving it to her, thereby suggesting to the jury, albeit inadvertently, that the infant had indeed testified truthfully."\textsuperscript{136}

Although limits are necessary on accommodations for children, some courts seem remarkably insensitive to children's needs. In \textit{State v. Palabay},\textsuperscript{137} for example, the Hawaii Court of Appeal ruled that a twelve-year-old should not be permitted to hold a teddy bear while testifying unless the state first demonstrated a compelling justification for this simple accommodation. One wonders if the Hawaii court would deny a Kleenex to a weeping adult rape victim absent a showing of compelling need.

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\textsuperscript{131} Id. at 547 (citations omitted).
\textsuperscript{132} 525 N.E.2d 607 (Ind. 1988).
\textsuperscript{133} Duffitt, 525 N.E.2d at 608.
\textsuperscript{135} 514 A.2d 1287, 1289 n.1 (N.J. 1986).
\textsuperscript{136} R.W., 514 A.2d at 1289 n.1.
\end{flushleft}
Minor changes in the courtroom may be anything but minor for children. The Child Witness Code at the end of this Article emphasizes the importance of such accommodations.

4. Judicial Control of the Proceedings and Questioning

The judge has authority to control the proceedings and interrogation of witnesses. In the United States, Rule 611(a) of the Federal Rules of Evidence is typical of statutes on this subject, and states:

The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

Several states have laws specifically addressing the judge’s authority to protect child witnesses. A New York statute provides that “[t]he judge presiding should be sensitive to the psychological and emotional stress a child witness may undergo when testifying.” A California law states that in sex offense cases “the court shall consider the needs of the child victim and shall do whatever is necessary, within existing budgetary resources, and constitutionally permissible to prevent psychological harm to the child victim.” California law specifically states that:

[w]ith a witness under the age of 14, the court shall take special care to protect him or her from undue harassment or embarrassment, and to restrict the unnecessary repetition of questions. The court shall also take special care to insure that questions are stated in a form which is appropriate to the age of the witness. The court may in the interests of justice, on objection by a party, forbid the asking of a question which is in a form that is not reasonably likely to be understood by a person of the age of the witness.

The California statute regarding developmentally inappropriate questions is particularly important in light of attorneys’ inexhaustible appetite for incomprehensible queries. Defense attorneys tend to ask more confusing and age-
inappropriate questions than prosecutors.\textsuperscript{142} Kathleen Murray reported that cross-examiners in Scotland “could rarely resist exploiting the immaturity of the children and by a combination of language devices and questioning styles tried systematically to destroy their credibility.”\textsuperscript{143} Moreover, defense counsel concentrate more often than prosecutors on peripheral matters.\textsuperscript{144} The following four examples from actual trials illustrate the problem of developmentally inappropriate questions:

Q: On the evening of January third, you did, didn’t you, visit your grandmother’s sisters’ house and didn’t you see the defendant leave the house at 7:30, after which you stayed the night?\textsuperscript{145}

Q: Well, I have jumped ahead a bit, so you will have to go back to what you were telling us about before that first incident. You told us of what you did and what he did to you. On the next occasion you went there, what kind of thing happened between you?\textsuperscript{146}

Q: Now on that day when your mother and Shelley came up were you there when your mother was discussing a possible job up in the North of England?
A: I am not sure.
Q: Was there a time when you suffered from eczema?\textsuperscript{147}

Q: Well I know, I understand what you say. You have been talking to her today but you see, what I am asking you is this. That statement suggests

\textsuperscript{142} See Rhona Flin, Ray Bull, Julian Boon & Anne Knox, \textit{Child Witnesses in Scottish Criminal Trials}, 2 INT’L J. VICTIMOLOGY 309, 326 (1993). The authors wrote:

In terms of the language used, again little difference was found between the prosecution and the defense lawyers. No significant difference was found in the age appropriateness of the vocabulary used in questioning. However, significant differences were found with respect to the age appropriateness of the grammatical structures. These indicated that on average the prosecution lawyers were more successful in putting questions during the examination-in-chief at levels which the children could understand than were the defense lawyers during their cross-examinations.

\textit{Id.}; \textit{see Testifying in Criminal Court, supra note 3, at 80 (noting that defense attorneys used “more age-inappropriate wording of questions”)}; \textit{id. at 88-89}.

\textsuperscript{143} Murray, supra note 68, at 96.

\textsuperscript{144} \textit{See Testifying in Criminal Court, supra note 3, at 80 (“The defense attorney, however, was judged to focus more on information peripheral or irrelevant to the assault . . . ”)}; \textit{see also id. at 88-89}.

\textsuperscript{145} Saywitz & Snyder, supra note 61.

\textsuperscript{146} Vicky K. Kranat & Helen L. Westcott, \textit{Under Fire: Lawyers Questioning Children in Criminal Courts}, 3 EXPERT EVIDENCE 16, 21 (1994). The authors wondered aloud why attorneys are permitted to ask incomprehensible, highly leading questions in court, while police and social workers are criticized when they ask mildly leading questions during investigative interviews. \textit{Id.} They wrote that “[i]t is difficult to reconcile lawyers’ freedom to question children (in any way they like) once they are in the courtroom with the restrictions now imposed upon those who question children before they reach court.” \textit{Id.}

\textsuperscript{147} Id.
that you said those things that you now say are wrong to the police. Now did you say it to the police or did you not?^{148}

Is it any wonder children get confused? Judges have ample authority to stop such nonsense.

A judge has authority to forbid unduly embarrassing questions.^{149} In the context of child sexual abuse, however, the nature of the crime often makes embarrassing questions necessary. The judge may disallow cross-examination on irrelevant issues, and may forbid confusing, misleading, ambiguous, and unintelligible questions.^{150} Finally, the judge has authority to curtail questions designed merely to harass or badger a witness.^{151}

Although judges have authority to control cross-examination, judges in the adversary system are typically reluctant to interfere. Within broad parameters, attorneys have the right to question witnesses as they see fit. Judges are particularly deferential to defense counsel’s right to cross-examine prosecution witnesses, including children. The Irish Law Reform Commission aptly observed that “[c]onfrontation and cross-examination are indelible characteristics of the adversarial system as normally operated.”^{152} The U.S. Supreme Court ruled that the right of defense counsel to cross-examine is protected by the U.S. Constitution.^{153} “[T]he cross-examiner is not only permitted to delve into the witness’ story to test the witness’ perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness.”^{154} The Supreme Court of Ireland reached a similar conclusion under its constitution, writing that “an accused person has a right to cross-examine every witness for the prosecution . . . .”^{155}

Attorneys place extraordinary confidence in cross-examination to uncover the truth and, in particular, unmask the liar. John Spencer and Rhona Flin observed that “[a]mong English-speaking lawyers no belief is more deeply held than the value of cross-examination. It has been the subject of fervent professions of faith in so many speeches and writings that a collection of them would fill a sizeable book.”^{156} American legal scholar John H. Wigmore opined that cross-examination “is beyond any doubt the greatest legal engine ever invented for the discovery of truth.”^{157}

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148. BRENNAN & BRENNAN, supra note 141.
149. See Fed. R. Evid. 611(a)(3).
150. See id.
151. See id.
152. IRISH LAW REFORM COMMISSION, A LAW REFORM COMMISSION CONSULTATION PAPER ON CHILD SEXUAL ABUSE 146 (1989) [hereinafter IRISH LAW REFORM COMMISSION].
154. Id. at 316.
156. SPENCER & FLIN, supra note 8, at 270.
157. 5 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1367 (Chadbourn rev. 1978).
Not everyone genuflects before the altar of cross-examination. Some European lawyers and judges are less enthusiastic. Spencer and Flin wrote:

If we really want to know what foreign lawyers think of cross-examination we should read what a distinguished French judge and legal writer, Francois Groophe, had to say about it:

The Anglo-American system has grave faults which cry out for it to be abolished. In the first place, it over-uses the right of questioning, to which it attributes an exaggerated efficiency in the case of suspect witnesses, whilst paying insufficient respect to witnesses who are sincere. Even more deplorably, it takes absolutely no precautions against the witness being influenced, or even badgered, and it takes no account of the distorting effect of suggestive questions, which get worse as the case is more bitterly contested. This, as Schneikert says, is 'the best means of working upon witnesses and leading them astray.' Wouldn’t the wretched witness have to be made of marble to stay calm and unruffled under the cross-fire of interrogation and counter-interrogation, examination, cross-examination, and re-examination which he must endure at the hand of the two adversarial opponents? Just think of a frightened witness, a weak one, or a child having to give evidence under such conditions! In reality, truth and justice cannot see the light of day except in an atmosphere of calmness and serenity.\(^{58}\)

From the perspective of the adversary system, Judge Groophe’s stinging criticism of cross-examination is interesting, but rather beside the point. Cross-examination is so thoroughly ensconced in the adversary system that the only hope for more humane treatment of children is to pare away clear abuses. The statutes cited earlier in this Section are steps in the right direction, and the Child Witness Code at the end of this Article places limits on inappropriate questioning.

5. **Support Persons for Child Witnesses**

Imagine five-year-old Susie, about to enter the hospital for the first time in her life. Susie is scheduled to undergo an unfamiliar and painful medical procedure. Mother drives Susie to the hospital, opens the car door, and says, “Okay honey, run along into the hospital and find the doctor. I’ll be back in a couple of hours to pick you up. Bye.” Mother drives off, leaving little Susie standing all alone outside the

\(^{58}\) **Francois Groophe, La Critique du Temoignage** 90 (2d ed. 1927), *quoted in Spencer & Flin, supra* note 8, at 271.
hospital. Preposterous you say? Mother won’t do that. She’ll walk Susie into the hospital and remain at her side to provide comfort, reassurance, and support. Moreover, the nurses and doctors understand the importance of emotional support for young patients and, unless there is some overriding medical reason to exclude mother during the procedure, she is welcome.

Now change the scene from the hospital to the courthouse. Susie is about to enter a courtroom for the first time, where she is to testify in the trial of the man accused of molesting her. Just as Susie’s mother did not abandon her at the hospital, mother accompanies Susie to court. Mother holds Susie’s hand as they approach the courtroom. At the door, however, Susie’s mother is told she cannot go in. All by herself, Susie is required to step into the huge room. She can feel the stares of unfamiliar grown-ups. Most of all, though, she feels the piercing gaze of the one adult she knows too well, the defendant. The bailiff points to the witness stand and says, “Take a seat up there.” Susie inches her way to the witness box and sits down. She can barely see over the rail around the box, and her feet dangle far above the floor. For a moment she lifts her eyes, only to drop them when she sees the defendant sitting a few feet away.

At the hospital, emotional support is an integral part of treatment, and parents are partners in therapy. At the courthouse, however, things are different. The tradition in court is that the child must go it alone. Fortunately, this tradition is giving way to a more enlightened approach. An increasing number of states have laws that allow support for children testifying in court. A sample of these laws follows:

When a child is summoned as a witness in any hearing in any criminal matter, including any preliminary hearing, notwithstanding any other statutory provision, parents, a counselor, friend or other person having a supportive relationship with the child shall be allowed to remain in the courtroom at the witness stand with the child during the child’s testimony

159. See, e.g., 18 U.S.C.A. § 3509(i) (West 1995); CAL. PENAL CODE § 868.5 (West 1995); ARK. CODE. ANN. § 16-42-102 (Michie 1994); CONN. GEN. STAT. ANN. § 54-86g(b) (West 1994); DEL. CODE ANN. tit. 11, § 5134(b) (1994); HAW. REV. STAT. ANN. § 621-28 (Michie 1994); IDAHO CODE § 19-3023 (1995); MICH. COMP. LAWS ANN. § 600.2163a(4) (West 1995); MINN. STAT. ANN. § 631.046 (West 1995); N.Y. EXEC. LAW § 642-a6 (McKinney 1995); R.I. GEN. LAWS § 12-28-9(2) (1994); WASH. REV. CODE ANN. § 7.69A.030(8) (West 1994).

The prosecuting attorney often provides important support for child witnesses. The prosecutor should not, however, serve the role of support person. Sexton v. Howard, 55 F.3d 1557 (11th Cir. 1995), cert. denied, 116 S. Ct. 936 (1996) was a habeas corpus case. In state court, the defendant was convicted of raping and sodomizing his four-year-old daughter, who was five at the time of trial. Throughout the child’s testimony,

Chief Deputy District Attorney Ellen Brooks sat on the witness stand with her. Over defense counsel’s objection, Brooks conducted the direct and redirect examinations of Amy while Amy was either sitting on her lap or sitting next to her on the stand, and Brooks continued to sit with Amy on the witness stand while defense counsel cross-examined her.

Id. at 1558. Although the state and federal courts did not approve of the prosecutor’s conduct, the conviction was upheld.
unless in written findings made and entered, the court finds that the defendant's constitutional right to a fair trial will be unduly prejudiced.160

A child victim or witness is entitled to be accompanied, in all proceedings, by a “friend” or other person in whom the child trusts, which person shall be permitted to advise the judge, when appropriate and as a friend of the Court, regarding the child’s ability to understand proceedings and questions.161

A child testifying at or attending a judicial proceeding shall have the right to be accompanied by an adult attendant to provide emotional support to the child. The court, at its discretion, may allow the adult attendant to remain in close physical proximity to or in contact with the child while the child testifies. The court may allow the adult attendant to hold the child’s hand or allow the child to sit on the adult attendant’s lap throughout the course of the proceeding. An adult attendant shall not provide the child with an answer to any question directed to the child during the course of the child’s testimony or otherwise prompt the child.162

[A]n adult who is known to the child and with whom the child feels comfortable shall be permitted to sit in close proximity to the child during the child’s testimony, provided such person shall not obscure the child from the view of the defendant or the trier of fact.163

[A] person supportive of the “child witness” or “special witness” . . . should be permitted to be present and accessible to a child witness at all times during his testimony, although the person supportive of the child witness should not be permitted to influence the child’s testimony.164

A witness who is called upon to testify shall be permitted to have a support person sit with, accompany, or be in close proximity to the witness during his or her testimony.165

Emotional support is not only humane, it is effective. Gail Goodman and her colleagues conducted research on children testifying in American criminal trials.166 The research disclosed that the presence of a supportive adult increases some

161. DEL. CODE ANN. tit. 11, § 5134(b) (1994).
163. CONN. GEN. STAT. ANN. § 54-86g(b)(2) (West 1994).
164. N.Y. EXEC. LAW § 642-a6 (McKinney 1995).
165. MICH. COMP. LAWS ANN. § 600.2163a(4) (West 1995).
166. See Testifying in Criminal Court, supra note 3.
children's capacity to testify. Goodman found that during trial testimony, "[p]resence of a parent/loved one was associated with children answering more questions during direct examination."167 During testimony at preliminary hearings, children whose nonoffending parent or loved one remained in the courtroom outperformed children who were not similarly supported.168 Children who received emotional support "were judged less frightened of the defendant throughout their testimony . . . . Also, during the defense attorney's questioning, children whose parent/loved one remained in court were also less likely to provide inconsistent testimony regarding peripheral details and more likely to be judged credible witnesses."169 Presence in the courtroom of a supportive adult "was associated with the child being less likely to recant the identity of the perpetrator, and less likely to recant main actions of the perpetrator during defense questioning . . . ."170

During the past decade, the most hotly-debated, legislated, and litigated courtroom reform has been testimony via live television link. It is rather ironic that so much attention has focused on "high tech" reforms like video testimony when more good is likely to flow from the decidedly "low tech" idea of allowing a child witness to see a friendly face in the courtroom.

6. Excluding Witnesses While They Are Not Testifying

Witnesses may be excluded from the courtroom while they are not testifying.171 The purpose of exclusion is to prevent witnesses from shaping their testimony in light of what others say.172 The practice goes back at least to the Old Testament, when Susanna was convicted and sentenced to die based on testimony from two of the elders. Before Susanna could be executed, however, Daniel rose to her defense. Daniel said, "Are ye such fools, ye sons of Israel, that without examination or knowledge of the truth ye have condemned a daughter of Israel? Return again to the place of judgment: for they have borne false witness against her." Daniel prepared to cross-examine the accusing elders but before he started he said, "Put these two aside one far from another, and I will examine them." Once the elders were separated they told inconsistent stories and their perjury was revealed.173

The rule excluding witnesses from the courtroom has changed little since biblical times, and Kirkpatrick and Mueller described its modern justification:

Excluding witnesses serves two main purposes. The first is to prevent testimony by one witness from being tailored by what he hears in testimony by

167. Id. at 92.
168. See id. at 85 (outperformed from the prosecution's perspective).
169. Id. at 85.
170. Id.
171. See FED. R. EVID. 615.
172. See MYERS, EVIDENCE IN CHILD ABUSE, supra note 13, § 8.2.
another. Where one of two witnesses called by the same party and generally in sympathy with the cause hears testimony by the other, the one may consciously or subconsciously mold his testimony into greater consistency with that of the other, or his memory may be unconsciously shaped by what he has heard. Where the sympathies of the witness are aligned with opposing sides, similar distortions may occur, this time increasing conflicts and inconsistencies between stories. The second reason is to assist the parties in detecting error or falsehood by the witness . . . . 174

In child abuse litigation the exclusion rule becomes important when a child needs the supportive presence of an adult who is also a witness, and who normally would be excluded from the courtroom during the child’s testimony. 175 In some cases the prosecutor may arrange for the presence of a support person who is not a witness. If the only adult who can support the child is also a witness, the adult may testify before the child so that the adult can remain in the courtroom during the child’s testimony.

7. Closing the Courtroom to the Public and the Press

One obvious way to reduce the stress of testifying is to close the courtroom to the public and the press. Under the U.S. Constitution, however, the defendant in a criminal case has a right to a public trial. 176 The right is not absolute, however, and competing interests may be balanced against the defendant’s right to an open proceeding. 177 Closure is particularly appropriate when a child must describe degrading and embarrassing acts. 178 Nevertheless, in the United States, open trials are the norm, and closure the exception.

In addition to the defendant’s right to a public trial, the American public and press have a constitutional right to attend criminal trials. 179 Here too the right is not absolute, and, in selected cases, the public and press may be excluded. 180 The U.S. Supreme Court’s decision in Globe Newspaper Co. v. Superior Court 181 is the leading American authority on closing the courtroom when children testify. In Globe

Newspaper, the Court declared unconstitutional a Massachusetts law that required judges to exclude the press and public in all cases where young sex offense victims testify. The Supreme Court wrote:

Although the right of access to criminal trials is of constitutional stature, it is not absolute. . . . But the circumstances under which the press and public can be barred from a criminal trial are limited; the State's justification in denying access must be a weighty one. Where, as in the present case, the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest.182

In Globe Newspaper, the State argued that its interest in protecting young sex offense victims from further trauma justified across-the-board exclusion of the press and public during children's testimony. The Supreme Court stated that "safeguarding the physical and psychological well-being of a minor"183 is a compelling governmental interest that sometimes overrides the public and press right of access, but the Court went on to rule that closure in all cases is unconstitutional. The Court wrote that, despite the compelling nature of the state's interest, the need to protect sex offense victims does not justify a mandatory closure rule, for it is clear that the circumstances of the particular case may affect the significance of the interest. A trial court can determine on a case-by-case basis whether closure is necessary to protect the welfare of a minor victim. Among the factors to be weighed are the minor victim's age, psychological maturity and understanding, the nature of the crime, the desires of the victim, and the interests of parents and relatives.184

In every case the party seeking to close the courtroom—usually the prosecutor—must convince the judge that closure is necessary to protect "an overriding interest that is likely to be prejudiced."185

A number of American states have laws regarding closure of the courtroom,186 and the U.S. Congress enacted a provision that applies in federal courts:

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183. Id. at 607.
184. Id. at 608-09.
When a child testifies the court may order the exclusion from the courtroom of all persons, including members of the press, who do not have a direct interest in the case. Such an order may be made if the court determines on the record that requiring the child to testify in open court would cause substantial psychological harm to the child or would result in the child’s inability to effectively communicate. Such an order shall be narrowly tailored to serve the government’s specific compelling interest.187

8. Video Testimony

No reform has generated more legislation and debate in the United States and elsewhere than allowing children to give evidence outside the physical presence of the defendant.188 Although several methods are available to accomplish this goal, the technique that garners the most attention is closed circuit television or, as it is called in Scotland and England, live television link.189 Unfortunately, the goal of sparing children the ordeal of a face-to-face encounter with the accused collides head-on with the defendant’s right to confront accusatory witnesses. John Spencer and Rhona Flin capture the importance in the adversary system of face-to-face confrontation when they write that “[i]t is a widely held belief among lawyers in the English-speaking world that confronting the accuser with the person he accuses ensures he tells the truth.”190 The United States Supreme Court wrote:

The perception that confrontation is essential to fairness has persisted over the centuries because there is much truth to it. A witness “may feel quite differently when he has to repeat his story looking at the man whom he will harm greatly by distorting or mistaking the facts. He can now understand what sort of human being that man is... . It is always more difficult to tell a lie about a person “to his face” than “behind his back.” In the former context, even if the lie is told, it will often be told less convincingly... . [F]ace-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult.191

Thus, face-to-face confrontation between witness and defendant is a cornerstone of adversarial criminal trials.192 In the United States, confrontation takes on

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188. See, e.g., Jean Montoya, Lessons from Akiki and Michaels on Shielding Child Witnesses, 1 PSYCHOL. PUB. POL’Y & L. 340 (1995); Two Legislative Innovations, supra note 68.
189. See VIDEOTAPING CHILDREN’S EVIDENCE, supra note 55; MURRAY, supra note 68.
190. SPENCER & FLIN, supra note 8, at 277.
192. See IRISH LAW REFORM COMMISSION, supra note 152, at 146 (“Confrontation and cross-examination are indelible characteristics of the adversarial system as normally operated... .”).

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heightened significance because the right is expressly enshrined in the Confrontation Clause of the Sixth Amendment to the U.S. Constitution, which provides that "[i]n all criminal prosecutions, the accused shall . . . be confronted with the witnesses against him."\textsuperscript{193} In England, "by contrast, there is no question of rules of procedure and evidence being held unconstitutional, because there is no written constitution."\textsuperscript{194} Ireland has a written constitution, although the document does not, by its terms, guarantee face-to-face confrontation, and the Irish Law Reform Commission concluded that "[t]here is . . . no authority for the proposition that a constitutional right of physical confrontation" exists in Ireland.\textsuperscript{195}

In the early and mid-1980s, numerous states in the United States passed video testimony laws designed to spare selected children face-to-face confrontation.\textsuperscript{196} Like the governor on an engine, however, the Confrontation Clause of the U.S. Constitution regulates how quickly and how far these laws may travel on the road to reform. In countries that do not have a constitutional guarantee of face-to-face confrontation, reform has been more thoroughgoing than in the United States.

Video testimony laws are of three types: (1) Videotaped investigative interviews, (2) videotaped testimony taken prior to trial, and (3) trial testimony through live link television.

\textit{a. Videotaped Investigative Interviews}

England leads the way regarding use at trial of videotaped investigative interviews.\textsuperscript{197} The Criminal Justice Act of 1991 "permits, for the first time, the admission of videotaped interviews with a child, conducted by a police officer or social worker as a substitute for the child's evidence-in-chief at trial."\textsuperscript{198} The judge has authority to exclude the tape "in the interests of justice," and the child must appear at trial for cross-examination.\textsuperscript{199}

Canadian law "contains a provision for the admissibility of videotaped interviews of child complainants of sexual abuse as long as the child adopts the contents of the tape on the witness stand, and the tape has been made within a reasonable length of time after the offense."\textsuperscript{200} In \textit{Regina v. D.O.L.},\textsuperscript{201} the Supreme Court of Canada ruled

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that admitting videotaped interviews “neither offends the principles of fundamental justice nor violates the right to a fair trial as guaranteed by . . . the Canadian Charter of Rights and Freedoms.”

During the 1980s, a number of American states enacted laws authorizing videotaped investigative interviews to be used at trial, usually in lieu of the child’s trial testimony. Several of these laws compromised the defendant’s constitutional right to confront and cross-examine child witnesses, and the statutes received mixed reviews from the courts.

b. Videotaped Testimony Taken Prior to Trial

A substantial number of American states and the federal government have laws allowing pretrial videotaping of children’s testimony. The taping occurs in the courtroom or at some other location. The laws usually require that the defendant be present at the videotaping. A number of statutes allow the judge to exclude the defendant from the videotaping if face-to-face confrontation would traumatize the child.

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204. See Lucy S. McGough, For the Record: Videotaping Investigative Interviews, 1 PSYCHOL., PUB. POL’Y & L. 370 (1995). The author wrote:

The appellate courts of six states (Kansas, Louisiana, Minnesota, Missouri, Texas, and Wisconsin) have upheld the constitutionality of their state videotaped evidence statutes when faced with confrontation or due process challenges.


In contrast, the appellate courts of Illinois, Tennessee, and Oklahoma have ruled their states’ pretrial videotaped child witness’s statement statutes unconstitutional.


Id. at 381-82.


c. Trial Testimony Through Live Television Link

In the United States, perhaps the most controversial courtroom reform is the live television link, which allows selected children to testify outside the physical presence of the defendant via closed-circuit television. The live television link often entails a complete abrogation of the defendant's right to face-to-face confrontation, and it is on constitutional grounds that the American battle over live link has raged.

In 1990, the U.S. Supreme Court resolved the constitutional issue with its decision in *Maryland v. Craig.* The Court reiterated the importance of confrontation but concluded that a face-to-face encounter at trial is not required in every case. The Court wrote that "a State's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court." Before confrontation may be curtailed, however, a judge must determine that the defendant's presence will cause emotional distress that "is more than de minimis, i.e., more than 'mere nervousness or excitement or some reluctance to testify.'" Moreover, the child's distress must emanate from the defendant, not from fear of the courtroom, spectators, or other factors. Although the Court declined to say how much emotional distress is required, the Court stated that "'serious emotional distress such that the child cannot reasonably communicate,' clearly suffices to meet constitutional standards."

The Supreme Court made clear that states may not enact laws that authorize all or most children to testify via live television link. Before a defendant's confrontation right may be impaired, the judge must determine that the particular child would be traumatized by a face-to-face encounter.

Countries that do not have a constitutional confrontation right do not ignore the importance of confrontation. Nevertheless, such countries have greater flexibility to employ video testimony. Thus, although the video testimony train left the station in the United States, it picked up steam elsewhere. Canada, England, and New Zealand climbed aboard in 1988 and 1989. In Scotland, "[s]tatutory authority for the use of live television link by child witnesses" went into effect in 1990. By the

207. The legal literature on the subject is voluminous. See, e.g., Montoya, *supra* note 188, at 340.
210. *Id.* at 856.
211. *Id.*
212. See SPENCER & FLIN, *supra* note 8, at 393.
213. See GRAHAM DAVIES & ELIZABETH NOON, *AN EVALUATION OF THE LIVE LINK FOR CHILD WITNESSES* (1991); *VIDEOTAPING CHILDREN'S EVIDENCE, supra* note 55; Bull & Davies, *supra* note 197; Margaret-Ellen Pipe & Mark Henaghan, *Accommodating Children's Testimony: Legal Reforms in New Zealand, in INTERNATIONAL PERSPECTIVES ON CHILD ABUSE AND CHILDREN'S TESTIMONY, supra* note *, at 145; Sas et al., *Children and the Courts in Canada, supra* note 106.
214. Murray, *supra* note 68, at i; see Flin et al., *supra* note 85.
early 1990s, most Australian jurisdictions enacted "[l]egislation allowing the use of closed circuit television for child witnesses."\(^{215}\)

Many advocates of testimony via live television link believe the procedure lowers children's distress and improves the quality of their evidence. Research provides support for the former\(^ {216}\) but offers a mixed appraisal of the latter. Experimental research by Ann Tobey and her colleagues provides insight into the effects of the use of a live television link on children and mock jurors.\(^ {217}\) The research involved mock trials with six- and eight-year-old witnesses. The children experienced a benign event and later testified about the event in a mock trial that the children thought was an actual trial. Some children testified in the courtroom while others testified via live television link, allowing comparisons between the two groups. Children were examined with three types of questions: specific, misleading, and correctly leading. Tobey wrote:

> the younger children made significantly more errors of omission in the regular trial condition than in the closed-circuit condition. However, for children testifying in the closed-circuit setting, younger children did not make significantly more omission errors than older children. Thus, compared with testifying via closed-circuit television, testifying in open court appeared to be problematic for the younger children because it was associated with an increase in omission errors to misleading questions.

Similarly, when the proportion of commission errors to the misleading questions was considered, adverse effects of testifying in open court were again detected.

When testifying in regular trials (that is, in open court), younger children made significantly more commission and omission errors than older children. Younger children testifying in regular trials also made more errors of omission than their peers who testified in a closed-circuit television setting. . . . [Y]oung children who testified in open court were found to have more errors with misleading questions than older children and other children their age who testified from the more protective environment of the closed-circuit courtroom.

\(^{215}\) Shrimpton et al., supra note 106.

\(^{216}\) See supra note 213 (citing authorities). Use of live television link does not relieve children's stress entirely. See Murray, supra note 68, at 66.

\(^{217}\) See Ann E. Tobey, Gail S. Goodman, Jennifer M. Batterman-Faunce, Holly K. Orcutt & Toby Sachsenmaier, Balancing the Rights of Children and Defendants: Effects of Closed-Circuit Television on Children's Accuracy and Jurors' Perceptions, in MEMORY AND TESTIMONY IN THE CHILD WITNESS, supra note 60, at 214.
In addition to examining the children's accuracy, we were also interested in the mock jurors' reactions to child witnesses who testified via closed-circuit television versus in open court. Would children be viewed as more or less credible witnesses when seen on a TV screen? In general, closed-circuit television was associated with more negative ratings of the child witnesses. Specifically, jurors rated children who testified via closed-circuit television as less believable, less accurate for both the prosecution and the defense attorney, less accurate in recalling the event, more likely to have made up the story, less able to testify based on fact rather than fantasy, less attractive, less intelligent, and less confident.218

The present study may have important implications for the use of closed-circuit technology when children testify. The protective atmosphere provided by the closed-circuit modality seemed most beneficial for young children, who were found to be less suggestible and who were rated as less stressed when not in the courtroom. However, the effects of testifying via closed-circuit television were not completely positive in regard to children's accuracy (e.g., for young children, the closed-circuit condition was also associated with more commission errors overall when the defendant was guilty). Despite this mixed pattern, the closed-circuit technology created consistent biases in the minds of the mock jurors against the child witnesses, indicating that a live witness will create a stronger case for the prosecution.219

Kathleen Murray's evaluation of live television link testimony in actual criminal trials in Scotland provides further insight into the mixed results of this technological innovation. Murray wrote:

Impact on the child

Children who testified by means of a live television link were significantly less likely to be in tears during cross-examination than children in the court room.

Children who testified by means of a live television link were significantly less likely to report feeling fear while testifying than those in the court room.

218. Id. at 231-32.
219. Id. at 237-38.
Children who testified by means of a live television link were significantly more likely than children in the court room to report that the mode of presenting their evidence was fair.

**Impact on quality of child’s evidence**

Children who testified by means of a live television link gave less detail during examination-in-chief than children in the court room.²²⁰

Children who testified by means of a live television link were less resistant to leading questions on peripheral matters during cross-examination than children in the court room.

**Relationship between signs of stress in the child and quality of evidence**

Children who were rated as under stress were significantly more likely to recant the assault and give inconsistent information than children who were not so rated.

**Impact of live television link on relationship between child’s stress and quality of the child’s evidence**

Children who were rated as under stress during examination-in-chief were more likely to be consistent regarding the main actions of the accused when testifying over live television link than in the court room.

Children who were rated as under stress during examination-in-chief were more likely to be consistent regarding the timing of events when testifying over a live television link than in the court room.

**Impact of live television link on relationship between lawyers questioning and quality of evidence**

When prosecutors’ questions focused primarily on the main actions of the accused, children on television were more likely to answer than children in the court room.

**Impact of live television link on rate of conviction**

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²²⁰ See Murray, supra note 68, at 80 (stating that children who testified in the courtroom provided more detail than children who testified by live television link).
There was no significant difference between live television link cases and non-link cases in rate of conviction.\(^\text{221}\)

Murray observed that in some respects testimony by live television link creates "more problems for the prosecution than the defen[s]e."\(^\text{222}\) She wrote that:

Whilst the differences in consistency levels between television users and non-users are not statistically significant, there was a clear tendency to rate the children testifying in the courtroom as more consistent than those on television when referring to the main actions of the accused and when answering questions about place. ... [T]he users of a live television link were more likely to change their story than those in open court, particularly in examination-in-chief. During cross-examination, none of the children in the courtroom recanted that the assault occurred.\(^\text{223}\)

... [C]hildren’s testimony presented in the court room was rated as more effective and more credible than testimony over the live television link, except under cross-examination when children’s testimony was seen as less credible in the court room... \(^\text{224}\)

... [O]nce children reached the trial the value of [live television link] appeared less certain. The results reported here... lend support to the belief that the ability to recount detailed and consistent testimony depended in some measure on freedom from anxiety and on an understanding and supportive questioner. However, in our experience these ideal conditions were more likely to prevail in the conventional court room than in the use of technology. We observed that children who testified in the conventional way were more relaxed, more communicative, less tearful. They answered more of the prosecutors' questions, provided more detailed and consistent testimony and were less likely to go back on their story. The prosecutors were more comfortable with the children by their side or in the witness box, and they felt under less pressure to ask non-leading questions. The cross-examiners were less likely to challenge witnesses on the central facts and children strongly resisted their leading questions on peripheral matters. Furthermore, most importantly, when testifying in the court room, children never recanted the assault in sexual abuse cases.\(^\text{225}\)

\(^{221}\). Id. at v.
\(^{222}\). Id. at 87.
\(^{223}\). Id.
\(^{224}\). Id. at 103.
\(^{225}\). Id. at 108.
Testimony by live television link is not a panacea. It is not surprising that many prosecutors are less than enthusiastic about the technology.

9. Counsel, Guardian Ad Litem, or Advocate for the Child

One way to help children cope with the adversary legal system is to assign an advocate to protect their interests. In the United States, the advocate’s role varies with the type of litigation. In noncriminal cases, a child’s advocate often takes an active role in investigating the case, making recommendations to the court, and examining and cross-examining witnesses at trial. In criminal trials, a child’s advocate plays a more limited role. For example, in North Dakota criminal cases, a child’s advocate—called a guardian ad litem—“may not separately introduce evidence or directly examine or cross-examine witnesses.” When not in trial, however, a child’s advocate may take an active part in assisting the child and family through the labyrinth of the legal system. Florida has a useful statute that provides:

Appointment of advocate for victims or witnesses who are minors . . .

(1) A guardian ad litem or other advocate shall be appointed by the court to represent a minor in any criminal proceeding if the minor is a victim of or witness to child abuse or neglect, or if the minor is a victim of a sexual offense or a witness to a sexual offense committed against another minor. The court may appoint a guardian ad litem or other advocate in any other criminal proceeding in which a minor is involved as either a victim or a witness. The guardian ad litem or other advocate shall have full access to all evidence and reports introduced during the proceedings, may interview witnesses, may make recommendations to the court, shall be noticed and have the right to appear on behalf of the minor at all proceedings, and may request additional examinations by medical doctors, psychiatrists, or psychologists. It is the duty of the guardian ad litem or other advocate to perform the following services:

(a) To explain, in language understandable to the minor, all legal proceedings in which the minor shall be involved;

(b) To act, as a friend of the court, to advise the judge, whenever appropriate, of the minor’s ability to understand and cooperate with any court.

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228. See DEBRA WHITCOMB, GUARDIANS AD LITEM IN CRIMINAL COURTS (1988).
proceeding; and

(c) To assist the minor and the minor's family in coping with the emotional effects of the crime and subsequent criminal proceedings in which the minor is involved.230

Child victims are not parties to criminal litigation and, like other crime victims, children sometimes get "lost in the shuffle." Children need a voice—an adult who understands the legal system and who has authority to speak up for them. Research indicates that judges seldom implement accommodations that are available under existing law.251 One reason for infrequent accommodation is probably the child's voicelessness in the process. An effective antidote to this unsatisfactory state of affairs is to ensure that every child involved in the criminal justice system has an advocate to protect his or her interests. The Child Witness Code at the end of this Article requires appointment of a guardian ad litem for every child involved in a criminal case.

10. Corroboration of Children's Testimony

During much of the twentieth century, children's testimony in sex offense cases was viewed with skepticism, and some courts imposed a corroboration requirement when a child's testimony was less than clear and convincing, or when the child's credibility was attacked.232 During the 1970s and 1980s, courts moved away from the corroboration requirement and, today, most jurisdictions do not impose corroboration as a substantive requirement. Thus, a conviction may be predicated on the uncorroborated testimony of a child.233

11. Jury Instruction Regarding Child Witnesses

It was once common to instruct jurors to consider a child's testimony with care.234 The modern trend, however, is moving away from such precautionary in-

231. See Murray, supra note 68, at i; Testifying in Criminal Court, supra note 3, at 83 ("Despite laws in Colorado that permit the use of a variety of innovative techniques designed to decrease courtroom trauma to child victims in sexual assault cases (e.g., videotaped testimony), use of these techniques was infrequent . . . ."). But see Pipe & Hanaghan, supra note 213, at 161 (surveying professionals in New Zealand and finding that accommodations for child witnesses are "frequently used and that they have become the norm rather than the exception. As one judge commented, cases in which screens and other procedures were not recommended were 'now very much the exception' . . . .").
232. See Myers, Evidence in Child Abuse, supra note 13, § 5.17.
233. Id.
234. Id. § 8.14.
structions.²³⁵

12. Residual Category

The accommodations outlined above by no means cover the waterfront. Judges make on-the-spot decisions to meet the exigencies of particular cases, and legislatures refine existing laws and generate new ideas. Ireland²³⁶ and South Africa,²³⁷ for example, have laws that allow the court to appoint an intermediary to question child witnesses. The Child Witness Code that follows incorporates many ideas found in the law of individual states and countries.

²³⁵ See, e.g., Guam v. McGravey, 14 F.3d 1344 (9th Cir. 1994).
²³⁶ See Ireland Criminal Evidence Act, § 14 (1992). The statute states:
(1) Where—
   (a) a person is accused of an offense to which this Part applies, and
   (b) a person under 17 years of age is giving, or is to give, evidence through a live television link, the court may, on the application of the prosecution or the accused, if satisfied that, having regard to the age or mental condition of the witness, the interests of justice require that any questions to be put to the witness be put through an intermediary, direct that any such questions be so put.
(2) Questions put to a witness through an intermediary under this section shall be either in the words used by the questioner or so as to convey to the witness in a way which is appropriate to his age and mental condition the meaning of the questions being asked.
(3) An intermediary referred to in subsection (1) shall be appointed by the court and shall be a person who, in its opinion, is competent to act as such.
²³⁷ See § 51 of South Africa Criminal Procedure Act of 1977, as amended in 1991, which states:
(1) Whenever criminal proceedings are pending before any court and it appears to such court that it would expose any witness under the age of 18 years to undue mental stress or suffering if he testifies at such proceedings, the court may, subject to subsection (4) appoint a competent person as an intermediary in order to enable such witness to give his evidence through that intermediary.
(2) (a) No examination, cross-examination or re-examination of any witness in respect of whom a court has appointed an intermediary under subsection (1), except examination by the court, shall take place in any manner other than through that intermediary.
   (b) The said intermediary may, unless the court directs otherwise, convey the general purport of any question to the relevant witness.
(3) If a court appoints an intermediary under subsection (1), the court may direct that the relevant witness shall give his evidence at any place—
   (a) which is informally arranged to set that witness at ease;
   (b) which is so situated that any person whose presence may upset that witness, is outside the sight and hearing of that witness; and
   (c) which enables the court and any person whose presence is necessary at the relevant proceedings to see and hear, either directly or through the medium of any electronic or other devices, that intermediary as well as that witness during his testimony.
(4) (a) The Minister may by notice in the Gazette determine the persons or the category or class of persons who are competent to be appointed as intermediaries.
   (b) An intermediary who is not in the full-time employment of the State shall be paid such traveling and subsistence and other allowances in respect of the services rendered by him as the Minister, with the concurrence of the Minister of Finance, may determine.
Id., quoted in Dap Louw & Pierre Olivier, Listening to Children in South Africa, in INTERNATIONAL PERSPECTIVES ON CHILD ABUSE AND CHILDREN’S TESTIMONY, supra note *, at 168, 179-80.
CONCLUSION

The past decade witnessed unprecedented change to accommodate children in court. Change has come in fits and starts, and is far from uniform. Moreover, some accommodations trammeled the rights of defendants. Nevertheless, the tide of change appears irreversible and, in the end, beneficial to children and the search for truth. The proposed code at the end of this Article endeavors to synthesize ten years of reform into a comprehensive Child Witness Code.

CHILD WITNESS CODE

The Child Witness Code that follows pertains to criminal cases. The Code draws heavily on existing law in the United States. Several sections of the Code—particularly sections dealing with live link television—are perhaps unique to the United States, with its constitutional guarantee of face-to-face confrontation. It is my hope that policy makers in the United States and other countries will find portions of the Code worthy of consideration.
CHILD WITNESS CODE

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§ 1 Legislative Intent

The Legislature hereby finds and declares as follows:

(a) This state has a compelling interest in protecting children from abuse. The law plays an important role in protecting children and punishing the persons who abuse them.

(b) Testimony from children is often essential to prove that abuse occurred, to identify the perpetrator of abuse, and to prove other crimes. Thus, children often must testify in legal proceedings.

(c) The courtrooms of this state and other states are not designed with children in mind, and the formal nature of the courtroom and the proceedings that occur there cause fear and anxiety that interferes with some children's ability to provide full and accurate testimony. In addition to fear and anxiety that interferes with full and accurate testimony, testifying in the traditional fashion is emotionally harmful for some children. Because testifying is very stressful for many children, and because testifying traumatizes some children and can interfere with full and accurate testimony, this state has a compelling interest in accommodating child witnesses to reduce unnecessary stress, anxiety, fear, and trauma, and to increase the accuracy and completeness of their testimony.

(d) Accommodations for child witnesses can be made without compromising the right to a fair trial and without unnecessarily undermining the right to confront and cross-examine witnesses.

(e) The judges of this state have a responsibility to protect vulnerable witnesses, including children, from unnecessary stress and trauma. Judges can accommodate child witnesses without compromising judicial neutrality and without undermining the rights of persons accused of a crime. Research discloses that judges seldom implement accommodations that are available to them under existing law.238 It is the intent of the Legislature that the judges of this state make liberal use of the provisions set forth in this Code to ensure maximum accommodation for child witnesses and to protect children from unnecessary trauma and stress. Judges should take an active role in accommodating child witnesses to reduce trauma and increase the

238. See MURRAY, supra note 68, at I; Testifying in Criminal Court, supra note 3, at 83, 85.
The cooperation of children and their families is essential to the successful prosecution of child abuse and other crimes. Release of information identifying child victims and witnesses and their families may subject the child and the child's family to unwanted contacts by the media, public scrutiny, severe embarrassment and humiliation, and psychological harm, and may place the child and the child's family at risk from some perpetrators. Release of information regarding a child victim or witness or the child's family to the press and the public harms the child and the child's family and has a chilling effect on the willingness of children and their families to report child abuse and other crimes and to cooperate with the investigation and prosecution of crime. Public dissemination of the child's name, address, phone number, school, and other identifying information about the child and the child's family is not necessary for the accurate release of information to the public concerning the operation of the criminal justice system. Therefore, the Legislature intends to assure child victims and witnesses and their families that the identities and locations of child victims and witnesses and their families will remain confidential.

§ 2 Title of Code

This code shall be known as the Child Witness Code.

§ 3 Purposes

The purposes of this Code are to ascertain the truth, reduce trauma to children, create conditions that will allow children to provide reliable and complete evidence, increase the number of children who are able to testify in legal proceedings, and protect the rights of persons accused of crime.

§ 4 Applicability of Child Witness Code

(a) This Code applies in all criminal proceedings, including pretrial and post-trial proceedings, conducted in this state. The term "criminal proceeding" includes juvenile delinquency proceedings conducted in the juvenile court.

(b) This Code applies to children who are victims of crime and children who witness crime but are not victims thereof. Certain sections of this Code apply only to children who are victims of crime.

(c) To the extent provisions of this Code provide guidance in civil litigation, a judge may rely on provisions of this Code to accommodate children in civil
cases.

§ 5 Code to Be Liberally Construed to Accommodate Children

This Code shall be liberally construed to ensure maximum accommodation of child witnesses. The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this Code.

§ 6 Inherent Judicial Authority

Judges of this state have inherent judicial authority to accommodate children in addition to the specific accommodations authorized by this Code.

§ 7 Definitions

(a) "Child" means a person under the age of 18 years.

(b) "Child abuse" means physical abuse, sexual abuse, and criminal neglect as defined elsewhere in applicable law.

(c) "Intermediary" means a person appointed by the court to pose questions to a child witness.

(d) "Record regarding a child" or "record" means any photograph, videotape, audiotape, film, handwriting, typewriting, printing, electronic recording, computer data or printout, or other memorialization, including any court document, indictment, complaint, or information, or any copy or reproduction of any of the foregoing, that contains the name, description, address, school, or any other personal identifying information about a child or the child's family and that is produced by or maintained by a public agency, private agency, or individual.

§ 8 Vertical Prosecution

Whenever practicable, the same prosecutor should handle all aspects of a case involving a child victim.

§ 9 Special Precautions for Child Witnesses

The court shall take steps to provide for the comfort and support of child witnesses and to protect children from coercion, intimidation, unnecessary psychological stress, and undue influence.
§ 10 Docket Priority

The court shall give docket priority to any criminal case involving a child victim. The court and the prosecutor shall take appropriate steps to insure a speedy trial in order to minimize the length of time the child must endure the stress of involvement in the proceedings.

§ 11 Continuances

Whenever a motion or other request for a delay or continuance is made in a case involving a child victim, the court shall grant the delay or continuance only for substantial reasons, and the court shall consider and give weight to the adverse impact the delay or continuance may have on the well-being of the child. The court shall make findings on the record when granting a continuance in cases involving a child victim.

§ 12 Court Preparation Programs

Programs designed to prepare children to testify serve the interests of justice and are encouraged. Judges are encouraged to participate in court preparation programs, and judicial participation in such programs is not a ground for recusal or disqualification. Judges should make their courtroom and staff available for court preparation programs. The fact that a child participated in a court preparation program may not be used to impeach the child’s credibility.

§ 13 Waiting Area for Child Witnesses

(a) The court shall provide a waiting area for children that is separate from waiting areas used by other persons. The child’s waiting area should be furnished so as to make the child comfortable.

239. There is general agreement that excessive continuances can harm children by prolonging their involvement in the legal system. See Desmond K. Runyan, The Emotional Impact of Societal Intervention Into Child Abuse, in CHILD VICTIMS, CHILD WITNESSES: UNDERSTANDING AND IMPROVING TESTIMONY 263, 270 (Gail S. Goodman & Bette L. Bottoms eds., 1993) ("[C]hildren left in limbo by the criminal court system were only 8 percent as likely to evidence improvement in depression as were their peers who were not in the court system or who had resolved all court issues."). It is interesting to note, however, that Gail Goodman and her colleagues found: Contrary to our prediction, the more times the case was continued, the more likely the child’s behavioral adjustment was to improve. This is surprising because it is commonly believed that continuances increase children’s distress. Our finding appears to reflect the mere passage of time, however. Since continuances typically prolonged the case, continuances gave the children more time to recover. When the length of the legal process was controlled, the number of continuances experienced no longer predicted improvement.

Testifying in Criminal Court, supra note 3, at 118.
(b) Courts are encouraged to create special waiting areas for child witnesses.

§ 14 Guardian Ad Litem

(a) The court shall appoint a guardian ad litem for a child who was a victim of, or a witness to, a crime to protect the best interests of the child. In making the appointment, the court shall consider a prospective guardian’s background in and familiarity with the judicial process, social service programs, and child development. The guardian ad litem shall not be a person who is a witness in a proceeding involving the child for whom the guardian is appointed. The guardian ad litem may, but need not, be an attorney. The guardian ad litem shall be notified of all proceedings.

(b) Duties of Guardian Ad Litem.

A guardian ad litem:

(1) May attend all interviews, depositions, hearings, and trial proceedings in which the child participates.

(2) Shall remain with the child in the courthouse or other location while the child waits to testify.

(3) May make recommendations to the court concerning the welfare of the child.

(4) May have access to all reports, evaluations, and records, except attorney’s work product, necessary to advocate effectively for the child.

(5) May interview witnesses.

(6) Shall marshal and coordinate the delivery of resources and special services to the child.

(7) May request additional examinations by medical or mental health professionals if there is a compelling need for additional examination.

(8) Shall explain, in language understandable to their ward, all legal proceedings, including police investigations, in which the child is involved.

(9) Shall, to the extent appropriate, assist the child and the child’s family in coping with the emotional effects of crime and subsequent criminal or civil proceedings in which the child is involved.
(c) A guardian ad litem shall not be compelled to testify in any proceeding concerning any information, statement, or opinion received from, or provided for, the child in the course of serving as a guardian ad litem.

(d) A guardian ad litem shall be presumed to be acting in good faith and shall be immune from civil and criminal liability for complying with the guardian’s duties described in this section.

(e) A guardian ad litem shall not participate in the trial by way of juror voir dire, opening statement, closing argument, introducing or objecting to evidence, or examination of witnesses, including the child witness; Provided, however, that a guardian ad litem may:

(1) If the guardian ad litem is an attorney the guardian ad litem may object during trial under section 33 that questions asked of the child are developmentally inappropriate.

(2) A guardian ad litem, whether or not an attorney, may communicate concerns regarding the child to the court at any time when court is not in session.

(3) A guardian ad litem, whether or not an attorney, may communicate concerns regarding the child to the court when court is in session through an officer of the court designated for that purpose by the court.

(4) A guardian ad litem, whether or not an attorney, may file motions pursuant to sections 20, 36, 37, 39, and 41(e).

§ 15 Support Persons

(a) A child testifying at or attending a judicial proceeding or deposition shall have the right to be accompanied by up to two persons of the child’s own choosing, one of whom may be a witness, to provide emotional support to the child. Both support persons may remain in the courtroom or other room and in the child’s sight during the child’s testimony. One of the support persons may accompany the child to the witness stand, provided the support person does not completely obscure the child from the view of the defendant or the trier of fact. If needed for emotional support, the support person may hold the child’s hand, hold the child on the support person’s lap throughout the course of the proceeding, or take other steps appropriate to support the
child.\textsuperscript{240}

(b) If a person chosen under subdivision (a) is also a witness, the court may disapprove the choice if the defense establishes by a preponderance of the evidence that the support person’s attendance during the testimony of the child would pose a substantial risk of influencing or affecting the content of the child’s testimony.

(c) If a person chosen under subdivision (a) is also a witness, the testimony of the support person shall normally be presented before the testimony of the child.

(d) A support person shall not provide the child with an answer to any question directed to the child during the course of the child’s testimony or otherwise prompt the child. The court shall admonish the support person or persons not to prompt, sway, or influence the child during the child’s testimony.

§ 16 Competency

Every child, irrespective of age, is qualified to be a witness unless the child lacks the ability to communicate, remember, distinguish truth from falsehood, or appreciate the duty to tell the truth in court. Every child is presumed to possess the requirements contained in this section.

§ 17 Competency Examination

(a) When Competency Examination Allowed. A court shall not hold a competency examination for a child unless the court, on its own motion or the motion of a party, determines that substantial doubt exists regarding the child’s competence to testify. A party seeking a competency examination must present specific evidence that establishes that a competency examination is required. A child’s age alone is not a sufficient reason for a competency examination.

(b) Burden on Party Challenging Competence. If a court orders a competency examination, the burden of persuasion is on the party challenging the child’s competence to rebut the presumption of competence established by section 16 and to prove by a preponderance of evidence that the child is not competent.

(c) **Persons Present at Examination.** The persons who may be present at a competency examination are limited to:

1. the judge;
2. the attorneys for the parties;
3. the child’s guardian ad litem;
4. one or more support persons for the child;
5. the defendant unless the defendant is excluded from the competency examination pursuant to section (d); and
6. such other persons as the Court deems appropriate.

(d) **Excluding Defendant from Examination.** The defendant shall be excluded from the competency examination unless the court determines that competence cannot be fully evaluated in the absence of the defendant.

(e) **Examination Outside Jury’s Presence.** A competency examination shall be conducted out of the sight and hearing of the jury unless the court determines that the examination should occur in the presence of the jury. A competency examination may be conducted in the judge’s chambers or in some other location.

(f) **Questioning by the Court.** Examination of a child related to competence shall normally be conducted by the court. Attorneys may submit questions to the court which the court may, in its discretion, ask the child. The court may permit an attorney to examine a child directly on competence if the court is satisfied that the child will not suffer emotional trauma as a result of the examination.

(g) **Developmentally Appropriate Questions.** The questions asked at the competency examination shall be appropriate to the age and developmental level of the child, shall not be related to the issues at trial, and shall focus on the child’s ability to communicate, remember, understand the difference between truth and falsehood, and understand the duty to testify truthfully.

(h) **Psychological and Psychiatric Examination Regarding Competence Prohibited.** Psychological and psychiatric examination to assess the competence of a child witness shall not be ordered.
(i) **Continuing Duty to Assess Competence.** The court’s responsibility to assess competence continues throughout the child’s testimony.

§ 18 **Oath or Affirmation**

Before testifying, a child shall be required to declare that the child will testify truthfully, by oath or affirmation in a form calculated to awaken the child’s conscience and impress the child’s mind with the duty to do so. For a child under the age of 10 the court shall administer an affirmation in which the child promises to tell the truth.

§ 19 **Interpreter for Child**

(a) When a child is incapable of understanding the English language or is incapable, due to developmental level, fear, shyness, disability, or other reason, of communicating in the English language so as to be heard and understood directly by counsel, court, and jury, an interpreter whom the child can understand and who understands the child shall be sworn to interpret for the child.

(b) An interpreter should not be a witness in the case and should not have an interest in the case: Provided, however, that if a witness or member of the child’s family is the only person who can serve as an interpreter for the child, then the witness or family member may serve as the child’s interpreter. If the interpreter is also a witness, the interpreter shall normally testify before the child.

(c) An interpreter shall take an oath or affirmation to make a true and accurate interpretation.

§ 20 **Intermediary to Pose Questions to Child**

(a) A party or the child’s guardian ad litem may apply for an order that an intermediary be appointed by the court. The court may appoint an intermediary on its own motion.

(b) The court may appoint an intermediary to pose questions to a child if the court finds that the child is unable to understand and/or respond to questions asked by counsel or the court.

(c) If the court appoints an intermediary to pose questions to the child, counsel for the parties shall not question the child. The intermediary shall pose questions desired by the prosecution and defense.
(d) Questions put to a child through an intermediary shall be either in the words selected by counsel or, if the child is not likely to understand the words selected by counsel, in words which are comprehensible to the child and which convey the meaning intended by counsel.

(e) An intermediary shall take an oath or affirmation to pose questions to the child accurately according to the meaning intended by counsel.

§ 21 Psychological and Psychiatric Examinations Regarding Credibility Prohibited

Psychological and psychiatric examination to assess the credibility of a child witness shall not be ordered.

§ 22 Comfort Items

A child shall be allowed to have with him or her while testifying a comfort item of the child’s own choosing such as a blanket, toy, or doll.

§ 23 Testimonial Aids

The court shall permit a child to use dolls, anatomical dolls, puppets, drawings, mannequins, or any other demonstrative device the court deems appropriate for the purpose of assisting a child in testifying.241

§ 24 Recesses During Child’s Testimony

(a) The child may be allowed reasonable periods of relief from direct examination, cross-examination, and re-examination during which the child may retire from the courtroom. The court may allow other witnesses to testify while the child retires from the courtroom.

(b) In advance of the child’s testimony the court may order that relief from testimony will occur at regular intervals.

(c) Child witnesses age eight and younger should normally be given relief from testimony every twenty minutes or more frequently.

241. Caution is necessary to ensure that a child witness is not distracted by a testimonial aid. See Testifying in Criminal Court, supra note 3, at 92 (“Taking a toy to the stand and using props were both associated with the child recanting previous testimony about peripheral details; perhaps the toys were somewhat distracting for children ....”).
§ 25 Persons Prohibited from Entering and Leaving Courtroom

The court may order that persons attending the trial shall not enter or leave the courtroom during the child's testimony.

§ 26 Testimony During Appropriate Hours

The court may order that the child's testimony be taken during a time of day when the child is well rested.

§ 27 Rearranging the Courtroom

In the court's discretion, the judge, child, parties, witnesses, support persons, and court personnel may be relocated within the courtroom to facilitate a more comfortable environment for the child. The child may testify from a location in the courtroom other than the witness chair. The court shall supervise the spatial arrangements of the courtroom and the location, movement, and deportment of all persons in attendance. The witness chair or other place from which the child testifies may be turned to facilitate the child's testimony. The defendant and the trier of fact must have a frontal or profile view of the child during the child's testimony. Whenever the witness chair or other place from which the child testifies is turned pursuant to this section, the child must be able to see the defendant without having to turn the child's head more than ninety degrees if the child chooses to look at the defendant. Nothing in this section or any other provision of law, except official in-court identification provisions, shall be construed to require a child to look at the defendant. The judge may remove the judge's robe. Accommodations for the child under this section need not be supported by a finding of trauma to the child.

§ 28 Approaching the Witness

The court may prohibit an attorney from approaching a child if it appears that the child is fearful of the attorney or intimidated by the attorney.

§ 29 Mode and Order of Questioning

The court shall exercise control over the questioning of children so as to (1) make the questioning and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, (3) protect children from harassment or undue embarrassment, and (4) insure that questions are stated in a form that is appropriate to the age and understanding of the child.

§ 30 Questioning by Court
The court may question the child to clarify facts, ensure that the child understands questions asked by attorneys, and for other purposes.

§ 31 Leading Questions During Direct Examination

The court may allow leading questions during direct and re-direct examination of a child if leading questions will further the interests of justice.

§ 32 Objections

The court may order that objections be made so as not to frighten, confuse, or intimidate the child.

§ 33 Objection to Developmentally Inappropriate Question

On its own motion, the objection of a party, or the objection of the child's guardian ad litem the court shall forbid the asking of a question which is in a form that is not reasonably likely to be understood by a child of the age or developmental level of the child.

§ 34 Sexual Abuse Shield Statute

(a) Evidence Generally Inadmissible. The following evidence is not admissible in any criminal or civil proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):

(1) Evidence offered to prove that any alleged victim engaged in other sexual behavior.

(2) Evidence offered to prove any alleged victim's sexual predisposition.

(b) Exceptions.

(1) In a criminal case, the following evidence is admissible, if otherwise admissible under these rules:

(A) evidence of specific instances of sexual behavior by the alleged victim to prove that a person other than the accused was the source of semen, injury, or other physical evidence;

(B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent if consent is relevant or by
the prosecution; and

(C) evidence the exclusion of which would violate the constitutional rights of the defendant.

(2) In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim's reputation is admissible only if it has been placed in controversy by the alleged victim.

(c) Procedure to Determine Admissibility.

(1) A party intending to offer evidence under subdivision (b) must:

(A) file a written motion at least 14 days before trial specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause requires a different time for filing or permits filing during trial; and

(B) serve the motion on all parties and the child's guardian ad litem.

(2) Before admitting evidence under this section the court must conduct a hearing in camera and afford the child, the child's nonoffending parent(s), the child's guardian ad litem, and parties a right to attend and be heard. The motion, related papers, and the record of the hearing must be sealed and remain under seal and protected by a protective order set forth in section 41(d). The child shall not be required to testify at the hearing in camera unless the child wishes to do so.

§ 35  Closing the Courtroom

When a child testifies the court may order the exclusion from the courtroom of all persons, including members of the press, who do not have a direct interest in the case. Such an order may be made if the court determines on the record that requiring the child to testify in open court would cause psychological harm to the child or would result in the child's inability to communicate effectively due to embarrassment, fear, or timidity. In reaching its decision the court shall consider the child's age, psychological maturity, the nature of the crime, the nature of the child's testimony regarding the crime, the relationship of the child to the defendant and to persons attending the trial, the desires of the child, and the interests of the child's parents or guardians. Such an order shall be narrowly
tailored to serve the state's interests in protecting the child from psychological harm and ensuring complete testimony.

§ 36  Live Link Television Testimony

(a) The prosecutor or the child's guardian ad litem may apply for an order that the child's testimony be taken in a room outside the courtroom and be televised to the courtroom by live link television. Before the child's guardian ad litem applies for an order under this section the guardian ad litem shall consult with the prosecutor and shall defer to the prosecutor's judgment regarding whether to apply for an order unless the guardian ad litem is convinced that the prosecutor's decision not to apply for an order will cause the child serious emotional trauma. The person seeking such an order shall apply at least 5 days before the trial date, unless the court finds on the record that the need for such an order was not reasonably foreseeable.

(b) The court may order that the testimony of the child be taken by live link television as provided in subdivision (a) if the court finds any of the following:

(1) The child is unable to testify fully in open court in the presence of the defendant due to fear of the defendant.

(2) There is a substantial likelihood that the child would suffer at least moderate nontransient emotional trauma from testifying in the presence of the defendant. The trauma need not be permanent, but must be more than the nervousness and anxiety experienced by most witnesses.

(3) Conduct by defendant or defense counsel causes the child to be unable to testify or continue testifying in the presence of defendant or defense counsel.

(c) The court shall support a ruling on use of live link television on the record. The court shall consider the totality of the circumstances. Expert testimony may be considered, although expert testimony is not required to support a ruling allowing live link television. The court may consider the following factors:

(1) the child's age and level of development;

(2) the child's physical and mental health, including any mental or physical disability;
(3) any physical, emotional, or psychological injury experienced by the child;

(4) the nature of the alleged abuse;

(5) any threats against the child;

(6) the child’s relationship to the defendant;

(7) the child’s reaction to any prior encounters with the defendant in court or elsewhere;

(8) the child’s reaction prior to trial when the topic of testifying was discussed with the child by parents or professionals;

(9) specific symptoms of stress exhibited by the child in the days prior to testifying;

(10) testimony of lay witnesses;

(11) the child’s custodial situation and the attitude of members of the child’s family regarding the events about which the child will testify; and

(12) any other relevant factors.

(d) In ruling on a request for live link television the court may question the child in chambers, or at some other comfortable place other than the courtroom, on the record. The only other persons who may be present during the questioning include a support person for the child, the prosecutor, the child’s guardian ad litem, and defense counsel. The defendant shall not attend the questioning. Questioning shall not be related to the issues at trial except that questions may relate to the child’s feelings about testifying in the courtroom in the presence of the defendant.

(e) If the court orders the taking of testimony by live link television, the prosecutor and the attorney for the defendant, not including a defendant representing him or herself, shall be present in a room outside the courtroom with the child and the child shall be available for direct and cross-examination. The only other persons who may be permitted in the room with the child during the child’s testimony are:

(1) the child’s guardian ad litem;
(2) persons necessary to operate the closed-circuit television equipment;

(3) a court officer, appointed by the court;

(4) other persons whose presence is determined by the court to be necessary to the welfare and well-being of the child; and

(5) one or both of the child's support persons.

(f) The child's testimony shall be transmitted by live link television into the courtroom for viewing and hearing by the defendant, jury, judge, and public. The defendant shall be provided with a means of private, contemporaneous communication with the defendant's attorney during the testimony.

(g) While the child testifies it is not necessary that the child be able to view an image of the defendant.

(h) The court may set any other conditions and limitations on the taking of the testimony that it finds just and appropriate, taking into consideration the interests of the child, the rights of the defendant, and any other relevant facts.

(i) If it is necessary for the child to identify the defendant at trial, the court may allow the child to enter the courtroom for the limited purpose of identifying the defendant or the court may allow the child to identify the defendant by observing the defendant's image on a television monitor.

(j) The child's testimony shall be preserved on videotape. The videotape shall be made a part of the court record and shall be subject to a protective order as provided in section 41(d).

§ 37 Videotaped Deposition

(a) The prosecutor or child's guardian ad litem may apply for an order that a deposition be taken of the child's testimony and that the deposition be recorded and preserved on videotape. Before the child's guardian ad litem applies for an order under this section the guardian ad litem shall consult with the prosecutor as required in section 36(a).

(b) Upon receipt of an application described in subdivision (a), the court shall make a finding regarding whether, at the time of trial, the child is likely to be unable to testify in open court.
(c) If the court finds pursuant to subdivision (b) that the child is likely to be unable to testify at trial, the court shall order that the child’s deposition be taken and preserved by videotape.

(d) The court shall preside at the videotape deposition of a child. Objections to deposition testimony or evidence or parts thereof, and the grounds for the objection, shall be stated at the time of the taking of the deposition. The only other persons who may be permitted to be present at the proceeding are:

(1) the prosecutor;

(2) the attorney for the defendant;

(3) the child’s guardian ad litem;

(4) persons necessary to operate the videotape equipment;

(5) subject to subdivision (f), the defendant;

(6) other persons whose presence is determined by the court to be necessary to the welfare and well-being of the child; and

(7) one or both of the child’s support persons.

(e) The defendant shall be afforded the rights applicable to defendants during trial, including the right to an attorney, the right to be confronted with the child, and the right to cross-examine the child.

(f) If the finding of likely inability to testify under subdivision (b) is based on evidence that the child is unable to testify in the physical presence of the defendant, the court may order that the defendant, including a defendant representing him or herself, be excluded from the room in which the deposition is conducted. If the court orders that the defendant be excluded from the deposition room, the court shall order that live link television equipment relay the child’s image into the room where the defendant is located, and that the defendant be provided with a means of private, contemporaneous communication with the defendant’s attorney during the deposition. If the defendant is excluded from the deposition, it is not necessary that the child be able to view an image of the defendant.

(g) The complete record of the examination of the child, including the image and voices of all persons who in any way participate in the examination, shall be made and preserved on videotape in addition to being stenographically recorded. The videotape shall be transmitted to the clerk of the court in which the action is pending and shall be made a part of the record.

(h) The court may set any other conditions and limitations on the taking of the deposition that it finds just and appropriate, taking into consideration the interests of the child, the rights of the defendant, and any other relevant factors.

(i) The videotape deposition shall be subject to a protective order as provided in section 41(d).

(j) If, at the time of trial, the court finds that the child is unable to testify for a reason described in section 36(b), or is unavailable for any reason described in [the rule defining unavailability, for example, Federal Rule of Evidence 804(a)], the court may admit into evidence the child’s videotaped deposition in lieu of the child’s testimony at the trial. The court shall support a ruling under this section with findings on the record.

(k) Upon timely receipt of notice that new evidence has been discovered after the original videotaping and before or during trial, the court, for good cause shown, may order an additional videotaped deposition. The testimony of the child shall be restricted to the matters specified by the court as the basis for granting the order.

§ 38 Videotaped Preliminary Hearing Testimony

(a) The prosecutor may apply at any time for an order that a child’s testimony at a preliminary hearing, in addition to being stenographically recorded, be videotaped.

(b) Upon timely receipt of the application, the magistrate shall order that the testimony of the child given at the preliminary hearing be videotaped. The videotape shall be transmitted to the clerk of the court in which the action is pending and shall be made a part of the record.

(c) If, at the time of trial, the court finds that the child is unavailable to testify for a reason described in section 36(b), or is unavailable for any reason described in [the rule defining unavailability, for example, Federal Rule of Evidence 804(a)], the court may admit into evidence the child’s videotaped
preliminary hearing testimony as former testimony. The court shall support a ruling under this section with findings on the record.

(d) The child’s videotaped preliminary hearing testimony shall be made a part of the court record and shall be subject to a protective order as provided in section 41(d).

§ 39 Screens and Other Devices to Shield Child from Defendant

(a) The prosecutor or the child’s guardian ad litem may apply for an order that a screen or other device be placed in the courtroom so that the child cannot see the defendant while the child testifies in the courtroom. Before the child’s guardian ad litem applies for an order under this section the guardian ad litem shall consult with the prosecutor as required in section 36(a). The person seeking such an order shall apply for such an order at least 5 days before the trial date, unless the court finds on the record that the need for an order was not reasonably foreseeable.

(b) The court may order that the child be screened from viewing the defendant as provided in subdivision (a) if the court finds any of the factors listed in section 36(b).

(c) The court shall support a ruling on screening the child from the defendant on the record. The court shall consider the factors in section 36(c).

(d) In ruling on an application to shield the child from the defendant during the child’s testimony in the courtroom, the court may question the child as provided in section 36(d).

(e) If the court grants an application to shield the child from the defendant during the child’s testimony in the courtroom, the court shall arrange the courtroom so that the defendant can view the child during the child’s testimony.

(f) If the court grants an application made under subdivision (a) the court shall describe for the record the courtroom arrangement approved by the court.

§ 40 Child Hearsay Exception

(a) A statement made by a child describing any act or attempted act of child abuse performed with or on the child by another, or describing any act or attempted act of child abuse witnessed by the declarant child, not otherwise admissible, is admissible in evidence in any civil, criminal, or administrative
proceeding if:

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

(2) the child either:

(A) testifies at the proceedings; or

(B) is unavailable as a witness: Provided, however, that when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

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

§ 41 Protection of Child’s Privacy and Safety

(a) Records Under Seal. Any record regarding a child that is part of the court record shall be confidential and under seal and shall not be released to anyone except the following:

(1) members of the court staff for administrative use;

(2) the prosecuting attorney;

(3) defense counsel;

(4) the child’s guardian ad litem;

(5) agents of investigating law enforcement agencies;

(6) other persons on order of the court.

(b) All Government and Private Agencies to Protect Privacy. Every agency of state or local government, and every private agency or person that provides services to children and/or their families shall protect the confidentiality of records containing the identity of children who are or may be victims of crime. Children have the right not to have their name, address,
telephone number, school, photograph, or other identifying information about them or their families disclosed by any law enforcement agency, prosecutor’s office, state or local government agency, or private agency or person as defined herein, without the permission of the child if the child is of sufficient age and maturity to give informed consent to release, or the child’s parent or guardian, to anyone except a law enforcement agency, prosecutor, defense counsel, guardian ad litem, or private or government agency or person that provides services to the child.

(c) Identifying Information Deleted. The name, address, telephone number, school, and other identifying information regarding a child and members of the child’s family shall not appear on any indictment, complaint, information, pleading, motion, brief, or any other court document or legal record in the trial courts or appellate courts of this state. In place of the child’s name shall appear initials or a fictitious name.

(d) Protective Order. Any videotape or audiotape of a child that is part of the court record shall be under a protective order that provides as follows:

PROTECTIVE ORDER

(1) For purposes of this order tape(s) means any videotape or audiotape of a child.

(2) Tapes may be viewed only by parties, their counsel and their counsel’s employees, investigators, and experts for the purpose of prosecuting or defending this action, and the child’s guardian ad litem.

(3) No tape, or the substance of any portion thereof, shall be divulged by any person subject to this protective order to any other person, except as necessary for the trial or preparation for trial in this proceeding, and such information shall be used only for purposes of the trial and preparation for trial herein.

(4) No person shall be granted access to the tape, any transcription thereof, or the substance of any portion thereof unless that person has first signed an agreement in writing that the person has received and read a copy of this protective order, that the person submits to the Court’s jurisdiction with respect to the protective order, and that the person will be subject to the Court’s contempt powers for any violation of the protective order.
(5) Each of the tape cassettes and transcripts thereof available to the parties, their attorneys and respective agents shall bear the following legend:

THIS OBJECT OR DOCUMENT AND THE CONTENTS THEREOF ARE SUBJECT TO A PROTECTIVE ORDER ENTERED BY THE COURT IN STATE V. ____________. CASE NUMBER ____________. THIS OBJECT OR DOCUMENT AND THE CONTENTS THEREOF MAY NOT BE EXAMINED, INSPECTED, READ, VIEWED, OR COPIED BY ANY PERSON, OR DISCLOSED TO ANY PERSON, EXCEPT AS PROVIDED IN THE PROTECTIVE ORDER. ANY PERSON VIOLATING SUCH PROTECTIVE ORDER IS SUBJECT TO THE FULL CONTEMPT POWER OF THE COURT AND MAY BE GUILTY OF A CRIME.

(6) Unless otherwise provided by order of this Court, no additional copies of the tape or any portion of the tape shall be made without prior court order.

(7) The tape shall not be given, loaned, sold, or shown to any person except as provided by this order or by subsequent order of this Court.

(8) Upon final disposition of this case any and all copies of the tape and any transcripts thereof shall be returned to the Court for safekeeping, except those tapes booked into and kept as evidence by the investigating law enforcement agencies. Those materials subject to this order so kept by any law enforcement agency shall remain subject to this order and those materials shall remain secured in evidence in accordance with the agency’s policies and procedures.

(9) This protective order shall remain in full force and effect until further order of this Court.

(e) Additional Protective Orders. The court may, on its own motion, or on the motion of any party, the child, the child’s parents or guardian, or the child’s guardian ad litem, enter any protective orders needed to protect the child’s privacy in addition to the protective order required by subdivision (d). A protective order may protect any record on a child.
(f) **Publication of Identity Unlawful.** Whoever publishes or causes to be published in any format the name, address, phone number, school, or other identifying information of a child who is or is alleged to be a victim of crime, or a member of the child’s family, or who violates the protective order set forth in subdivision (d) shall be guilty of a misdemeanor.

(g) **Physical Safety of Child; Exclusion of Evidence.** A child has a right at any court proceeding not to testify regarding personal identifying information including the child’s name, address, telephone number, school, and other information that could lead to the whereabouts of the child or the child’s family. The court may require the child to testify regarding personal identifying information that is required to be disclosed in the interest of justice.

(h) **Unauthorized Release Does Not Bar Prosecution.** Any release of information in violation of this section does not bar prosecution or other legal action or provide grounds for dismissal of charges.

(i) **Destruction of Videotapes and Audiotapes.** Any videotape or audiotape of a child produced under the provisions of this Code or otherwise made part of the court record shall be destroyed after five years have elapsed from the date of entry of judgment or other disposition; Provided, however, that if an appeal is filed, the tape shall not be destroyed until a final judgment on appeal has been rendered.

(j) **Disclosure of Defendant’s Name.** The name of the defendant shall be available as part of the record to the extent permitted by law whether or not the defendant is a member of a child victim’s family.

§ 42 **Multidisciplinary Team Investigation; Interviewing**

(a) Every county, or combination of counties, in the state shall create and maintain one or more multidisciplinary teams to investigate child abuse and interview children who witness abuse or who may be victims of abuse.

(b) Every county, or combination of counties, in the state, in conjunction with appropriate state, local, and private agencies, shall provide ongoing training to professionals who interview children. Training shall be provided to multidisciplinary teams and other professionals who interview children.

(c) Whenever it is necessary to interview a child regarding possible child abuse, efforts shall be made to have the child interviewed by a professional with training and experience interviewing children.
§ 43 Videotaping and Audiotaping Investigative Interviews

(a) Whenever child abuse is suspected and a child is interviewed by a member of a multidisciplinary team or a representative of law enforcement or child protective services, the interview shall be videotaped unless exigent circumstances render videotaping extremely difficult or impossible. If an interview is not videotaped, the interview shall be audiotaped unless audiotaping is impossible due to lack of proper equipment or an emergency.

(b) The requirements of this section regarding videotaping and audiotaping pertain to in-depth investigative interviews, commonly called disclosure interviews, where the goal of questioning is to determine whether child abuse occurred. Nothing in this section shall be construed to require videotaping or audiotaping of brief field contacts between children and representatives of law enforcement or child protective services that do not constitute in-depth investigative interviews.

(c) The fact that an investigative interview is or is not videotaped or audiotaped may be considered in determining the reliability of a child’s statements describing abuse.

(d) The fact that an investigative interview is not videotaped or audiotaped as required by this section shall not by itself constitute a basis to exclude from evidence a child’s out-of-court statements or testimony.

§ 44 Corroboration of Children’s Testimony

Except as provided in section 40(a)(2)(B) of this Code, corroboration shall not be required of a child’s testimony, and a child’s testimony, if believed, shall be sufficient to support a finding of fact, conclusion, or verdict.

§ 45 Jury Instruction Regarding Child Witness

In any proceeding in which a child testifies as a witness, upon the request of a party, the court shall instruct the jury, as follows:

In evaluating the testimony of a child you should consider all of the factors surrounding the child’s testimony, including the age of the child and any evidence regarding the child’s level of cognitive development. Although, because of age and level of cognitive
development, a child may perform differently as a witness than an adult, that does not mean that a child is any more or less credible a witness than an adult. You should not discount or distrust the testimony of a child solely because the witness is a child.\textsuperscript{243}

§ 46 Severability

If any provision of this Child Witness Code or its application to any person or circumstance is held invalid, the remainder of the Code or the application of the provision to other persons or circumstances is not affected.

\textsuperscript{243} See CAL. PENAL CODE § 1127F (West 1995).