those who shape national policy. Those two elements are crucial to the preservation of that healthy balance which uniquely marks our federal system.

RESPONDING TO CHILD SEXUAL ABUSE AND EXPLOITATION: THE KENTUCKY APPROACH

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I. INTRODUCTION

The growing public awareness of the prevalence of child sexual abuse has only recently been accompanied by increased sensitivity to the trauma that the child victim experiences from the criminal justice system itself. In Kentucky, this has resulted in broad-based, extensive efforts to increase the protections afforded to the most vulnerable citizens of the Commonwealth. These efforts are based upon the simple principle that victims, particularly child victims of sexual abuse and exploitation, also have rights. They have the right to personal safety at home, at school, and at play. They have the right to call upon government for protection from those who would physically and emotionally exploit them. They have the right to be taken seriously in court and to be spared, as much as possible, the trauma associated with a legal process which often is terrifying even to adults. Who would deny our children these rights? And yet, as experience shows, in many states these rights *are* limited or denied simply because the citizens of that state have failed to act.

Kentucky is in the forefront of those states which have chosen to aggressively respond to the growing tragedy of child sexual abuse and exploitation.[1] It did not get there by accident. Ken-

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The opinions expressed in this article are solely those of the authors.

1. Perhaps the most pertinent indicator of this response which can be easily compared to other states is legislation. Kentucky has long taken the lead. As of May, 1985, Kentucky was one of only 17 states to allow videotaped testimony by child sexual abuse victims, and one of only four states to provide a special hearsay exception for videotaped interviews of child sexual abuse victims. Bulkley, *Evidentiary and Procedural Trends in State Legislation and Other Emerging Legal Issues in Child Sexual Abuse Cases*, 89 DICK. L. REV. 645, 666-668 (1985). This legislation was enacted by the Kentucky General Assembly in 1984 and will be discussed in detail below.

tucky's national reputation for innovation and commitment in this area was forged through the inspiration and dedication of leaders at the state and local levels, comprehensive legislation enacted in the last two sessions of the Kentucky General Assembly, the efforts of many volunteers, and the strong support of the general public. Because funding for new programs has remained virtually nonexistent, Kentucky has focused on innovation to meet funding requirements at little or no cost to the taxpayer, local leadership to assure local participation united with an approach appropriate to the community, and statewide advocacy, training, and coordination. In adopting this comprehensive approach to the social and legal issues of child sexual abuse and exploitation, Kentucky has set a standard for other states to follow and improve upon. Moreover, the Commonwealth continues to actively build upon its initial success. It is certain that the problem of child sexual abuse and exploitation will not disappear, but the demands of prevention, advocacy, and moderation of the legal process to accommodate the child victim can be squarely faced.

Much has been written on the rise in reported incidents of child sexual abuse in recent years.[2] Studies may be conflicting and it is often difficult to make valid comparisons between child and sexual abuse reporting in the various states. However, the broad dimensions of the crisis of child abuse, and, more specifically, child sexual abuse, are well known. In the past decade, annually reported instances of child maltreatment made to public agencies increased dramatically from 669,000 in 1976 to over 1.9 million in 1985.[3] Approximately twelve percent of the 1985 reports involved child sexual abuse allegations.[4] Although not all of these reports will be confirmed, it is estimated that at least 100,000 children are sexually abused or molested in the United States each year.[5] This means that one out of four girls and one

2. Note, *Parent-Child Incest: Proof at Trial Without Testimony in Court by the Victim*, 15 U. MICH. J.L. REF. 131, 131-132 n.5 (1981). As the American Bar Association concluded, there "is considerable debate over whether there are more instances of child abuse in recent years or simply more cases coming to our attention." *Guidelines for the Fair Treatment of Child Witnesses in Cases Where Child Abuse is Alleged*, 1985 A.B.A. SEC. CRIM. JUST. 7 [hereinafter *Guidelines*].

3. *Highlights of Official Child Neglect and Abuse Reporting 1985*, 1987 AM. HUMANE A. 3.

4. *Id.* at 16.

5. KENTUCKY CHILD SEXUAL ABUSE AND EXPLOITATION PREVENTION BOARD, ANNUAL REPORT 1 (1986) [hereinafter 1986 ANNUAL REPORT].

out of eight boys will be sexually abused or molested sometime during their childhood.[6]

The problem is equally serious in Kentucky. Between 1977 and 1984 reports of general child abuse and neglect increased threefold.[7] In 1984, of every thousand Kentucky two-year-olds, "19 were known victims of neglect, six were physically abused, two were mentally or emotionally abused, and one was sexually abused."[8] In Kentucky, from July 1, 1984 to June 30, 1985, there were 3,456 reported cases of child sexual abuse, with nearly 2,000 of these being substantiated cases.[9] This is "an increase of 1,300 reported cases over the same twelve-month period one year earlier."[10] Undoubtedly an increase of this size results primarily from heightened public awareness and willingness to report such incidents,[11] but by the same token it is believed that, as in years past, a substantial number of molestations continue to go unreported.

Kentucky has responded to the challenge of child sexual abuse and exploitation in four ways. First, through local *prevention programs*, run primarily by volunteers and aimed at a specific community. Second, through the improvement and coordination of statewide *advocacy* on behalf of victims, but particularly child victims, through the Attorney General's Office and the offices of local prosecutors. Third, through *legislation*. Beginning in the 1984 session, the Kentucky General Assembly enacted far-reaching legislation moderating the demands of the legal process upon the child victim and providing for the funding of local prevention programs. It also passed the Victims' Bill of Rights, which is intended to insure that all victims of crime will be treated with

6. *Id.*

7. G. BONHAM, KENTUCKY CRIMINAL JUSTICE STATISTICAL ANALYSIS CENTER, CHILD ABUSE AND NEGLECT IN KENTUCKY: 1978-1984, EXECUTIVE SUMMARY NO. 2, 1 (1985).

8. *Id.* at 2.

9. 1986 ANNUAL REPORT, *supra* note 5, at 1.

10. *Id.*

11. "Many professionals contend, and the Child Sexual Abuse and Prevention Exploitation Board believes, that the increase in reporting is a result of the efforts of primary prevention programs. Typically, these prevention programs focus on acceptable and unacceptable touching. They teach children how to say 'NO' and give them permission to tell someone about the abuse." KENTUCKY CHILD SEXUAL ABUSE AND EXPLOITATION PREVENTION BOARD, ANNUAL REPORT AND STATE PLAN FOR THE CHILD VICTIMS' TRUST FUND 2 (1987) [hereinafter 1987 ANNUAL REPORT AND PLAN FOR CHILD VICTIMS' TRUST FUND].

compassion, dignity, and simple courtesy by Kentucky's criminal justice system. Finally, active *litigation* upholds and further defines the extent to which the rights of the child victim can be balanced with the rights of the criminal defendant.

II. Prevention and Advocacy

The prevention of child abuse and exploitation,[12] particularly child sexual abuse, is the first line of defense in the protection and continuing well-being of Kentucky's innocent children. It is also the critical first step in breaking the cycle of abuse that passes from generation to generation, since more than eighty percent of child abusers were themselves abused as children.[13] The state's obligation to its youngest citizens is that of *parens patriae*, the ultimate parent, and is strongest where its charges, by virtue of their age, are most vulnerable.[14] To fulfill this obligation the Kentucky General Assembly established the Child Victims' Trust Fund[15] and the Child Sexual Abuse and Exploitation Prevention Board.[16]

A. The Child Victims' Trust Fund

The Child Victims' Trust Fund was created to provide a central source of funding for local, independently managed projects which would normally be beyond the resources of all but the wealthiest communities. As enacted, the Child Victims' Trust Fund was created as a separate fund in the office of the state treasurer.[17] However, no money is appropriated from the General Fund and no additional burden is placed on the Kentucky taxpayer. All money that goes into the Trust Fund is derived from a voluntary

12. "Child abuse" is a general term denoting many types of physical, emotional, and sexual abuse or neglect of minors. Sexual abuse is more narrowly defined in the Kentucky Revised Statutes as the touching of sexual organs or intimate parts of another by forcible compulsion (use of actual physical force or the threat of such force) or when such activity occurs with one who is incapable of consent because of age or physical helplessness. Ky. Rev. Stat. Ann. § 510.110 (Michie 1985). Sexual exploitation refers to the use of minors in sexual performances such as films, peep-shows, photographs, dancing, or any other visual representation exhibited before an audience. *id.* § 531.300-.370 (Michie 1985).

13. 1986 Annual Report, *supra* note 5, at 1.

14. *See* Commonwealth v. Ludwig, 366 Pa. Super. 361, 531 A.2d 459, 465 (1987) (petition for allowance of appeal pending) (Montemuro, J., concurring).

15. Ky. Rev. Stat. Ann. § 41.400 (Michie 1986).

16. *Id.* § 15.900-940 (Michie 1985).

17. *Id.* § 41.400(1) (Michie 1986).

state tax refund check-off, grants from the federal government, or from charitable contributions by business, industry, private groups, and individuals.[18] During its first year, despite limited promotion due to time constraints, over $135,000 was raised from the check-off on 1984 Kentucky tax returns.[19] This rate of return "represents a participation rate of 4.5% among taxpayers receiving refunds. The national norm for similar trust funds is 1 percent."[20] The tax refund check-off has continued this impressive performance in subsequent tax seasons.[21] Donations by groups and individuals have also been significant.[22] Substantial funding now exists to sponsor local programs of education and training dedicated to preventing child abuse and exploitation.

B. The Child Sexual Abuse and Exploitation Prevention Board

The Child Victims' Trust Fund is administered by the Child Sexual Abuse and Exploitation Prevention Board, which reviews and awards grants to nonprofit organizations devoted to child sexual abuse and exploitation prevention activities. By statute, the Board is composed of the Attorney General, the Secretary of the Human Resources Cabinet, the Secretary of the Finance and Administration Cabinet, the Superintendent of Public Instruction, the Commissioner of the Kentucky State Police or their designees, and ten members of the public appointed by the

18. *Id.* § 41.400, 15.930 (Michie Supp. 1985 & 1985). Originally, the Kentucky Form 740 taxpayer could contribute only $2.00 of his refund ($4.00 if filing jointly). During the 1986 General Assembly, the statute was amended to allow the donation of any amount, up to the full amount of the refund, if desired. The General Assembly chose to terminate the refund check-off privilege when the state treasurer certifies that the assets in the trust fund exceed twenty million dollars ($20,000,000). *id.* § 141.440(1) (Michie Supp. 1986). After that time, disbursements from the fund are limited to the earnings as provided by KRS § 41.400(4) (Michie 1986).

19. 1986 Annual Report, *supra* note 5, at 3.

20. *Id.*

21. 1987 Annual Report and Plan for Child Victims' Trust Fund, *supra* note 11, at 13.

22. To date, the largest single contributor has been the Kentucky Chapter of the American Telephone Pioneers. This organization adopted the program as its statewide charitable endeavor for two years and has contributed over $40,000 to the Child Victims' Trust Fund. Not all contributions are financial. The Louisville Ad Club, for example, developed materials and public service announcements to be used in the promotion of the trust fund. The public service announcements were broadcast during high usage times on television stations throughout Kentucky. Other organizations and individuals gave generously of their time and money to stimulate interest in the fund and to promote the check-off provision. 1986 Annual Report, *supra* note 5, at 3-4.

Governor.[23] The Board is charged with developing a biennial, state-wide plan for the distribution of funds from the trust fund which is sent to the General Assembly and the Governor.[24] Additionally, the Board develops criteria for grant recipients; reviews, approves, and monitors the Trust Fund money used by these recipients at the local level; coordinates and provides for the exchange of information among these groups; establishes procedures for the evaluation of the performance of the state board at all levels; and, lastly, performs various statewide educational, training, and public awareness functions.[25]

The activities of the Child Sexual Abuse and Exploitation Prevention Board described above are performed continuously. A collateral but significant secondary activity is to make recommendations to the Governor and the General Assembly regarding "changes in state programs, statutes, policies, budgets, and standards which will reduce the problem of child sexual abuse and exploitation, improve coordination among state agencies that provide prevention services and improve the condition of children and parents or guardians who are in need of prevention program services."[26]

The primary channel through which the Child Victims' Trust Fund money is put to use in a specific geographical area—typically one or two counties—is the local task force. The local task force serves as the Board's eyes and ears in local communities, making sure that the prevention programs and messages are appropriate and that there is no duplication of existing community services.[27] Although they are themselves authorized

23. KY. REV. STAT. ANN. § 15.910(1)(a), (b) (Michie 1985). Guidelines for the Governor's appointment of public members were established as follows:

> It is recommended that, as a group, the public members shall demonstrate knowledge in the area of child sexual abuse and exploitation prevention; shall be representative of the demographic composition of this state; and, to the extent practicable, shall be representative of all the following categories: parents, school administrators, law enforcement, the religious community, professional providers of child sexual abuse and exploitation prevention services, and volunteers in child sexual abuse and exploitation prevention services.

Id. § 15.910(1)(b) (Michie 1985). The term of each public member is three years. *id.* § 15.910(2) (Michie 1985).

24. *Id.* § 15.920 (1)(b) (Michie 1985).

25. *Id.* § 15.920(1)(c)-(g) (Michie 1985).

26. *Id.* § 15.925 (Michie 1985).

27. 1986 ANNUAL REPORT, *supra* note 5, at 9.

to receive trust fund grants, the normal role of the local task force, where it exists, is to review grant applications from its service area to be submitted for Board consideration.[28] Because not all areas have local task forces, their encouragement and development is considered to be a critical element in the work of the Board.[29]

By the end of 1987, forty-one Kentucky counties have been or are presently being served by trust fund grants in one form or another.[30] Local projects have directly reached over 37,000 students and 16,000 adults.[31] The formation of new local task forces is a continuing priority.[32] As of December, 1987, a total of over $175,000 had been allocated to thirty-three separate local child sexual abuse and exploitation prevention projects.[33]

Assisting the Board is the Victims' Advocacy Division of the Attorney General's Office. The Division was created in 1985 through a reorganization of resources already existing in the Department of Law.[34] It serves as staff to the Child Sexual Abuse and Exploitation Prevention Board,[35] and as an information clearinghouse and resource center for victims' concerns. Although many of the functions of the Division apply to all victims of crime, special attention is paid to the needs of child victims, particularly victims of sexual abuse and exploitation.[36] Another of its major functions is to develop and lobby for victims' legislation. Efforts by this division were instrumental in the passage of the Kentucky Victims' Bill of Rights in 1986.[37] In addition, the

23. *Id.*

29. *Id.*

30. 1987 ANNUAL REPORT AND PLAN FOR CHILD VICTIMS' TRUST FUND, *supra* note 11, at 11.

31. *Id.*

32. *Id.* at 12.

33. *Id.* at 11.

34. COMMONWEALTH OF KENTUCKY DEPARTMENT OF LAW, BIENNIAL REPORT 1983-85, 18 (1985) [hereinafter BIENNIAL REPORT 1983-85].

35. In this capacity the division staff monitor the implementation of programs and projects financed in part at the local level and by the Child Victims' Trust Fund. The division is also involved in developing local task forces in communities where there is interest in developing such programs.

36. BIENNIAL REPORT 1983-85, *supra* note 34, at 55.

37. COMMONWEALTH OF KENTUCKY DEPARTMENT OF LAW, BIENNIAL REPORT 1985-87, 20 (1987) [hereinafter BIENNIAL REPORT 1985-87]. The Kentucky Victims' Bill of Rights, KY. REV. STAT. ANN. § 421.500-550 (Michie Supp. 1986), outlines a victim's rights during the legal process. These rights include the right to be promptly notified of changing court

Victims' Advocacy Division conducts statewide educational seminars and conferences on the prevention of child sexual abuse and the necessity for accommodations during the legal process to prevent further trauma to the child.[38]

Finally, the Criminal Appellate Division of the Attorney General's Office is responsible for upholding challenged legislation and favorable court precedents. A special unit of this division was created to handle all child sexual abuse cases. Attorneys in this unit not only are more familiar with this rapidly developing area of the law, but can also anticipate potential issues for review and provide training for local prosecutors. This familiarity and training is instrumental in protecting recent gains simply because there are aspects of recent child victims' legislation which are controversial. This is particularly true where, at least arguably, the rights of the child victim are being balanced against the constitutional rights of the criminal defendant. Some critics have presumed that every gain for the child victim represents an equivalent loss for the defendant. These critics charge that special legislation and procedures to lessen the trauma of the criminal justice system upon the young victim have stripped the criminal defendant of important constitutional guarantees. There is, however, no compelling rationale to view this balancing of rights as a "zero sum" game in which one side must lose if the other gains. The goal of the criminal justice system is to reveal and act upon the truth. Where the trauma to the child can be constitutionally lessened, enabling the child victim/witness to reveal the truth as he or she understands it, this goal is furthered. Proponents of increasing protections for Kentucky's children even beyond those in place today, including the authors of this Article, are convinced not only that such accommodations are necessary and constitutional, but also that victims, innocent defendants, and the criminal justice system are benefited. This is one of the more dynamic challenges in the law today—the protection of the child victim

dates, judicial proceedings, and other actions which affect the status of the defendant such as bail or parole hearings; to submit a victim impact statement to the court at the time of sentencing and to be consulted regarding any ultimate resolution of the case short of conviction, such as dismissal or plea negotiations. Victims shall also be notified of appellate proceedings and a victim impact statement may be submitted to the parole board. *id.* §§ 421.500(5)(6)(10) and 421.521-530 (Michie Supp. 1986).

38. BIENNIAL REPORT 1985-87, *supra* note 37, at 19.

from the trauma of the legal process while preserving the constitutional rights of the defendant.

III. PROTECTING THE CHILD VICTIM FROM THE LEGAL PROCESS—LEGISLATION AND LITIGATION

"[J]ustice, though due to the accused, is due to the accuser also."[39]

Conflicts between the constitutional interests of victims and defendants come into sharpest focus in child sexual abuse prosecutions. The only eyewitness to the crime is often a child of tender years who has been betrayed by a powerful, trusted adult. Perhaps for this reason the criminal justice system has been slow to recognize that procedural accommodations can be made to reduce the trauma inherent whenever an abused child enters the legal process as an accuser—often the only accuser.[40] This "second victimization," however, is largely unnecessary. While there will always be difficult, even traumatic moments for the child who must testify in court, this trauma can be reduced without infringing upon the rights of the defendant. Again, Kentucky is in the forefront of the states in providing the extra layer of protection that the child victim of sexual abuse needs. Legislation has been enacted by the General Assembly and active litigation by the defense bar and the Office of the Attorney General continues to define the constitutional boundaries. A new and decidedly altered constitutional balance is being struck as courts and legislatures increasingly moderate the traditional demands of the legal process to accommodate this special class of victims.

A. The Need For Special Accommodation

From the first moment of victimization, the sexually abused child lives in a world of shame, false guilt, and fear. It is an experience shared by far too many children. One study has concluded that ten percent of males and perhaps twenty-five

39. Snyder v. Massachusetts, 291 U.S. 97, 122 (1934) (Cardozo, J.).

40. As early as 1969, David Libai eloquently described those "components of legal proceedings that are capable of putting a child victim under prolonged mental stress and endangering his emotional equilibrium. . . ." Libai, *The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System*, 15 WAYNE L. REV. 977, 984 (1969). It was many years before his words were heeded.

percent of females were sexually abused as children.[41] Only about six percent of the perpetrators are strangers.[42] These figures are estimates because the actual incidence of child sexual abuse is believed to be substantially underreported, "largely because of the trauma of pre-trial and trial procedures for the complaining witness."[43] Furthermore, child sexual abuse is fundamentally different from the way most adults experience sexual assault.[44] The crime typically does not involve a sudden overpowering by a stranger. Instead, the children "are usually persuaded and tricked by known, and often trusted, adults into repeated sexual activity over extended periods of time."[45] Because of the inherent violation of authority and trust, the child victim is typically frightened at having to face the molester again.[46] The psychological damage is more severe if the child must testify against a person he knows than against a stranger.[47] This damage may be compounded where, as some studies show, between forty and sixty-five percent of reported sexual abuse cases involve parents.[48] Fear of retaliation is especially likely if the offender is an acquaintance or relative.[49] In sexual abuse cases, studies suggest, repeated court appearances compound the trauma of public testimony and can be damaging.[50] Although the National Center on Child Abuse and Neglect reported in 1981 that the average age of a victim of child sexual abuse was between eleven and fourteen, more recent data from one program showed that one-third of the victims were

41. METROPOLITAN COURT JUDGES COMMITTEE, *Deprived Children: A Judicial Response* 7 (1986) [hereinafter METROPOLITAN COURT JUDGES COMMITTEE] (citing Finkelhor, "Sexual Abuse: A Sociological Perspective," paper presented at the Third International Conference on Child Abuse and Neglect, Amsterdam, 1981).

42. Russell & Trainor, *Trends in Child Abuse and Neglect: A National Perspective*, 1984 AM. HUMANE A. 35.

43. Parker, *The Rights of Child Witnesses: Is the Court a Protector or Perpetrator?*, 17 NEW. ENG. L. REV. 643, 645 (1982) (citing DeFrancis, *Protecting the Child Victim of Sex Crimes Committed by Adults*, 35 FED. PROBATION 15, 17 (September 1971)).

44. Berliner, *The Child Witness: The Progress and Emerging Limitations*, 40 U. MIAMI L. REV. 167, 167-168 (1985).

45. *Id.* at 168.

46. Parker, *supra* note 43, at 651.

47. *Id.* at 646, 653.

48. Note, *supra* note 2, at 131 n.5.

49. Parker, *supra* note 43, at 651.

50. *Id.* at 652; Minnesota Developments, *Defendants' Rights In Child Witness Competency Hearings: Establishing Constitutional Procedures For Sexual Abuse Cases*, 69 MINN. L. REV. 1377, 1390 (1985).

under age six.[51] Like the plight of victims of crime generally, the child victim, no matter how young or how fragile, was simply expected to go along. This was the system that, in 1982, the Chairman of the President's Task Force on Victims of Crime described as a "national disgrace."[52]

Since that time the need for extensive reform in the handling of child victims has been recognized by the American Bar Association,[53] the United States Attorney General's Task Force on Family Violence,[54] the more than 2,000 members of the National Council of Juvenile and Family Court Judges,[55] and the United States Attorney General's Advisory Board on Missing Children,[56] among others. The Attorney General's Task Force on Family Violence summarized the necessity for accommodation aptly:

> Children are especially vulnerable in the courtroom. They typically feel they are somehow to blame for their victimization. Repeating and reliving the abuse through direct testimony and vigorous cross-examination further compounds their guilt and confusion. They become the pivotal players in an unfolding adult drama they cannot understand. The initial trauma inflicted upon the very young must not recur in the courtroom. Judges should adopt special rules and procedures to enable these victims to more comfortably and effectively communicate the harm they have suffered.[57]

This perspective is supported not only by the weight of authority, but by common sense and experience.

The impact of the legal process upon the child victim of sexual abuse is most evident in two areas. First, there is the sheer

51. Bulkley, *supra* note 1, at 647. For additional statistical references, see Note, *supra* note 2, at 133 n.8.

52. PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT vii (1982) (statement of Lois Haight Herrington). "Somewhere along the way, the system began to serve lawyers and judges and defendants, treating the victim with institutionalized disinterest." *id.* at vi. *See generally* Carrington and Nicholson, *The Victim's Movement: An Idea Whose Time Has Come*, 11 PEPPERDINE L. REV. 1 (1984) (highlighting the growing strength and importance of the victims' movement in the 1980s).

53. *Guidelines*, *supra* note 2, at 8-10.

54. UNITED STATES ATTORNEY GENERAL'S TASK FORCE ON FAMILY VIOLENCE, FINAL REPORT 37-40 (1984).

55. METROPOLITAN COURT JUDGES COMMITTEE, *supra* note 41, at 13-17.

56. UNITED STATES ATTORNEY GENERAL'S ADVISORY BOARD ON MISSING CHILDREN, AMERICA'S MISSING AND EXPLOITED CHILDREN: THEIR SAFETY AND THEIR FUTURE 23-25 (1986). During his tenure as Kentucky Attorney General, co-author David L. Armstrong was Vice Chairman of the Advisory Board on Missing Children.

57. UNITED STATES ATTORNEY GENERAL'S TASK FORCE ON FAMILY VIOLENCE, *supra* note 54, at 38.

number of times the victim is required to tell his or her story: to social workers, investigators, prosecutors, defense counsel, at preliminary hearings, and finally, at trial. This repeated interviewing is not only damaging to the victim but is also sharply criticized by the defense bar. When improperly done, this repetition may unintentionally mold the child's perception of what actually occurred.[58] A second form of trauma occurs because, among child sexual abuse victims, the most frequently mentioned fear was facing the defendant.[59] For both of these reasons, child advocates strongly recommend the use of videotaping, closed-circuit television and other screening techniques to lessen the trauma of testifying for the child sexual abuse victim and to enhance the reliability of the testimony.[60] "Whether the courtroom experience is traumatic or therapeutic depends in large measure on the attitude of the court itself toward modifying the proceedings as necessary to accommodate the needs of child victims and witnesses."[61] Modifications are necessary because the *risk* of trauma is present in all cases and in many cases is substantial.[62]

The use of modern technology and revised procedures to protect and reassure the young victim of sexual abuse during the prosecution of the adult defendant is one of the most significant steps taken by the Kentucky General Assembly to aid the innocent victim of crime. Such advancements, however, are tempered by the defendant's rights, particularly the right of confrontation. It is against this backdrop that the use of videotaped interviews

58. Underwager and Wakefield, *Interviewing the Alleged Victim in Cases of Child Sex Abuse: The Role of the Psychologist*, 11 THE CHAMPION 17, 24-25 (January/February 1987) (This is the official journal of the National Association of Criminal Defense Lawyers).

59. U.S. DEPARTMENT OF JUSTICE, WHEN THE VICTIM IS A CHILD: Issues for Judges and Prosecutors 17, 49 (1985).

60. Arthur, *Child Sexual Abuse: Improving the System's Response*, 37 JUV. & FAM. CT. J. 1, 30-33 (1986).

61. *Guidelines*, *supra* note 2, at 19.

62. "For a small girl to have to talk about an intimate experience is painful. . . . To be cross-examined by lawyers trying to discredit her, however gently, is painful. To repeat it in a large courtroom with twelve jurors staring at her, and an armed and uniformed bailiff and a judge sitting above her all in black is painful. Each of the pains may be as traumatic as the incident itself, often more so. The pains can be reduced." Arthur, *supra* note 60, at 30. For a compilation of important papers regarding almost all aspects of legal reforms in child sexual abuse prosecutions, see NATIONAL LEGAL RESOURCE CENTER FOR CHILD ADVOCACY AND PROTECTION, PAPERS FROM A NATIONAL POLICY CONFERENCE ON LEGAL REFORMS IN CHILD SEXUAL ABUSE CASES (1985).

at trial, videotaped depositions, closed-circuit TV broadcasts of live testimony, and other innovations such as screening, a child's hearsay exception, and a speedy trial right for child victims, have been advocated and adopted. These innovations are now being scrutinized by the states' and the nation's highest courts.

B. *Videotaped Interviews*

One area of common agreement for both prosecutors and the defense bar is the need to avoid repeated interviewing of the child victim. In the view of defense attorneys, repeated interviews by social workers, prosecutors and others may greatly diminish the reliability of the child's testimony.[63] Under this theory, each interview unconsciously molds the testimony of the child in the direction the interviewers want it to take.[64] For prosecutors, repeated interviewing is recognized as potentially harmful to the witness and lends strength to the defense claim that the child has been "rehearsed." The fact of repeated interviews is no idle conjecture. Two researchers reported that in some cases they had seen, the children had been "interviewed 30 to 50 times by up to 10 different people."[65]

Recognizing this, the 1984 Kentucky General Assembly enacted a statute providing that a videotaped oral statement of a child victim of sexual abuse, aged twelve or under, made prior to the initiation of proceedings against the defendant, is admissible into evidence provided certain criteria are met.[66] Once the statement is admitted, either party may then call the child to testify and the other party may cross-examine.[67] For the prosecutor, the advantage of the comprehensive videotaped interview is that it avoids needless repetition, protects against the witness later

63. Underwager and Wakefield, *supra* note 58, at 19-20.

64. *Id.* at 24-25.

65. *Id.* at 19.

66. KY. REV. STAT. ANN. § 421.350(1), (2) (Michie Supp. 1986). The criteria are: (1) no attorney for either party was present when the statement was made; (2) the recording is both visual and oral; (3) the statement is accurately recorded on adequate equipment run by a competent operator; (4) the recording is unaltered; (5) leading questions are not used; (6) every voice is identified and the interviewer is available to testify; (7) the defense had an opportunity to review the tape; and (8) the child is available to testify. *id.* § 421.350(2) (a)-(h) (Michie Supp. 1986).

67. *Id.* § 421.350(2) (Michie Supp. 1986).

recanting, and encourages guilty pleas. The advantage for the defense bar is that the videotaped interview can be used to highlight the inconsistencies in the child's statements, just as it may demonstrate leading or coaching. The use of the videotaped interview however, has been criticized and is subject to constitutional objections, particularly on confrontation clause grounds. State appellate courts facing this issue have not been entirely consistent in their responses. In *Long v. State*,[68] for example, a Texas appellate court held a statute very similar to Kentucky's to be an unconstitutional violation of the defendant's right to confront the witnesses against him. The fact that under the statute the child *could* be called to the stand, if desired, was deemed insufficient to protect the defendant's confrontation right. Moreover, the statute was found to be an unconstitutional violation of the defendant's right to compulsory attendance of witnesses because the burden—and onus—of calling the child to the stand was shifted to him. This same section of the Kentucky videotaping statute was challenged before the Kentucky Court of Appeals as a violation of the confrontation rights of the defendant and as an unconstitutional infringement of the inherent rights of the judiciary, but was upheld. The Kentucky Supreme Court, however, reserved judgment on the lower appellate court's decision by simply depublishing the opinion, thereby limiting its holding to that case only.[69]

These arguments were raised again in *Gaines v. Commonwealth*,[70] in which the Kentucky Supreme Court addressed the constitutionality of the statute for the first time. The court held the videotaped interview section of the statute to be an unconstitutional violation of the state constitution's provisions concerning the separation of powers.[71] Two violations were cited by the court. First, the statute "permits testimony from a child who has not been declared by the trial court competent to testify as a witness" and, second, it authorizes a "child to be a witness without first having undertaken a solemn obligation to tell the

68. 742 S.W.2d 302 (Tex. Crim. App. 1987).

69. Eastman v. Commonwealth, published in the Advance Sheets at 720 S.W.2d 348-352 (Ky. 1986). This case was depublished by the Kentucky Supreme Court in its denial of discretionary review and is not printed in the final bound volume of the official reporter.

70. 728 S.W.2d 525 (Ky. 1987).

71. KY. CONST. §§ 27 & 28.

truth. . . ."[72] Thus the failure to determine competency *or* to give the oath was considered fatal.[73] In this fashion the Kentucky Supreme Court found the statute unconstitutional without even addressing the broader confrontation clause issue. A recent case has held that *Gaines* error will not be cured by a showing of later competency or taking of the oath at trial—it is "of no consequence. . . ."[74] What if the child is found competent and given the oath *before* the interview? Only then, it appears, will the Kentucky appellate courts reach the broader constitutional issues posed by the use of the videotaped interview at trial.

Although *Gaines* has foreclosed the use of videotaped interviews at trial as a matter of general admissibility, such procedures remain beneficial and should be utilized. Not only might the use of the videotape cut down on the number of interviews to which the child is subjected, but the videotape interview itself can be useful as a prior consistent statement if the defense claims recent fabrication. On the other hand, if the child recants, the child victim's prior inconsistent statement may be admissible with a proper *Jett*[75] foundation.[76]

C. *Videotaped Depositions and Closed Circuit Testimony*

Videotaped depositions of child sexual abuse victims twelve and under are now specifically authorized, by statute, upon motion of either party, as is the one-way closed-circuit broadcast of the child's live testimony into the courtroom.[77] During the deposition or testimony, the child is specifically prohibited from hearing or seeing the defendant, although the defendant must be able to observe and hear the testimony of the child "in person" by use of one-way screening.[78] Other criteria similar to those imposed upon videotaped statements are enumerated.

72. *Gaines*, 728 S.W.2d at 527.

73. *Compare* Hardy v. Commonwealth, 719 S.W.2d 727, 728-729 (Ky. 1986) (no error in failure to administer the oath to child witness before a videotape deposition where defendant did not object and competency hearing demonstrated that child understood her moral obligation to tell the truth).

74. Ballard v. Commonwealth, 743 S.W.2d 21, 22 (Ky. 1988).

75. Jett v. Commonwealth, 436 S.W.2d 788 (Ky. 1969).

76. Hester v. Commonwealth, 734 S.W.2d 457, 459 (Ky. 1987) (dicta), *cert. denied*, 108 S. Ct. 510 (1987).

77. KY. REV. STAT. ANN. § 421.350(3)(4) (Michie Supp. 1986).

78. *Id.*

The use of the videotape itself is not novel. In *Hardy v. Commonwealth*,[79] use of videotaped depositions, taken with the defendant present, was authorized under Kentucky Rules of Criminal Procedure 7.10 and 7.12. These rules generally permit the use of a deposition where there is a prospective witness who may be "unable" to attend the trial. In *Hardy*, the child witness was determined to be "unavailable" based on affidavits from a certified psychologist and the child's physician that "her testimony in person at trial would be detrimental to the child emotionally and psychologically and might permanently endanger her psychological recovery."[80] This was held to be sufficient under the rules where there was no limit placed upon "face to face" confrontation (the defendant was present when the witness was examined) nor upon cross-examination by defense counsel.[81] The effective demonstration of "psychological unavailability"[82] for purposes of depositions under the Kentucky Rules of Criminal Procedure was a key to the holding in this case.

Use of videotaped depositions, closed-circuit live broadcasts of the child's testimony, and in-court screening of the defendant from the sight and hearing of the witness were approved by a sharply divided Kentucky Supreme Court in *Commonwealth v. Willis*.[83] Willis was charged with sexually abusing his girlfriend's five-year-old daughter. At a pre-trial competency hearing the young child made it clear that she was intimidated by Willis' presence in the hearing room. She seemed afraid that she would be hurt again and could not respond to the questioning.[84] In this

79. 719 S.W.2d 727, 728 (Ky. 1986).

80. *Id.*

81. *Id.*

82. *See* Warren v. United States, 436 A.2d 821, 830 n.18 (D.C. App. 1981), *aff'd*, 515 A.2d 208 (D.C. App. 1986) (suggested criteria for determining psychological unavailability).

83. 716 S.W.2d 224 (Ky. 1986). This case was orally argued by then Attorney General David L. Armstrong in the first personal appearance of a Kentucky Attorney General before Kentucky's highest court in more than three decades.

84. "When the child was asked why she would not respond to certain questions, she stated:

A. I don't want him—hurt me.
* * * * * * * *
Q. Somebody here you don't want to see?
A. (Witness nods affirmatively.)
Q. Who's that?
A. Uncle Leslie. (TH 9.)
* * * * * * * * * *
Q. Are you going to talk for us
A. I don't want him here. (TH 10.)
* * * * * * * * *
A. Yes. I don't want Uncle Leslie, Mommy. (TH 19.)

The trial judge was unable to rule on whether she was competent or incompetent because her answers were unresponsive." *id.* at 226.

landmark case the statute was found constitutional; it did not violate the defendant's right to "face to face" confrontation under Section 11 of the Kentucky Constitution or the sixth amendment to the United States Constitution.[85] In addition, the trial judge's observations at the hearing were sufficient to show the necessity for the videotaping procedure.[86]

Willis is significant not only because this was the first such statute to withstand constitutional challenge in a state's highest court, but also because the confrontation clause of the Kentucky Constitution, like those of many other states, uses the words "face to face." This language was initially thought to make it more difficult for the courts to uphold such statutes than under constitutions which use the word "confront."

The heart of the issue in *Willis* was whether a screening of the defendant from the witness would unduly inhibit the right to effective cross-examination embodied in the confrontation clauses of both constitutions. The four-member majority found the use of this television technology to be "the functional equivalent of testimony in court."[87] The defendant could communicate with counsel, see and hear the witness; counsel could cross-examine, and the jury could observe the demeanor of the witness. Under these conditions, where reasonable necessity for the use of these procedures is established, neither constitution was violated.[88] The majority opinion noted the extensive public hearings conducted by the legislature before it "accepted the philosophy

85. *Id.* at 227. Subsequent to *Willis* at least two other states have upheld videotaping statutes where the defendant is sight and sound screened from the child victim despite "face to face" confrontation rights under state constitution or statute. State v. Cooper, 291 S.C. 351, 353 S.E.2d 451 (1987); and Commonwealth v. Ludwig, 366 Pa. Super. 361, 531 A.2d 451 (1987).

86. *Willis*, 716 S.W.2d at 230.

87. *Id.* at 228.

88. *Id.* at 231. Although the Kentucky Constitution speaks of "face to face" confrontation, the majority noted that there "is no authority to support the proposition that ... [Kentucky's confrontation clause] should be construed more stringently than the same right in the United States Constitution." *id.* at 229.

that testifying in a formal courtroom atmosphere at a criminal trial before the defendant, judge and jury can be one of the most intimidating and stressful aspects of the legal process for children."[89] The court found that "the state has compelling interests in prosecuting crimes in which the only witness is a young, fearful and uncommunicative child and protecting that child from the prolonged ordeal of recounting the abusive acts in open court."[90] It was also suggested that the face to face language in the Kentucky Constitution need not be interpreted as requiring eyeball to eyeball contact between child witness and defendant, but may only reflect an inability to foresee modern technology whereby cross-examination can occur without physical presence.[91]

Three members of the majority joined in the main opinion and added their own concurring opinion. Dicta in this separate concurring opinion found the statutory provision which would not allow the defendant to call the child to the stand after the videotaped deposition was entered into evidence, to be "constitutionally impermissible under any circumstances."[92]

D. In-Court Screening

The use of a one-way screen during trial to prevent the child witness from seeing the defendant is not provided for by statute in Kentucky, but its use is sanctioned by dicta in *Commonwealth v. Willis*.[93] A statute requiring a child's testimony in court but permitting the trial judge to utilize a one-way screen which "does not allow the child to see or hear the party" reached the United States Supreme Court on confrontation and due process grounds.[94] *Coy v. Iowa*[95] became the first United States Supreme Court case

89. *Id.* at 227.
90. *Id.* at 230.
91. *Id.*
92. *Id.* at 233 (Leibson, J., concurring) (referring to KY. REV. STAT. ANN. § 421.350(5) (Michie 1987)).
93. *Id.* at 227, 232.
94. IOWA CODE § 910A.14(1) (Supp. 1988). The Iowa statute appears to be unique but the use of a shielding device has been repeatedly suggested by commentators. *See* Libai, *supra* note 40, at 1017; Parker, *supra* note 43, at 669.
95. 56 U.S.L.W. 4931 (U.S. June 28, 1988). Writing an *amicus curiae* brief on behalf of Iowa that was joined by 34 other states, Kentucky had argued that the confrontation clause did not require eye to eye contact, but simply an opportunity for effective cross-examination. The lower court decision is State v. Coy, 397 N.W.2d 730 (Iowa 1986). A summary of oral argument may be found at 56 U.S.L.W. 3493-94 (January 26, 1988).

to address the concept of sixth amendment confrontation as a "face to face" right involving interaction between the witness and the accused. Deferring to such diverse sources as Shakespeare and President Eisenhower, Justice Scalia, writing for the Majority, concluded that "[i]t is always more difficult to tell a lie about a person 'to his face' than 'behind his back.' "[96] The Court concluded that this interaction was a "core" confrontation right clearly violated by the screen placed between the child victim and the defendant; further, the violation of this right could not be justified by a general legislative presumption of trauma to the child victim found in the Iowa statute. Because there was no individualized showing of necessity, the Court held that the violation of the defendant's confrontation right was clear, and remanded the case back to the Iowa Supreme Court for a determination of harmless error.[97]

Although *Coy v. Iowa* broke new ground in its veneration of confrontation as a "face to face" experience, its impact upon the measures recently enacted by the Kentucky General Assembly for the protection of child victims/witnesses remains to be seen. In a concurring opinion in *Coy*, Justices O'Connor and White stressed that nothing in the Majority opinion—which they joined—necessarily prevented the use of innovations such as closed-circuit television and other protective procedures where necessity was shown.[98] Since Justice Blackmun and Chief Justice Rehnquist would have held the Iowa statute constitutional in any event, and Justice Kennedy did not participate, it is apparent that the broader constitutional questions raised by these procedures must be reserved for another day.

E. Screening of the Child Victim from the Defendant During Competency Hearings

Kentucky v. Stincer,[99] recently decided by the United States Supreme Court, was a significant victory in the moderation of what has come to be known as the "second victimization" of child sexual abuse victims. This second victimization occurs during the prosecution of the offender, when the child is forced to repeatedly

96. *Coy*, 56 U.S.L.W. at 4933.
97. *Id.* at 4934.
98. *Id.* at 4934 (O'Connor, J., concurring).
99. 107 S. Ct. 2658 (1987).

appear in court and face the perpetrator, who is most likely a member of the family or even a parent.

Sergio Stincer was indicted in 1983 for having deviate sexual intercourse with three children incapable of consent, these being an eight-year-old female, a seven-year-old female, and a five-year-old male.[100] Prior to the testimony of the two girls a hearing was held to determine whether the children were competent to testify.[101] The trial court indicated that Stincer would be returned to the courtroom while the two children were examined. Stincer's counsel did not object, and correctly informed Stincer that the scope of the hearing would be merely to "talk to the children, not about the case really but just to see if they're old enough to understand the difference between telling a lie and telling the truth...."[102] The children were examined by the trial court and counsel and were found to be competent. No questions regarding the crime or relating to Stincer's guilt or innocence were asked.[103]

At trial, in front of the jury, the same process was repeated. Both female witnesses were again asked competency questions before beginning their substantive testimony. Stincer was found

100. The charge involving the five-year-old boy was later dismissed at the request of the prosecutor because the child was too young to testify coherently.

101. A large number of states follow a similar approach when the competency of a witness is questionable. Competency hearings are automatic in these states. EATMAN AND BULKLEY, PROTECTING CHILD VICTIM/WITNESSES SAMPLE LAWS AND MATERIALS 37, 45-46 (1986). Other jurisdictions may presume competency but can hold a hearing if the child's capacity is formally placed in issue. *id.* at 38-39, 43-44.

102. *Stincer*, 107 S. Ct. at 2670 n.1 (Marshall, J., dissenting). In Kentucky the standard for competency is whether the child is of sufficient intelligence to observe, recall and narrate facts, and has a moral sense of obligation to tell the truth. Capps v. Commonwealth, 560 S.W.2d 559, 560 (Ky. 1977). Typical *voir dire* questions require recollection and narration of these past facts such as home address, age, names of relatives, teachers and the like. *See* Comment, *The Competency Requirement For The Child Victim of Sexual Abuse: Must We Abandon It?*, 40 U. MIAMI L. REV. 245, 263 (1985). Children are asked their understanding of the truth and whether they will tell the truth. Reported decisions reflect a common practice of *voir dire* examination in chambers or otherwise outside the presence of a jury. Commonwealth v. Willis, 716 S.W.2d 224, 226 (Ky. 1986); Payne v. Commonwealth, 623 S.W.2d 867,878 (Ky. 1981); *Capps*, 560 S.W.2d at 560; Hendricks v. Commonwealth, 550 S.W.2d 551, 554 (Ky. 1977).

103. During trial, an additional competency hearing was held concerning a four-year-old boy who had witnessed the incident. Stincer either was present or made no request to be present—the record is silent and no issue was raised on appeal. It is to this hearing that two of the Kentucky Justices refer when they criticize the asking of questions on substantive testimony during a competency hearing. Stincer v. Commonwealth, 712 S.W.2d 939, 942 (Ky. 1986) (Wintersheimer, J., dissenting).

guilty and was sentenced to twenty years imprisonment.[104]

On direct appeal, the Kentucky Supreme Court, in a 5-2 decision, held that Stincer's exclusion from the competency hearing violated the confrontation clauses of the United States and Kentucky Constitutions.[105] The Kentucky Supreme Court stated that the competency hearing was a crucial phase of the trial because if it were determined that the children could not testify, the prosecution's case would fall apart.[106] Because of the importance of this ruling, both in Kentucky and nationally, the Office of the Attorney General sought review from the United States Supreme Court; certiorari was granted December 8, 1986.[107]

Kentucky argued that the confrontation clause of the United States Constitution could not be extended to cover a preliminary hearing where the guilt or innocence of the defendant was not at stake and where the right to full and complete confrontation at trial was preserved. The Commonwealth also argued that due process was not implicated by the Kentucky trial court's action because Stincer's absence from the competency hearing bore no reasonably substantial relationship to his opportunity to defend himself against the charges. Counsel for Stincer argued that to exclude the defendant from the competency hearing would pro-

104. *Id.* at 940.

105. *Stincer*, 712 S.W.2d at 939. In addition to Kentucky, four state courts had considered the identical question of whether the sixth amendment was violated by holding a competency hearing for a child witness outside the presence of the accused. All four cases involved child sexual abuse victims. All four courts concluded there was no violation of the confrontation clause. State v. Ritchey, 107 Ariz. 552, 490 P.2d 558 (1971); People v. Breitweiser, 38 Ill. App. 3d 1066, 349 N.E.2d 454 (Ill. App. Ct. 1976); Moll v. State, 351 N.W.2d 639 (Minn. App. 1984) (exclusion of both defendant *and* counsel); State v. Taylor, 103 N.M. 189, 704 P.2d 443 (Ct. App. 1985).

106. *Stincer*, 712 S.W.2d at 940-941. There are many phases of any criminal prosecution at which the defendant has no right of presence but at which decisions crucial to the prosecution's case will be made. Many an informal interview has convinced a prosecutor that the child witness was too vulnerable, too scared, or would simply be too traumatized by the courtroom experience to be utilized, and so the case is dropped. *See* State v. Sheppard, 197 N.J. Super. 411, 417, 484 A.2d 1330, 1333 (N.J. Super. Ct. Law Div. 1984) (out of 75-80 child sexual abuse cases reviewed in a local prosecutor's office, nearly ninety percent "were dismissed as a result of problems attending the testimony of children, who could not deal with the prospect of facing fathers, stepfathers, relatives, and strangers in a courtroom setting").

107. 107 S. Ct. 642 (1986) (granting certiorari). In his first written opinion from the bench, newly-confirmed Justice Antonin Scalia denied the Commonwealth's application for a stay of the Kentucky Supreme Court's decision based upon his belief that certiorari would not be granted. Kentucky v. Stincer, 107 S. Ct. 7 (1986) (denial of application for stay).

foundly diminish existing confrontation clause rights and result in a denial of due process. Both sides presented considerable authority both for and against the proposition that repeatedly facing the offender was demonstrably harmful to the child.[108]

On June 19, 1987 a six-member majority of the United States Supreme Court reversed the Kentucky Supreme Court and held that neither the confrontation clause nor due process was implicated by the defendant's exclusion from the competency hearing.[109] Reiterating its previous holdings that the fundamental purpose of the confrontation clause is to advance the truth-finding function of the criminal trial through the protection of the defendant's right to cross-examination, the Court dismissed Stincer's confrontation claims.

> There was no Kentucky rule of law, nor any ruling by the trial court, that restricted respondent's ability to cross-examine the witnesses at trial. Any questions asked during the competency hearing, which respondent's counsel attended and in which he participated, could have been repeated during direct examination and cross-examination of the witnesses in respondent's presence.[110]

Moreover, since the competency questions (How old are you? Where do you go to school? etc.) did not relate to the guilt or innocence of the accused, they would have been easy to repeat at trial, and indeed, were substantially repeated. Under these circumstances, the Court held, there was no violation of the confrontation clause.[111] Nor was Stincer's due process argument of constitutional significance since, due to the limited nature of the competency hearing, there was no reasonably substantial relationship between Stincer's presence at the hearing and his ability to defend against the charges at the later trial.[112]

The ruling of the United States Supreme Court in *Kentucky v. Stincer* makes clear the standard by which the balancing of the rights of child victim and criminal defendant are to be judged under confrontation clause and due process analysis. As such, it

108. Many of the authorities found in Brief for Petitoner, Kentucky v. Stincer, 107 S. Ct. 2658 (1987) (No. 86-572) and in Brief for Amici Curiae, Coy v. Iowa, 56 U.S.L.W. 4931 (U.S. June 28, 1988) (No. 86-6757) were utilized in this article.

109. Kentucky v. Stincer, 107 S. Ct. 2658 (1987).

110. *Id.* at 2664.

111. *Id.* at 2666.

112. *Id.* at 2667-68.

is a significant milestone in mitigating the number of times the young victim must face a courtroom environment made even more hostile and traumatic by the physical presence of the defendant.[113] The holding is also significant because it affirmed, in the words of a Kentucky Justice, that "[t]he right to be present and the right to confront does not confer a right to intimidate."[114]

F. Hearsay for Child Victims

In 1986 the Kentucky General Assembly enacted a statute which specifically provides that, "[n]otwithstanding any other provision of law or rule of evidence, a child victim's out-of-court statements regarding physical or sexual abuse ... are admissible in any criminal or civil proceeding" provided that certain conditions are met.[115] Prior to admission the trial court must determine that the interests of justice would be best served by the admission of the statement into evidence and that, based upon general criteria, the statements are determined to be reliable.[116] Once the statement has been admitted, either party may call the child to testify and the opposing party may cross examine.[117] It would appear, therefore, that the child witness would have to be "available" to take part in the trial in order for the hearsay statement to be admitted. The constitutionality of the child victim's hearsay statute has not yet been litigated.

G. Speedy Trial for Child Victims and Victims' Bill of Rights

The Kentucky Victims' Bill of Rights, enacted by the General Assembly in 1986 following a major lobbying effort by the Office of the Attorney General, outlines the crime victim's rights during criminal proceedings.[118] These rights include the right to be promptly notified of changing court dates or judicial and other actions which affect the status of the defendant such as bail or

113. The United States Supreme Court also decided another important child victims case this same term. Pennsylvania v. Ritchie, 107 S. Ct. 989 (1987) (the confrontation clause does not mandate providing defendant in child sex abuse case access to confidential state child welfare agency files compiled during investigation into witnesses' allegation of child sexual abuse).

114. Stincer v. Commonwealth, 712 S.W.2d at 944 (Wintersheimer, J., dissenting).

115. KY. REV. STAT. ANN. § 421.355(1) (Michie Supp. 1986).

116. *Id.* § 421.355(1)(a), (b) (Michie Supp. 1986).

117. *Id.* § 421.355(2) (Michie Supp. 1986).

118. *Id.* § 421.500-550 (Michie Supp. 1986).

parole hearings.[119] It also allows the victim to submit a victim impact statement to the court at time of sentencing or to the parole board.[120] Victims are also to be contacted regarding plea negotiations and to be notified of appellate proceedings.[121]

Where a sexual offense involving a child of less than sixteen is involved, the Victims' Bill of Rights makes the additional provision of a speedy trial.[122] The trial court is instructed to rule upon a speedy trial motion under this section within ten days and, if granted, to proceed to trial within ninety days.[123] In ruling on a motion by the defendant to delay the proceedings, the trial court is specifically instructed to take the well-being of the child victim into account.[124]

IV. Conclusion

Kentucky has taken significant steps to address the problem of child sexual abuse and exploitation and to mitigate the inherent danger to the psychological well-being of the child from the legal process. Much more remains to be done. For example, there is no legal duty in Kentucky for a parent to prevent child abuse.[125] It has been proposed that a statute be enacted to establish such a legal duty for the parent, custodian, or adult residing with the child to make reasonable and proper effort to prevent criminal acts where they have knowledge. Concealment of a child by one parent in order to prevent visitation by the other parent should be criminalized. Child victims of sexual assault or abuse should not be able to be identified by name or biographical data from court documents, and the records of their victimization should be sealed at the conclusion of trial. The requirement of a determination of competency before the child witness testifies should be eliminated, as it is under the Federal Rules of Criminal Procedure and in many states. Other methods to protect Kentucky's innocent children from the perpetrators of child abuse, child sexual abuse, and child exploitation can and must be developed, presented, and adopted. Our children are a resource too precious to waste. All of these areas represent unplowed ground. For those who have an interest in the well-being of Kentucky's children, children's rights, or simply in a better world, these are issues for their scrutiny.

119. *Id.* § 421.500(5)(a), (b) (Michie Supp. 1986).
120. *Id.* § 421.520-.530 (Michie Supp. 1986).
121. *Id.* § 421.500(6), (10) (Michie Supp. 1986).
122. *Id.* § 421.510 (Michie Supp. 1986).
123. *Id.* § 421.510(2) (Michie Supp. 1986).
124. *Id.* § 421.510(3) (Michie Supp. 1986).
125. Knox v. Commonwealth, 735 S.W.2d 711, 712 (Ky. 1987).