Justice for Our Children: New Jersey Addresses Evidentiary Problems Inherent in Child Sexual Abuse Cases

INTRODUCTION

Child sexual abuse is a societal problem that has recently received prominent and well-deserved attention.[1] Statistics demonstrate that reported incidents of child sexual abuse have increased drastically since the 1970s and continue to increase today.[2] Specifically, the number of accounts of child sexual abuse reported nationally nearly doubled between 1986 and 1989 to 386,400 cases.[3] The magnitude of the problem is even more alarming when the estimated number of unreported cases is considered.[4]

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[1] *See* Diana Younts, *Evaluating and Admitting Expert Opinion Testimony in Child Sexual Abuse Prosecutions*, 41 DUKE L.J. 691, 693 (1991) ("Since the 1970s . . . there has been a growing awareness of child sexual abuse . . . .").

[2] *Id.* at 693-94.

[3] *Id.* at 694 n.17 (citation omitted). In 1976 there were 7559 reported incidents of child sexual abuse in the United States. *Id.* at 693-94. The significance of these statistics is evidenced by the increase in reported incidents to approximately 200,000 reports made nationally ten years later. *Id.* at 694 (citing Linda B. Suski, *Child Sexual Abuse—An Increasingly Important Part of Child Protective Service Practice*, 3 PROTECTING CHILDREN 3 (1986)). By 1989, the number of reports further increased to 386,400. *Id.* at 694 n.17 (citation omitted); *see also* John E.B. Myers, *The Child Sexual Abuse Literature: A Call for Greater Objectivity*, 88 MICH. L. REV. 1709, 1709 (1990) (citation omitted) (noting that the American Humane Association estimated that there were 132,000 substantiated reports of child sexual abuse nationwide in 1986); Jean L. Kelly, Comment, *Legislative Responses to Child Sexual Abuse Cases: The Hearsay Exception and the Videotape Deposition*, 34 CATH. U. L. REV. 1021, 1021 (1985) (footnote omitted) (estimating that 100,000 to 500,000 children are sexually abused each year).

In 1991, there were 4022 reports of child sexual abuse in the state of New Jersey. BUREAU OF RESEARCH, EVALUATION, & QUALITY ASSURANCE, NEW JERSEY DEP'T OF HUMAN SERVS., CHILD ABUSE AND NEGLECT IN NEW JERSEY 1991 ANNUAL REPORT 6 (1992). Of these reported cases, 1608 were substantiated. *Id.* at 7.

[4] *See* Maria H. Bainor, Note, *The Constitutionality of the Use of Two-Way Closed Circuit Television to Take Testimony of Child Victims of Sex Crimes*, 53 FORDHAM L. REV. 995, 996 (1985) (citations omitted) (noting that "experts agree that incidents of child molestation are greatly underreported"). Experts believe that the incidents of child sexual abuse that are actually reported are but a fraction of actual incidents. *See, e.g.*, ROBERT L. GEISER, HIDDEN VICTIMS—THE SEXUAL ABUSE OF CHILDREN 9 (1979) (estimating that for every reported case of child sexual abuse, two to three cases go unreported); Suzanne M. Sgroi, *Sexual Molestation of Children: The Last Frontier in Child Abuse*, *in* THE SEXUAL VICTIMOLOGY OF YOUTH 25, 27 (Leroy G. Schultz ed., 1980) (maintaining that the number of reported incidents of child sexual abuse represent a fraction of actual incidents of abuse).

There are a number of reasons why sexually abused children may not report incidents of abuse. *See* Bainor, *supra*, at 996 n.3. Children may feel that adults will not

The increase in reports of sexual abuse has brought to the forefront the evidentiary problems inherent in the prosecution of child sexual abuse cases.[5] In these situations, the prosecution's case often turns upon the testimony of the child.[6] The child victim's account of the alleged acts of abuse is usually the best and, at times, the only evidence that the child was sexually abused because there are seldom any outside witnesses to the alleged acts of abuse or any physical evidence of abuse.[7] Furthermore, parents are often reluctant to expose their children to the trial procedure because they believe that their children will be further traumatized through participation in the legal process.[8]

This Comment focuses on the steps that the New Jersey judiciary and legislature have taken to address the special issues and problems posed by child sexual abuse cases.[9] Part I of this Comment examines the use of closed circuit television to take the testimony of the child witness outside of the courtroom. In Part II, the adoption of a new hearsay exception that specifically addresses the out-of-court statements of child victims of sexual abuse is discussed. Part III analyzes the admissibility of expert testimony concerning the credibility of a child's allegations of abuse by comparing the child's behavior to those symptoms commonly found in child victims of sexual abuse. Finally, this Comment concludes that an analysis of the major statutes and cases pertaining to evidentiary issues in child sexual abuse cases demonstrates a successful balanc-

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believe them or may be uncertain as to whether the act is wrong. Doris Stevens & Lucy Berliner, *Special Techniques for Child Witnesses, in* THE SEXUAL VICTIMOLOGY OF YOUTH 246, 251 (Leroy G. Schultz ed., 1980). Also, very young children may be unable to understand and/or to communicate that they have been abused. Bainor, *supra*, at 996 n.3 (citations omitted).

[5] *See* State v. D.R., 109 N.J. 348, 362, 537 A.2d 667, 674 (1988); *see also* Mike McGrath & Carolyn Clemens, *The Child Victim as a Witness in Sexual Abuse Cases*, 46 MONT. L. REV. 229, 230-31 (1985) (citations omitted) (listing the problems that arise in the prosecution of child sexual abuse cases). For a discussion of *State v. D.R.*, see *infra* notes 40-44 and accompanying text.

[6] *D.R.*, 109 N.J. at 358, 537 A.2d at 672 (citing State v. R.W., 104 N.J. 14, 16, 514 A.2d 1287, 1287-88 (1986)).

[7] *See id.* at 358-59, 537 A.2d at 672 (citing NATIONAL LEGAL RESOURCE CENTER FOR CHILD ADVOCACY & PROTECTION, AMERICAN BAR ASS'N, RECOMMENDATIONS FOR IMPROVING LEGAL INTERVENTION IN INTRAFAMILY CHILD SEXUAL ABUSE CASES 30, 36 (1982) [hereinafter RECOMMENDATIONS FOR IMPROVING LEGAL INTERVENTION]); Lucy Berliner & Mary Kay Barbieri, *The Testimony of the Child Victim of Sexual Assault*, 40 J. SOC. ISSUES 125, 129 (1984).

[8] *See* Berliner & Barbieri, *supra* note 7, at 127.

[9] For an overview of reforms that focus on solutions to the problems inherent in child sexual abuse prosecutions, see Josephine Bulkley, *Introduction: Background and Overview of Child Sexual Abuse—Law Reforms in the Mid-1980's*, 40 U. MIAMI L. REV. 5 (1985).

ing of the interests of victims and their families, the state's interest in prosecuting child sexual abuse, and the constitutional rights of defendants.

I. THE USE OF CLOSED CIRCUIT TELEVISION TO ALLOW CHILD WITNESSES TO TESTIFY OUTSIDE OF THE COURTROOM

Problems in prosecuting child sexual abuse cases often stem from the victim's fear of being in close proximity to the accused molester.[10] This fear may negatively impact the reliability of a child's testimony.[11] Moreover, parents may choose not to put a child through the trauma of testifying in an open courtroom.[12] Recognizing these problems, commentators have determined that the courts need to establish procedures and utilize settings that offer support and comfort for the child witness who is a victim of sexual abuse.[13]

One solution to the problems resulting from the child witness's fear and anxiety is to allow the testimony of the child witness to be given outside of the courtroom and out of the presence of the accused.[14] Generally, there are two ways in which state statutes provide for the taking of a child witness's testimony outside of the open court.[15] First, some states permit the child witness's testimony to be videotaped and later presented to the jury.[16] A second

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10 Bainor, *supra* note 4, at 997-98 (citing Jacqueline Y. Parker, *The Rights of Child Witnesses: Is the Court a Protector or Perpetrator?*, 17 NEW ENG. L. REV. 643, 651, 652 (1982)) (other citations omitted).

11 *See id.* (citations omitted).

12 *See* Berliner & Barbieri, *supra* note 7, at 128. Once the trial has begun, it is difficult for parents to rescind a complaint of child sexual abuse even if they believe that their child is being further traumatized as a result of the trial process. *See* Bainor, *supra* note 4, at 997 n.6 (citation omitted). This is because the state's interest in prosecuting child sexual abuse is considered to be greater than the interest of parents in avoiding the further traumatization of their child. *Id.* This policy, however, may serve as a deterrent to parents' pursuing complaints of sexual abuse. *Id.*

13 *See* Berliner & Barbieri, *supra* note 7, at 136; Parker, *supra* note 10, at 668-70.

14 *See* Bainor, *supra* note 4, at 1003-05 (citations & footnotes omitted). Other alternative methods of taking a child victim's testimony may also work to ease the trauma of the testifying experience. *Id.* at 1003-04 (citations omitted). For example, the child may be seated in a way that obscures the child's view of the accused. *Id.* at 1004-05 (citations omitted). Also, the court may set up a "child courtroom" where the jury, defendant, and spectators observe the victim's testimony through a one-way glass. *Id.* at 1003 n.42 (citation omitted).

15 *See id.* at 1004-05 (citations omitted); Berliner & Barbieri, *supra* note 7, at 130.

16 *See* ALA. CODE § 15-25-2 (Supp. 1993); ARIZ. REV. STAT. ANN. § 13-4253(B) (1989); ARK. CODE ANN. § 16-44-203 (Michie 1987); CAL. PENAL CODE § 1346 (West Supp. 1994); COLO. REV. STAT. ANN. § 18-6-401.3 (West 1990); DEL. CODE ANN. tit. 11, § 3511 (1987); FLA. STAT. ANN. § 92.53 (West Supp. 1993); HAW. R. EVID. 616(a) & (b); IOWA CODE ANN. § 910A.14(2) (West 1994); KAN. STAT. ANN. § 38-1558(2)

approach allows the child's testimony to be taken outside of the courtroom via closed circuit television.[17] New Jersey employs this second technique.[18] New Jersey Statutes Annotated section 2A:84A-32.4 allows children to testify via closed circuit television in certain cases, including child sexual abuse cases, if the witness is sixteen years old or younger and if the trial court finds that there is a substantial chance that the child will suffer severe emotional distress if compelled to testify in open court.[19]

(1986); KY. REV. STAT. ANN. § 421.350(4) (Michie/Bobbs-Merrill 1992); MICH. COMP. LAWS ANN. § 600.2163a(5) (West Supp. 1993); MINN. STAT. ANN. § 595.02(4) (West 1988); MISS. CODE ANN. § 13-1-407 (Supp. 1993); MO. ANN. STAT. § 491.680 (Vernon Supp. 1993); MONT. CODE ANN. § 46-15-402 (1993); NEV. REV. STAT. ANN. § 174.227 (Michie 1992); N.H. REV. STAT. ANN. § 517:13-a (Supp. 1993); N.M. STAT. ANN. § 30-9-17 (Michie 1984); OHIO REV. CODE ANN. § 2907.41(A) (Anderson 1993); OKLA. STAT. ANN. tit. 22, § 753(C) (West 1992); 42 PA. CONS. STAT. ANN. § 5984 (Supp. 1993); S.D. CODIFIED LAWS ANN. § 23A-12-9 (1988); TENN. CODE ANN. § 24-7-116 (Supp. 1993); TEX. CODE CRIM. PROC. ANN. art. 38.071(2) (West Supp. 1994); VT. R. EVID. 807(d); WIS. STAT. ANN. § 967.04(7) (West Supp. 1993); WYO. STAT. § 7-11-408 (1993).

New Jersey does not have a statute specifically permitting the use of videotaped depositions in child sexual abuse cases, but does have a statute permitting a child sexual abuse victim's testimony to be taken outside of the courtroom via closed circuit television. *See* N.J. STAT. ANN. § 2A:84A-32.4 (West Supp. 1993). The New Jersey State Assembly deleted language in the statute that would have permitted videotaped testimony of child witnesses. *Id.* (Senate Judiciary Committee Statement). The assembly reasoned that the use of closed circuit television most effectively handled the problem of having child witnesses testify while safeguarding the defendant's constitutional rights. *Id.*

For an analysis and discussion of statutes allowing videotape depositions of child victims of sexual abuse, see Kelly, *supra* note 3, at 1041-43; Note, *The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations*, 98 HARV. L. REV. 806, 813-16, 822-26 (1985) [hereinafter *Testimony of Child Victims*].

[17] *See* ALA. CODE § 15-25-3 (Supp. 1993); ALASKA STAT. § 12.45.046 (1990); ARIZ. REV. STAT. ANN. § 13-4253(A) (1989); CAL. PENAL CODE § 1347 (West Supp. 1994); CONN. GEN. STAT. ANN. § 54-86g (West Supp. 1993); FLA. STAT. ANN. § 92.54 (West Supp. 1993); GA. CODE ANN. § 17-8-55 (1990); HAW. R. EVID. 616(d); IDAHO CODE § 19-3024A (Supp. 1993); IOWA CODE ANN. § 910A-14(1) (West 1994); KAN. STAT. ANN. § 38-1558(1) (1986); KY. REV. STAT. ANN. § 421-350(3) (Michie/Bobbs-Merrill 1993); LA. REV. STAT. ANN. § 15:283 (West 1992); MD. CODE ANN., CTS. & JUD. PROC. § 9-102 (Supp. 1993); MINN. STAT. ANN. § 595.02(4) (West 1988); MISS. CODE ANN. § 13-1-405 (Supp. 1993); N.J. STAT. ANN. § 2A:84A-32.4 (West Supp. 1993); N.Y. CRIM. PROC. LAW § 65.10 (McKinney 1992); OHIO REV. CODE ANN. § 2907.41(C) (Anderson 1993); OKLA. STAT. ANN. tit. 22, § 753(B) (West 1992); 42 PA. CONS. STAT. ANN. § 5985 (Supp. 1993); TEX. CODE CRIM. PROC. ANN. art. 38.071(3) (West Supp. 1994); VT. R. EVID. 807(e); VA. CODE ANN. § 18.2-67.9 (Michie 1988).

[18] *See* N.J. STAT. ANN. § 2A:84A-32.4 (West Supp. 1993).

[19] *Id.* Specifically, § 2A:84A-32.4 provides in pertinent part:

> a. In prosecutions for aggravated sexual assault, sexual assault, aggravated criminal sexual contact, criminal sexual contact, or child abuse, or any action alleging an abused or neglected child . . . the court may, on motion and after conducting a hearing in camera, order the taking of the testimony of a witness on closed circuit television at the

Testimony by closed circuit television addresses the problems posed by children's fear of the accused molester and the trauma of the legal process in general.[20] Such a solution, however, may interfere with defendants' constitutional right to confront their accusers, as afforded by the Confrontation Clause of the Sixth Amendment.[21] In *Maryland v. Craig*,[22] the United States Supreme Court established guidelines to determine the constitutionality of statutes allowing child witnesses to testify outside of the defendant's presence.[23] The *Craig* Court initially determined that the

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trial, out of the view of the jury, defendant, or spectators upon making findings as provided in subsection b. of this section.

b. An order . . . may be made only if the court finds that the witness is 16 years of age or younger and that there is a substantial likelihood that the witness would suffer severe emotional or mental distress if required to testify in open court. The order shall be specific as to whether the witness will testify outside the presence of spectators, the defendant, the jury, or all of them and shall be based on specific findings relating to the impact of the presence of each. . . .

. . . .

d. The defendant's counsel shall be present at the taking of testimony in camera. If the defendant is not present, he and his attorney shall be able to confer privately with each other during the testimony by a separate audio system.

Id. The Senate Judiciary Committee noted that the purpose behind this provision was to spare young witnesses the ordeal of having to repeatedly discuss the details of sexual abuse. *Id.* (Senate Judiciary Committee Statement).

20 *See* Bainor, *supra* note 4, at 1003-05 (citations omitted).

21 *See id.* at 1005 (citations omitted); *see also* U.S. CONST. amend. VI (providing that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witness against him"). In early decisions interpreting the Confrontation Clause, the United States Supreme Court identified the rights afforded by this clause as having two aspects. *See* Kirby v. United States, 174 U.S. 47, 55 (1899); Mattox v. United States, 156 U.S. 237, 244 (1895). First, the Court asserted, the Confrontation Clause entitles the defendant to a face-to-face meeting with the witnesses against him at trial. *Kirby*, 174 U.S. at 55; *Mattox*, 156 U.S. at 244. Second, the Court declared, the defendant is entitled to cross-examine his accusers. *Kirby*, 174 U.S. at 55; *Mattox*, 156 U.S. at 244. Although the Court continues to acknowledge that the Confrontation Clause affords defendants both of these rights, the Court has also recognized that a defendant's right to face-to-face confrontation is not absolute. *See* Delaware v. Fensterer, 474 U.S. 15, 21-22 (1985) (noting that "[t]he Confrontation Clause includes no guarantee that every witness for the prosecution will refrain from giving testimony that is marred by forgetfulness, confusion, or evasion"). Specifically, the Supreme Court has stated that certain circumstances may warrant courts to dispense with face-to-face confrontation. *See* Ohio v. Roberts, 448 U.S. 56, 64 (1980) (citations omitted) (stating that "[t]he Court, however, has recognized that compelling interests . . . may warrant dispensing with confrontation at trial").

22 497 U.S. 836 (1990). For a detailed discussion of *Maryland v. Craig*, see Theresa Cusick, Note, *Televised Justice: Toward a New Definition of Confrontation Under* Maryland v. Craig, 40 CATH. U. L. REV. 967 (1990).

23 *See Craig*, 497 U.S. at 855-57. In *Craig*, the United States Supreme Court upheld the constitutionality of a Maryland statute that permitted alleged victims of child sex-

Confrontation Clause does not guarantee defendants an absolute right to confront witnesses face-to-face.[24] The Court asserted that the primary concern of the Confrontation Clause is to subject the testimony of witnesses against the defendant to stringent testing in the context of an adversarial proceeding.[25] In *Craig*, the United States Supreme Court held that the use of a procedure allowing a child victim to testify outside of the defendant's presence is justified by the state's "sufficiently important" interest in protecting child victims of sexual abuse from the traumatic effects of testifying, so long as the state makes a sufficient showing of necessity.[26] The Court asserted that an adequate showing of necessity requires that the trial court determine, in each case, that the use of the procedure is necessary to safeguard the welfare of the child witness, that the child would be traumatized by the defendant's presence, and that the emotional trauma suffered by the child would be greater than *de minimis*.[27]

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ual abuse to testify via closed circuit television. *Id.* at 840-41, 860. This statute required that the trial court first determine whether the child victim would suffer severe emotional distress if compelled to testify in the courtroom. MD. CODE ANN., CTS. & JUD. PROC. § 9-102 (Supp. 1993). *See infra* note 32 for the text of § 9-102 and a comparison of its application with New Jersey's closed circuit television statute.

The state accused Craig of sexually abusing a six year old child. *Craig*, 497 U.S. at 840. The prosecution attempted to invoke a Maryland statutory procedure that permitted a child victim of sexual abuse to testify via closed circuit television upon a determination that the child would suffer severe emotional distress if compelled to testify in court. *Id.* at 840-41. The trial court found that the procedure did not violate Craig's Sixth Amendment right to confront her accuser. *Id.* at 842 (citation omitted). This decision was affirmed by the Maryland Court of Special Appeals, but the Court of Appeals of Maryland reversed. *Id.* at 843 (citations omitted).

[24] *Craig*, 497 U.S. at 849-50. The Court stated that the Confrontation Clause signifies a *preference* for a face-to-face confrontation between the defendant and the witness against the defendant, and that this preference must sometimes give way to public policy considerations and the necessities of the particular case. *Id.* at 849 (quoting *Roberts*, 448 U.S. at 63; *Mattox*, 156 U.S. at 243).

[25] *Id.* at 845. The purposes of the Confrontation Clause, the *Craig* Court stated, are served by four elements of confrontation that combine to ensure that the evidence admitted against a defendant is reliable and submitted to the rigorous adversarial testing characteristic of criminal proceedings in the Anglo-American system. *Id.* at 846 (citations omitted). The four elements noted by the Court are the witness's oath, the witness's physical presence, the cross-examination of the witness, and the observation of the witness's demeanor by the trier of fact. *Id.*

[26] *Id.* at 855.

[27] *Id.* at 855-56 (citations omitted). The United States Supreme Court refused to second-guess the state's judgment concerning the importance of protecting victims of child abuse from the trauma of testifying. *Id.* at 855. The Court recognized that the state has a "transcendent interest in protecting the welfare of children" that is bolstered by the growing body of literature documenting the psychological trauma endured by victims of child abuse who must testify in the courtroom. *Id.* (quoting Ginsberg v. New York, 390 U.S. 629, 640 (1968)) (other citations omitted).

The constitutionality of New Jersey Statutes Annotated section 2A:84A-32.4 was specifically addressed by the New Jersey Supreme Court in *State v. Crandall*.[28] The court determined that the statute is constitutional on its face because it complies with the requirements set forth by the United States Supreme Court in *Craig*.[29] In *Crandall*, the court found that the constitutional rights of defendants are adequately protected by the statutory requirement that a hearing be conducted to determine whether testimony via closed circuit television is necessary to protect the welfare of a child witness.[30] Such a hearing protects defendants' rights, the court explained, because section 2A:84A-32.4 requires that the trial court find that the child's emotional distress would be both severe and caused by the defendant's presence in the courtroom rather than by the courtroom scene in general.[31]

In fact, section 2A:84A-32.4 achieves the most precise balance

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28 120 N.J. 649, 653, 577 A.2d 483, 484-85 (1990). The State of New Jersey convicted Richard Crandall of endangering the welfare of a child, sexual assault, and aggravated sexual assault. *Id.* at 651, 577 A.2d at 484. At Crandall's trial, the child victim was permitted to testify by closed circuit television under § 2A:84A-32.4. *Id.* Crandall appealed on the basis that the procedure authorized by the statute deprives defendants of their Sixth Amendment right to confront witnesses. *Id.*

29 *Id.* at 651, 655-56, 577 A.2d at 484, 486. The court also held that expert testimony is not required to establish that the child witness would suffer severe emotional distress if forced to testify in the presence of the defendant. *Id.* at 661, 577 A.2d at 488. The statute, the court observed, does not mention any need for expert testimony. *Id.* The court also noted that the majority of jurisdictions with similar statutes have determined that the testimony of experts is not an absolute requirement in justifying the use of the procedure. *Id.* at 662, 577 A.2d at 489 (citations omitted). In addition, the *Crandall* court pointed out that factors, other than expert testimony, that may establish that the child witness will suffer severe emotional distress as a result of testifying in open court include: (1) the child had a pre-existing mental condition rendering him or her child particularly susceptible to severe emotional distress; (2) the defendant was an authority figure in the child witness's life; (3) the offense alleged is especially heinous; (4) a dangerous weapon or instrument was used in the commission of the offense; (5) the sexual abuse was ongoing and occurred over an extended period of time; (6) the defendant inflicted serious bodily harm upon the child; (7) the defendant threatened to harm the child or another person if the child reported the incident; (8) the child has been a victim of abuse previously; or (9) the defendant had ready access to the child or was financially supporting the child. *Id.* at 663, 577 A.2d at 490 (citing CAL. PENAL CODE § 1347(b) (West Supp. 1994); N.Y. CRIM. PROC. LAW § 65.20(9) (McKinney 1992)).

30 *Id.* at 656, 577 A.2d at 486 (citations omitted).

31 *Id.* at 655-56, 577 A.2d at 486 (citations omitted). In dicta, the court stated that if the child witness fears the defendant only, and not the jury, the trial court should still use a procedure which allows the child to testify outside of the courtroom, unless the defendant requests that the child witness testify in the presence of the jury. *Id.* at 658, 577 A.2d at 487. The court added that if the defendant insists that the child testify in the presence of the jury, she must execute a valid and knowing waiver of her right to be present in the courtroom. *Id.* at 659, 577 A.2d at 487 (citation omitted).

possible between the constitutional rights of defendants and the state's interests in protecting child victims of sexual abuse and in prosecuting child sexual abuse cases.[32] The statute meets the threshold requirements set forth in *Craig* without going beyond them to give defendants more protection than the Constitution mandates.[33] As a result, the chance that a child witness will be further traumatized is greatly reduced.[34] Furthermore, the problems in prosecuting child sexual abuse cases arising from the child's fear of the accused molester are effectively alleviated without trammelling upon the constitutional rights of defendants.[35]

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[32] *See* N.J. STAT. ANN. § 2A:84A-32.4 (West Supp. 1993). Section 2A:84A-32.4 may be compared with the Maryland statute held constitutional in *Craig*. *See* MD. CODE ANN., CTS. & JUD. PROC. § 9-102 (Supp. 1993); Maryland v. Craig, 497 U.S. 836, 855-57 (1990) (holding that § 9-102 meets the constitutional standards under the Confrontation Clause). The pertinent text of § 9-102 states as follows:

> (a) *Conditions.*—In a case of abuse of a child . . . a court may order that the testimony of a child victim be taken outside the courtroom and shown . . . by means of closed circuit television if:
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> (1) The testimony is taken during the proceeding; and
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> (2) The judge determines that testimony . . . in the defendant's presence will result in the child suffering serious emotional distress . . . .

MD. CODE ANN., CTS. & JUD. PROC. § 9-102 (Supp. 1993). It should be noted that both the Maryland statute and § 2A:84A-32.4 require that the trial judge determine that the child witness will suffer from severe emotional distress if compelled to testify in the presence of the defendant. *See id.*; N.J. STAT. ANN. § 2A:84A-32.4(b) (West Supp. 1993).

Sections 9-102 and 2A:84A-32.4 should also be contrasted with a similar Pennsylvania provision. *See* 42 PA. CONS. STAT. ANN. § 5985 (Supp. 1993). Section 5985 states in pertinent part: "(a) *Closed-circuit television.*—The child victim or material witness . . . may move, for good cause shown, that the testimony of a child be taken in a room other than the courtroom and televised by closed-circuit equipment . . . ." *Id.* Section 5985, in contrast to the "severe emotional distress" requirements of the New Jersey and Maryland statutes, only mandates that the prosecution show "good cause" for taking a child witness's testimony outside of the courtroom via closed circuit television. *Compare id.* ("[T]he court may, *for good cause shown*, order the taking of a videotaped deposition . . . .") (emphasis added) *with* N.J. STAT. ANN. § 2A:84A-32.4(b) (West Supp. 1993) ("An order . . . may be made only if the court finds . . . that *there is a substantial likelihood that the witness would suffer severe emotional or mental distress* if required to testify in open court.") (emphasis added) *and* MD. CODE ANN., CTS. & JUD. PROC. § 9-102 (Supp. 1993) ("[A] court may order that the testimony of a child victim be taken outside the courtroom . . . if . . . [t]he judge determines that testimony by the child . . . *will result in the child suffering serious emotional distress* . . . .") (emphasis added). It is unlikely that this "good cause" standard would meet the constitutional requirement of "necessity" as set forth in *Craig*. *See Craig*, 497 U.S. at 855-57 (citations omitted).

[33] *See Craig*, 497 U.S. at 855-57; N.J. STAT. ANN. § 2A:84A-32.4 (West Supp. 1993). *See supra* notes 23-27 (detailing the *Craig* requirements for constitutionality).

[34] *See* Bainor, *supra* note 4, at 1003-05 (citations omitted).

[35] *See Craig*, 497 U.S. at 855-57; Bainor, *supra* note 4, at 1018.

II. HEARSAY EXCEPTIONS DIRECTED PRIMARILY TOWARD OUT-OF-COURT STATEMENTS MADE BY CHILD VICTIMS OF SEXUAL ABUSE

The problem of getting a child victim's testimony before the jury is not solved by taking testimony via closed circuit television if the child is disqualified or not able to testify because of emotional distress, fear, or severe shyness.[36] In such cases, the hearsay statements of the child are extremely valuable to the prosecution's case.[37] Commentators have urged that states adopt hearsay exceptions expressly addressing children's out-of-court statements concerning sexual abuse.[38] Many states, including New Jersey, have enacted rules recognizing the need for such special hearsay exceptions.[39]

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[36] *See* McGrath & Clemens, *supra* note 5, at 234.

[37] *See* Bainor, *supra* note 4, at 1001-02 (citations omitted). Hearsay is defined as a "species of testimony given by a witness who relates, not what he knows personally, but what others have told him, or what he has heard said by others." BLACK'S LAW DICTIONARY 722 (6th ed. 1990). Testimonial statements that are not subject to cross-examination are excluded under the hearsay rule. 5 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1370, at 55 (James H. Chadbourn ed., rev. vol. 1974). The theory behind the rule is that the test of cross-examination will bring to light any existing inaccuracies and untrustworthiness in a witness's assertions. *Id.* § 1420, at 251. Thus, exceptions to the hearsay rule are centered around two circumstances: (1) where the cross-examination process is deemed superfluous due to a high probability of trustworthiness; and (2) where the test of cross-examination is impossible to apply. *Id.* The traditional exceptions to the hearsay rule are: statements against interest, dying declarations, attestation of a signatory witness, statements about family history, various statements of deceased persons, entries made in the ordinary course of business, official statements, reputation, sundry commercial documents, learned treatises, affidavits, assertion of a mental condition, statements by a voter, and spontaneous exclamations. *Id.* § 1426, at 257.

[38] *See, e.g.*, Kelly, *supra* note 3, at 1054 (concluding that challenges to hearsay exceptions specifically addressing out-of-court statements of child sexual abuse victims should be rejected); *Testimony of Child Victims*, *supra* note 16, at 826 (stating that there is a clear need for new approaches to children's testimony in sexual abuse cases, such as hearsay statutes).

[39] *See* ARIZ. REV. STAT. ANN. § 13-1416 (1989); ARK. R. EVID. 803(25); CAL. EVID. CODE § 1228 (West Supp. 1994); COLO. REV. STAT. ANN. § 13-25-129 (West 1989 & Supp. 1993); FLA. STAT. ANN. § 90.803(23) (West Supp. 1993); IDAHO CODE § 19-3024 (1987); MD. CODE ANN., CTS. & JUD. PROC. § 9-103.1 (Supp. 1993); MINN. STAT. ANN. § 595.02(3) (West 1988); MISS. CODE. ANN. § 13-1-403 (Supp. 1993); N.J.R.E. 803(c)(27); OKLA. STAT. ANN. tit. 12, § 2803.1 (West Supp. 1994); 42 PA. CONS. STAT. ANN. § 5985.1 (Supp. 1993); S.D. CODIFIED LAWS ANN. § 19-16-38 (Supp. 1992); UTAH CODE ANN. § 76-5-411 (1990); WASH. REV. CODE ANN. § 9A.44.120 (West Supp. 1993).

Under the "fresh complaint" rule, the New Jersey judiciary has admitted testimony stating that the victim complained of a sexual assault. *See* State v. Hill, 121 N.J. 150, 151, 578 A.2d 370, 371 (1990). Such testimony, the *Hill* court ruled, may be admitted for the purpose of negating any inference arising from the victim's silence about the abuse. *Id.* at 151-52, 578 A.2d at 371. The New Jersey Supreme Court has considered the issue of whether a statement concerning sexual abuse made by a child

In *State v. D.R.*,[40] the New Jersey Supreme Court proposed a modification of the hearsay rules to allow the admission of out-of-court statements made by the victims of child sexual abuse.[41] The court proposed this hearsay exception in an effort to enable the judicial system to manage the evidentiary problems inherent in

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during questioning qualifies under this "fresh-complaint" rule. *See* State v. Bethune, 121 N.J. 137, 139, 578 A.2d 364, 365 (1990). The *Bethune* court recognized that flexibility is necessary in applying the "fresh-complaint" rule to children's complaints alleging acts of sexual abuse because children are often too embarrassed and afraid to talk about such acts. *Id.* at 144, 578 A.2d at 367. Yet the court held that statements directly responding to coercive questions are not admissible as a "fresh-complaint." *Id.* at 145, 578 A.2d at 367. The court then listed factors that should be employed to determine if the questioning preceding the complaint of sexual abuse was coercive: the child's age, the nature of the relationship between the child and the interviewer, the circumstances surrounding the questioning, the nature of the questions asked, whether the discussion was initiated by the child, and the specificity of the questions asked. *Id.*, 578 A.2d at 368.

Detailed testimony concerning the victim's statements, the *Bethune* court asserted, is not admissible under the "fresh-complaint" rule because the purpose of the rule is only to prove that the victim complained of the sexual assault. *Id.* at 146, 578 A.2d at 368. Details of the victim's statements, however, may be admissible under Rule of Evidence 63(33). *See* N.J. Evid. R. 63(33), N.J. STAT. ANN. § 2A:84A (West Supp. 1993).

[40] 109 N.J. 348, 537 A.2d 667 (1988). The defendant in *D.R.* appealed from convictions of endangering the welfare of a child, sexual assault, and aggravated sexual assault. *Id.* at 351, 537 A.2d at 669. In this appeal, the *D.R.* court confronted the issue of "the admissibility of the child's out-of-court account of the sexual assault." *Id.* The New Jersey Supreme Court used this case as an opportunity to consider the need to create a special exception to the hearsay rule. *Id.* at 358-63, 537 A.2d at 672-75.

[41] *Id.* at 363, 537 A.2d at 675. The rule proposed by the New Jersey Supreme Court in *D.R.* read in pertinent part:

> 1. Rule 63 shall be amended to read as follows . . . . Evidence of a statement offered to prove the truth of the matter stated which is made other than by a witness while testifying at the hearing is hearsay evidence and is inadmissible except as provided in Rules 63(1) through 63(33).
> 2. A new rule to be designated as Rule 63(33) shall be adopted to read as follows . . . A statement made by a child under the age of 12 relating to a sexual offense . . . committed on, with, or against that child is admissible in a criminal proceeding . . . if (a) the proponent of the statement makes known to the adverse party his intention to offer the statement and the particulars of the statement at such time as to provide him with a fair opportunity to prepare to meet it; (b) the court finds, in a hearing . . . that on the basis of the time, content, and circumstances of the statement there is a probability that the statement is trustworthy; and (c) either (i) the child testifies at the proceeding, or (ii) the child is unavailable as a witness and there is offered admissible evidence corroborating the act of sexual abuse; provided that no child whose statement is to be offered in evidence pursuant to this rule shall be disqualified to be a witness in such proceeding by virtue of the requirements of paragraph (b) of Rule 17.

Id. app. at 378, 537 A.2d app. at 682-83.

child sexual abuse prosecutions.[42] A child victim's account of an act of sexual abuse made spontaneously in an out-of-court setting, the court noted, may be highly credible because of its content and the context in which it is made.[43] The New Jersey Supreme Court contrasted these hearsay statements with the in-court testimony of child witnesses, which is often adversely affected by the defendant's presence, the stressful atmosphere of the courtroom, and the prosecution's use of leading questions.[44]

The proposal made by the New Jersey Supreme Court in *State v. D.R.* was adopted by the legislature in 1989 as Rule of Evidence 63(33).[45] Rule 63(33) is a hearsay exception that allows the admission of out-of-court statements made by a child below the age of twelve under the following circumstances: (1) when the defendant is given fair notice that the statement will be offered and of its particulars; (2) when the court finds that the statement is trustworthy; and (3) when the child either testifies or is unavailable to testify, and there is admissible corroborating evidence of the alleged act of

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[42] *Id.* at 363, 537 A.2d at 675. The court noted that commentators have almost universally agreed that a modification of the hearsay rules—aimed at admitting into evidence the reliable out-of-court statements of child victims—is necessary because of the particular limitations on the accessibility of evidence in child sexual abuse cases. *Id.* at 362, 537 A.2d at 674 (citing Glen Skoler, *New Hearsay Exceptions for a Child's Statement of Sexual Abuse*, 18 J. MARSHALL L. REV. 1, 46-48 (1984); Judy Yun, Note, *A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases*, 83 COLUM. L. REV. 1745, 1763-66 (1983); *Testimony of Child Victims*, *supra* note 16, at 826-27)); *see also* Kelly, *supra* note 3, at 1054 (stating that constitutional challenges to such hearsay exceptions should be rejected because the exceptions are a constitutionally sound way of protecting child victims from the trauma resulting from in-court testimony); JoEllen S. McComb, Comment, *Unavailability and Admissibility: Are a Child's Out-of-Court Statements About Sexual Abuse Admissible if the Child Does Not Testify at Trial?*, 76 KY. L.J. 531, 565-67 (1988) (concluding that a child victim's reliable hearsay statements should be admitted when the child is unavailable to testify or deemed incompetent to testify).

[43] *D.R.*, 109 N.J. at 359, 537 A.2d at 673. The supreme court noted that young children will sometimes relate incidents of sexual abuse to a trusted adult in a matter-of-fact manner because children, having little knowledge of sexual matters, do not consider a sexual encounter to be unpleasant or shocking. *Id.* at 359-60, 537 A.2d at 673 (citing Yun, *supra* note 42, at 1756; *Testimony of Child Victims*, *supra* note 16, at 817-18 n.80). Commentators have determined, the court further recognized, that a child victim's account of acts of sexual abuse are often highly reliable. *Id.* at 360, 537 A.2d at 673 (citing Skoler, *supra* note 42, at 44-45; RECOMMENDATIONS FOR IMPROVING LEGAL INTERVENTION, *supra* note 7, at 35).

[44] *Id.* (citing Yun, *supra* note 42, at 1751-52; Skoler, *supra* note 42, at 6).

[45] *See id.* app. at 378, 537 A.2d app. at 682-83; N.J. Evid. R. 63(33), N.J. STAT. ANN. § 2A:84A (West Supp. 1993). Since the enactment of Rule 63(33), the New Jersey Rules of Evidence have been revised and the text of Rule 63(33) has been re-enacted almost verbatim in newly-adopted Rule 803(c)(27). *See* N.J.R.E. 803(c)(27). For the text and a discussion of Rule 803(c)(27), see *infra* notes 87-89 and accompanying text.

abuse.[46]

These hearsay exceptions, however, are potentially in conflict with the rights of defendants under the Sixth Amendment's Confrontation Clause.[47] The United States Supreme Court, in *Idaho v. Wright*,[48] set forth the constitutional standards for hearsay exceptions that allow admission of children's out-of-court statements concerning acts of sexual abuse.[49] In *Wright*, the Court held that such hearsay statements are not admissible under the Sixth Amendment's Confrontation Clause unless certain requirements are met.[50] Specifically, the Court asserted that the Sixth Amend-

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46 N.J. Evid. R. 63(33), N.J. STAT. ANN. § 2A:84A (West Supp. 1993). Rule of Evidence 63(33) stated in pertinent part:

> A statement by a child under the age of 12 relating to a sexual offense . . . committed on, with, or against that child is admissible in a criminal proceeding brought against a defendant for the commission of such offense if (a) the proponent of the statement makes known to the adverse party his intention to offer the statement and the particulars of the statement at such time as to provide him with a fair opportunity to prepare to meet it; (b) the court finds, in a hearing conducted pursuant to Rule 8(1), that on the basis of the time, content, and circumstances of the statement there is a probability that the statement is trustworthy; and (c) either (i) the child testifies at the proceeding, or (ii) the child is unavailable as a witness and there is offered admissible evidence corroborating the act of sexual abuse; provided that no child whose statement is to be offered . . . shall be disqualified to be a witness in such proceeding by virtue of the requirements of paragraph (b) of Rule 17.

Id. Paragraph (b) of Rule 17 provided that a witness is disqualified if he or she is incapable of comprehending a witness's duty to be truthful. N.J. Evid. R. 17, N.J. STAT. ANN. § 2A:84A (West 1976). When a child witness was disqualified from testifying because he or she could not comprehend the duty of a witness to tell the truth, Rule 63(33)'s exception to the hearsay rule did not apply. *See* N.J. Evid. R. 63(33), N.J. STAT. ANN. § 2A:84A (West Supp. 1993). Moreover, Rule 63(33) specifically allowed for admission of a child's hearsay statements in criminal proceedings. *Id.* The New Jersey judiciary, however, held Rule 63(33) to be applicable in civil cases as well. R.S. v. Knighton, 125 N.J. 79, 100, 592 A.2d 1157, 1167 (1991); M.P. by D.P. v. Wee Care Day Nursery, 250 N.J. Super. 119, 124, 593 A.2d 799, 802 (App. Div. 1991).

47 *See* U.S. CONST. amend. VI; Skoler, *supra* note 42, at 14; *Testimony of Child Victims*, *supra* note 16, at 809-13.

48 497 U.S. 805 (1990). An Idaho court convicted Wright of two counts of lewd conduct with a minor. *Id.* at 805. The court, pursuant to the state's residual hearsay exception, admitted the testimony of a physician concerning statements about sexual abuse that one of the child victims had made to the physician. *Id.* at 809-12. Wright appealed, and the state supreme court reversed the conviction, finding that the admission of the physician's testimony violated Wright's Sixth Amendment right to confrontation. *Id.* at 812.

49 *See id.* at 814-15 (citations omitted).

50 *Id.* While the Court has recognized that the Confrontation Clause and hearsay rules are generally intended to preserve similar values, the *Wright* Court observed, the Court has not equated the prohibitions of the Confrontation Clause with the general rule forbidding the admission of hearsay statements. *Id.* at 814 (citing California v. Green, 399 U.S. 149, 155-56 (1970) (citations omitted); Dutton v. Evans, 400 U.S. 74,

ment requires that the declarant must testify at the trial, or the prosecution must demonstrate that the declarant is unavailable to testify, and that the statement must bear "adequate indicia of reliability."[51]

The Supreme Court elaborated on the issue of the reliability of a hearsay statement, holding that a showing of "adequate indicia of reliability" may be satisfied under two circumstances: (1) where the statement falls within the scope of an established hearsay exception; or (2) where the statement is supported by "a showing of particularized guarantees of trustworthiness."[52] The Court further explained that "particularized guarantees of trustworthiness" must be demonstrated from the circumstances surrounding the statement and must characterize the declarant as worthy of belief.[53] The evidence must be so trustworthy, the Court asserted, that little would be added to its reliability through the cross-examination process.[54]

The passage of Rule 63(33) pre-dates the *Wright* decision, but an analysis of this rule demonstrates that it adheres to the constitutional standards set forth in *Wright*.[55] The first constitutional re-

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86 (1970) (plurality opinion) (footnote omitted); United States v. Inadi, 475 U.S. 387, 393 n.5 (1986) (citation omitted)).

51 *Id.* at 814-15 (citing Ohio v. Roberts, 448 U.S. 56, 65 (1980) (citations omitted)). The Court stated that *Roberts* sets forth the "general approach" for ascertaining when an incriminating statement, admissible under a hearsay exception, also meets Confrontation Clause requirements. *Id.* at 814 (citing *Roberts*, 448 U.S. at 65). The Court then explained that the scope of admissible hearsay is restricted by the Confrontation Clause in two distinct ways. *Id.* (quoting *Roberts*, 448 U.S. at 65). First, the Court stated, the Confrontation Clause requires the prosecution to either produce the declarant or demonstrate that the declarant is unavailable to testify. *Id.* (quoting *Roberts*, 448 U.S. at 65). Second, the Court continued, the statement of an unavailable witness is admissible only if it exhibits adequate "indicia of reliability." *Id.* at 814-15 (quoting *Roberts*, 448 U.S. at 65-66).

52 *Id.* at 815 (quoting *Roberts*, 448 U.S. at 66) (other citations omitted).

53 *Id.* at 819. This conclusion, the Court stated, is derived from the rationale underlying the exceptions to the general rule against the admission of hearsay statements. *Id.* The Court noted that the general rule against hearsay is based on a theory that sources of untrustworthiness and inaccuracy may best be exposed by cross-examination, but cross-examination may be considered superfluous where it is sufficiently clear that the evidence offered is unlikely to be inaccurate or untrustworthy. *Id.* (quoting 5 WIGMORE, *supra* note 37, § 1420, at 251).

54 *Id.* at 821 (citing Lee v. Illinois, 476 U.S. 530, 544 (1986); State v. Ryan, 691 P.2d 197, 204 (Wash. 1984) (en banc)). The Court concluded that the Confrontation Clause requires the exclusion of an out-of-court statement "unless an affirmative reason, arising from the circumstances in which the statement was made, provides a basis for rebutting the presumption that a hearsay statement is not worthy of reliance at trial." *Id.*

55 *See* N.J. Evid. R. 63(33), N.J. STAT. ANN. § 2A:84A (West Supp. 1993). *See supra* note 46 (providing the relevant text of Rule 63(33)).

quirement of *Wright*, that the witness testify at trial or is unavailable to testify,[56] was addressed in 63(33)(c).[57] This section expressly provided that a child's hearsay statements will be inadmissible unless the child testifies at the trial or is unavailable to testify.[58] The second constitutional requirement set forth in *Wright*, that the statement be supported by "adequate indicia of reliability,"[59] was addressed in 63(33)(b).[60] This provision maintained that a child's hearsay statements will be inadmissible unless the court finds it probable that the child's statement was trustworthy.[61] Furthermore, the rule required that this determination of trustworthiness be based upon the time, circumstances, and content of the statement.[62] This qualification is in accord with the United States Supreme Court's holding in *Wright* that the trustworthiness of hearsay statements is to be judged on the basis of the circumstances surrounding the making of the statement.[63] Thus, Rule 63(33) embodied all of the constitutional requirements for the admission of hearsay statements set forth by the Supreme Court.[64]

Cases interpreting Rule 63(33) have added to the understanding of how to apply the hearsay exception addressing children's out-of-court statements concerning acts of sexual abuse.[65] Particularly, the New Jersey judiciary has addressed the issue of what makes a child victim's hearsay statement "trustworthy" for the purposes of Rule 63(33).[66] First, in *State v. M.Z.*,[67] the law division

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56 *Wright*, 497 U.S. at 814.

57 *See* N.J. Evid. R. 63(33)(c), N.J. STAT. ANN. § 2A:84A (West Supp. 1993). Rule of Evidence 63(33)(c) specifically required that "either (i) the child testifies at the proceeding, or (ii) the child is unavailable as a witness and there is offered admissible evidence corroborating the act of sexual abuse." *Id.*

58 *Id.*

59 *Wright*, 497 U.S. at 814-15.

60 *See* N.J. Evid. R. 63(33)(b), N.J. STAT. ANN. § 2A:84A (West Supp. 1993).

61 *Id.* Rule 63(33)(b) required that "the court finds, in a hearing pursuant to Rule 8(1), that on the basis of the time, content, and circumstances of the statement there is a probability that the statement is trustworthy." *Id.*

62 *See id.*

63 *Wright*, 497 U.S. at 819.

64 *See supra* notes 48-54 and accompanying text for a detailed discussion of the United States Supreme Court's holding in *Wright*.

65 *See infra* notes 67-86 and accompanying text for a discussion of these cases.

66 *See, e.g.*, State v. C.H., 264 N.J. Super. 112, 124, 624 A.2d 53, 59 (App. Div. 1993) (setting forth factors that relate to the credibility of a child's hearsay statement) (quoting *Wright*, 497 U.S. at 821-22 (citations omitted)); State v. J.G., 261 N.J. Super. 409, 421, 619 A.2d 232, 238 (App. Div. 1993) (finding that the court may not consider other evidence at trial in determining the trustworthiness of a child's hearsay statement), *cert. denied*, 133 N.J. 436, 627 A.2d 1142 (1993); State v. M.Z., 241 N.J. Super. 444, 450, 575 A.2d 82, 85 (Law Div. 1990) (positing that admissibility under Rule

held that "trustworthy" is not equivalent to "credible."[68] The court explained that the admissibility of a child's hearsay statements under Rule 63(33) is dependent upon the trial court's finding that there exists some indicia of reliability resembling those found in other hearsay exceptions.[69] Additionally, in *State v. C.H.*,[70] the appellate division set forth a list of factors that relate to the issue of whether a child's hearsay statement is reliable.[71] In this list, the court included the consistent repetition of allegations of sexual abuse, the spontaneity of the statement, the child's mental state at the time the statement was made, the lack of any motive to fabricate allegations of sexual abuse, and the use of terminology that is uncommon for a child of the declarant's age and maturity.[72] Finally, in *State v. J.G.*,[73] the appellate division held that a child's hearsay statement must be reliable by virtue of its inherent trustworthiness, and therefore the trial court may not consider corroborating evidence in reaching a determination that a child's

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63(33) requires a finding of indicia of reliability resembling those found in other hearsay exceptions).

67 241 N.J. Super. 444, 575 A.2d 82 (Law Div. 1990). The child victim in this case made statements to her mother concerning the actions of the defendant. *Id.* at 447-49, 575 A.2d at 84. The court held that these statements were properly admitted under Rule 63(33) because the statements were spontaneous and not prompted, and as such were "trustworthy." *Id.* at 451, 575 A.2d at 86.

68 *Id.* at 449, 575 A.2d at 85. In explaining its interpretation of "trustworthy," the law division noted that witnesses whose credibility is doubtful are often permitted to testify in court, and that the credibility of a witness is a matter for the jury to decide. *Id.* at 449-50, 575 A.2d at 85. The court then asserted that the combination of the witness's first-hand knowledge and oath to tell the truth create sufficient evidence of "trustworthiness" to allow the jury to decide "credibility." *Id.* at 450, 575 A.2d at 85 (citing State v. Briley, 53 N.J. 498, 506, 251 A.2d 442, 446 (1969)). In contrast, the court noted, when hearsay statements are involved, the issue becomes more complicated and it is necessary that there exist some other evidence of "trustworthiness." *Id.*

69 *Id.* For a list of the traditional exceptions to the hearsay rule, see *supra* note 37.

70 264 N.J. Super. 112, 624 A.2d 53 (App. Div. 1993). In this case, the trial court, pursuant to Rule 63(33), admitted into evidence statements made by an eight year old victim to family members, a caseworker, two physicians, and a police detective. *Id.* at 117-19, 624 A.2d at 56. The appellate division held that the evidence presented at the pretrial hearing supported the trial court's findings and conclusions as to the admissibility of the victim's hearsay statements. *Id.* at 124, 624 A.2d at 59.

71 *See id.* (quoting Idaho v. Wright, 497 U.S. 805, 821-22 (1990)).

72 *Id.* (quoting *Wright*, 497 U.S. at 821-22).

73 261 N.J. Super. 409, 619 A.2d 232 (App. Div. 1993), *cert. denied*, 133 N.J. 436, 627 A.2d 1142 (1993). In *J.G.*, the state convicted the defendant of aggravated sexual assault and endangering the welfare of a child. *Id.* at 414, 619 A.2d at 234. The appellate division found that the trial court erred in considering in its determination of trustworthiness the defendant's confessions and other evidence corroborating sexual abuse. *Id.* at 421, 619 A.2d at 238. The court, however, found this to be harmless error and held that the trial court's admission of the hearsay statements was supported by other identified circumstances. *Id.* at 421-22, 619 A.2d at 238-39.

hearsay statements are "trustworthy."[74]

Another issue that has been addressed by the New Jersey judiciary is the question of what constitutes an "unavailable" witness under Rule 63(33).[75] In *State v. Roman*,[76] the appellate division held that a witness will not be considered "unavailable" for the purposes of Rule 63(33) unless the prosecution demonstrates that it exercised due diligence in attempting to procure the child witness whose hearsay statements are sought to be admitted.[77] In *State v. Maben*,[78] the New Jersey Supreme Court also considered the issue of what comprises an "unavailable" witness for the purposes of Rule 63(33).[79] To balance the defendant's right to confront his or her accusers with the state's need to prosecute child sexual abuse cases, the *Maben* court held that the state must adhere to the requirements of good faith, due diligence, and reasonableness in its efforts to procure a missing witness before hearsay evidence will be

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74 *Id.* at 421, 619 A.2d at 238; *see also* State v. Roman, 248 N.J. Super. 144, 152, 590 A.2d 686, 690 (App. Div. 1991) (holding that the reliability of a child's hearsay statement must be determined from the totality of circumstances surrounding its declaration).

75 *See* State v. Maben, 132 N.J. 487, 501-02, 626 A.2d 63, 71 (1993); *Roman*, 248 N.J. Super. at 148-50, 590 A.2d at 688-89.

76 248 N.J. Super. 144, 590 A.2d 686 (App. Div. 1991). In this case, the court determined whether the child victim, whose hearsay statements were admitted pursuant to Rule 63(33), was "unavailable as a witness." *Id.* at 148, 590 A.2d at 688. Because the prosecutor failed to exert due diligence in procuring the child victim's testimony, the court held, the law division erred in finding that the child victim was unavailable to testify. *Id.* at 149-50, 590 A.2d at 688-89 (citations omitted).

77 *Id.* at 149, 590 A.2d at 688-89 (citations omitted). Specifically, the *Roman* court held that the prosecutor did not exercise due diligence because he failed to establish that it would be futile to resort to the Uniform Act to Secure the Attendance of Witnesses (Interstate Compact). *Id.* at 149-50, 590 A.2d at 688-89. The Interstate Compact, the appellate division stated, is available to procure a child witness's appearance at trial so long as the requirements of the statute are satisfied. *Id.* at 149, 590 A.2d at 688 (citing N.J. STAT. ANN. § 2A:81-19 (West 1976) (summoning witness in New Jersey to testify in another state)). The court noted that the victim's mother's refusal to honor a subpoena, in itself, was not sufficient to establish that it would have been futile to utilize the Interstate Compact. *Id.* The appellate division recognized that difficulties arise in securing the appearance of child witnesses when parents refuse to cooperate, but the court observed that the Interstate Compact, the appointment of a guardian, and the contempt power are all remedies that may be employed to insure compliance by deviant parents. *Id.* at 149-50, 590 A.2d at 688-89.

78 132 N.J. 487, 626 A.2d 63 (1993). In *Maben*, the child victim moved from New Jersey, and the state failed to check a potential address in Florida that was contained in the records of the Division of Youth and Family Services. *Id.* at 493, 626 A.2d at 66. Nevertheless, the trial court found that the prosecution had exercised due diligence in its efforts to locate the child witness. *Id.* at 491, 626 A.2d at 65. The New Jersey Supreme Court, however, affirmed the decision of the appellate division, holding that the prosecution failed to prove that it had exercised due diligence in its efforts to find the child witness. *Id.* (quotation omitted).

79 *Id.* at 501-02, 626 A.2d at 71.

admitted.[80] The supreme court further noted that the possibility of a formidable search is not sufficient to justify a failure to proceed past cursory threshold inquiries into the witness's whereabouts.[81]

Finally, in *State v. M.Z.*,[82] the law division considered the matter of who may testify under Rule 63(33).[83] Rule 63(33), the *M.Z.* court held, is not limited to statements made to expert witnesses.[84] The court maintained that the New Jersey Supreme Court did not intend that the application of the hearsay exception proposed in *State v. D.R.*[85] be limited to statements made to psychologists and other experts.[86]

It should be noted that Rule 63(33) has been re-enacted as Rule 803(c)(27) under the new New Jersey Rules of Evidence.[87]

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80 *Id.* at 501, 626 A.2d at 71. At a minimum, the court noted, the trial court must employ a balancing test that examines the burden on the state in conducting a search, the burden on the accused if he or she is unable to confront the missing witness, the gravity of the offense committed, and the existence of corroborating evidence. *Id.* at 501-02, 626 A.2d at 71. The *Maben* court recognized that this requirement may impose an additional burden upon the state, but the fact that the defendant's constitutional rights are at issue requires that the state prove the witness to be truly unavailable before hearsay statements will be admitted into evidence. *Id.* at 502, 626 A.2d at 71.

81 *Id.* at 496, 626 A.2d at 68.

82 241 N.J. Super. 444, 575 A.2d 82 (Law Div. 1990). See *supra* notes 67-69 and accompanying text for further discussion of *State v. M.Z.*

83 *M.Z.*, 241 N.J. Super. at 451, 575 A.2d at 86.

84 *Id.* The court held that statements about acts of sexual abuse made by the victim to a police detective were admissible under Rule 63(33). *Id.*

85 109 N.J. 348, app. 378, 537 A.2d 667, app. 682-83 (1988). For a discussion of the hearsay exception proposed in *State v. D.R.*, see *supra* notes 40-44.

86 *M.Z.*, 241 N.J. Super. at 451, 575 A.2d at 86.

87 *See* N.J.R.E. 803(c)(27). Rule 803(c)(27) provides in pertinent part:

> Statements by a child relating to a sexual offense.
>
> A statement by a child under the age of 12 relating to sexual misconduct committed with or against that child is admissible in a criminal, juvenile, or civil proceeding if (a) the proponent of the statement makes known to the adverse party his intention to offer the statement and the particulars of the statement at such time as to provide him with a fair opportunity to prepare to meet it; (b) the court finds . . . that on the basis of the time, content and circumstances of the statement there is a probability that the statement is trustworthy; and (c) either (i) the child testifies at the proceeding, or (ii) the child is unavailable as a witness and there is offered admissible evidence corroborating the act of sexual abuse; provided that no child whose statement is to be offered in evidence pursuant to this rule shall be disqualified to be a witness in such proceeding by virtue of the requirements of Rule 601.

Id.

The legislature has proposed Rule 804(b)(8), a rule of evidence concerning the hearsay statements of child witnesses regarding acts of sexual abuse that differs slightly from Rule 63(33). *See id.* cmt.; N.J. STAT. ANN. § 2A:84A (West Supp. 1993)

The requirements of Rule 803(c)(27) are identical to those of Rule 63(33).[88] The only material difference between the two provisions is that Rule 803(c)(27) is expressly permitted for use in juvenile, criminal, and civil proceedings.[89]

New Jersey's hearsay exception that is primarily directed toward statements of child sexual abuse victims, as it has been applied by the state's judiciary, reflects a careful balancing of the state's interest in prosecuting child sexual abuse and the constitutional interests of defendants.[90] On the one hand, under this exception to the hearsay rule, the state is able to effectively manage the obstacles that arise from the inherent evidentiary problems associated with child sexual abuse cases.[91] When the requirements of the rule are satisfied, the state may admit into evidence the out-of-court statements of the victim that are often the best and only evidence that an act of sexual abuse has taken place.[92] On the other hand, the defendant's Sixth Amendment right to confront his or her accuser is adequately protected by the rule's criteria that ensure that the victim's statements possess manifestations of reliability such that testing in an adversary proceeding would add little to their credibility.[93]

(to be codified at N.J.R.E. 804(b)(8)) (proposed May 17, 1993). Proposed Rule 804(b)(8) differs from Rule 803(c)(27) in three substantial ways. *Compare id. with* N.J.R.E. 803(c)(27). First, Rule 804(b)(8) would not allow the admission of hearsay statements of a declarant who can give testimony at trial regarding the substance of the out-of-court statement. N.J.R.E. 803(c)(27) cmt. Second, it would not be limited to sexual abuse cases. *Id.* Finally, Rule 804(b)(8) would apply only to children of "tender years" and not to all children under the age of 12. *Id.* The legislature declined to include this significantly-altered provision in its revision of the evidence rules in response to objections advanced by the New Jersey State Bar Association and the Attorney General's office. *Id.* Future amendments to Rule 803(c)(27), however, are anticipated. *Id.*

88 *Compare* N.J.R.E 803(c)(27) *with* N.J. Evid. R. 63(33), N.J. STAT. ANN. § 2A:84A (West Supp. 1993). See *supra* note 46 for the text of Rule 63(33) and *supra* note 87 for the text of current Rule 803(c)(27).

89 *See* N.J.R.E. 803(c)(27). Although Rule 63(33) did not expressly apply to civil proceedings, cases interpreting the scope of the rule held that it was applicable in civil cases. *See* R.S. v. Knighton, 125 N.J. 79, 100, 592 A.2d 1157, 1167 (1991); M.P. by D.P. v. Wee Care Day Nursery, 250 N.J. Super. 119, 124, 593 A.2d 799, 802 (App. Div. 1991).

90 *See* State v. Maben, 132 N.J. 487, 496, 626 A.2d 63, 68 (1993) (citing U.S. CONST. amend. VI; N.J. CONST. art. I, ¶ 10).

91 *See* McGrath & Clemens, *supra* note 5, at 234.

92 *See* State v. D.R., 109 N.J. 348, 358-59, 537 A.2d 667, 672 (1988) (citing RECOMMENDATIONS FOR IMPROVING LEGAL INTERVENTION, *supra* note 7, at 30, 36).

93 *See* N.J.R.E. 803(c)(27); Idaho v. Wright, 497 U.S. 805, 821 (1990).

III. THE ADMISSIBILITY OF EXPERT EVIDENCE THAT SPEAKS TO THE ISSUE OF THE CREDIBILITY OF A CHILD'S ALLEGATIONS OF SEXUAL ABUSE BY COMPARING THE CHILD'S BEHAVIOR TO THOSE SYMPTOMS COMMONLY OBSERVED IN CHILD VICTIMS OF SEXUAL ABUSE

Many of the evidentiary problems plaguing child sexual abuse prosecutions arise from the central role played by expert witnesses in such cases.[94] The credibility of expert witnesses often affects the outcome of child sexual abuse cases, and if the truth-seeking purpose of the trial is to be accomplished it is imperative that the expert testimony offered be reliable.[95] The use of expert testimony in child sexual abuse prosecutions becomes particularly problematic when it infringes upon other interests.[96] For example, the expert testimony may invade the domain of the jury, may be unduly prejudicial, may improperly bolster the credibility of the child witness, may create a situation where one witness judges the credibility of another witness, or may lead to a "battle of experts."[97] Such situations often arise when the expert testimony in question concerns psychological evidence that attempts to compare a child's behavior to those symptoms commonly found in victims of child sexual abuse.[98]

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94 Younts, *supra* note 1, at 697.

95 *Id.* at 698. Courts need to carefully consider the reliability of such expert testimony prior to admitting this testimony into evidence because investigations of child sexual abuse are sometimes inadequately conducted and may lead to a misdiagnosis of abuse. *Id.* at 692 (citation omitted).

96 Veronica Serrato, Note, *Expert Testimony in Child Sexual Abuse Prosecutions: A Spectrum of Uses*, 68 B.U. L. REV. 155, 156-57 (1988).

97 *Id.* (citing State v. Lindsey, 720 P.2d 73, 76 (Ariz. 1986); State v. Moran, 728 P.2d 248, 251-52 (Ariz. 1986); State v. Myers, 382 N.W.2d 91, 95 (Iowa 1986)).

98 *See id.* at 163-67 (placing expert testimony used in child sexual abuses cases into a spectrum of admissibility based upon its impact on the ultimate issue of the case).

One type of expert testimony employed in child sexual abuse cases is testimony that describes behavior commonly observed in victims of child sexual abuse. *See* John E.B. Myers et al., *Expert Testimony in Child Sexual Abuse Litigation*, 68 NEB. L. REV. 1, 51 (1989). Such testimony has two possible uses. *See id.* First, it may be offered as substantive evidence of abuse. *Id.* Second, it may be offered as rehabilitative evidence to explain behavior that appears to be inconsistent with the child's allegations of sexual abuse. *See id.* It is this second category of expert testimony that is the focus of Part III of this Comment.

Expert testimony that concerns psychological evidence may be contrasted to expert testimony that pertains to medical evidence of sexual abuse. *See id.* at 48 (citations omitted). The latter is usually admissible. *Id.* Expert medical witnesses have been allowed to offer opinions as to the origin of the victim's injuries, to establish whether penetration occurred, and to answer inquiries concerning whether the accused's explanation for an injury is reasonable and whether the victim's injuries could have occurred in a particular manner. *Id.* at 49 (citations omitted).

The Supreme Court of New Jersey addressed the issue of the admission of such expert psychological testimony in *State v. J.Q.*[99] The specific issue presented to the *J.Q.* court involved the admissibility of expert testimony regarding the Child Sexual Abuse Accommodation Syndrome (CSAAS), which embodies characteristics that are commonly observed in children who have been victims of sexual abuse.[100] The court held that CSAAS evidence is admissible only to explain that a victim's behavior, which may appear to be inconsistent with allegations of abuse, may actually be compatible with abuse because such behavior is commonly observed in victims of child sexual abuse.[101] CSAAS evidence, the court continued, may not be used as substantive evidence of abuse, and an expert is not permitted to give an opinion as to whether the child was sexu-

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Another area of expert testimony concerns the admissibility of inferences drawn by experts from the child's interaction with anatomically-correct dolls during investigative questioning. *See* State v. J.Q., 130 N.J. 554, 566, 617 A.2d 1196, 1202-03 (1993); Younts, *supra* note 1, at 706. The admissibility of such evidence is highly questionable because the dolls have not been shown to be dependable indicators of sexual abuse. Younts, *supra* note 1, at 706. The New Jersey judiciary has not yet addressed this issue, but the supreme court has questioned the admissibility of such testimony in dictum. *See J.Q.*, 130 N.J. at 566, 617 A.2d at 1202-03. The court noted, however, that the use of anatomically-correct dolls may help a child in recounting the event in a way that will help the jurors to better understand the event in question. *Id.* at 566, 617 A.2d at 1203.

99 130 N.J. 554, 556, 617 A.2d 1196, 1197 (1993).

100 *Id.* The state's expert witness, Dr. Madeline Milchman, offered testimony describing the Child Sexual Abuse Accommodation Syndrome (CSAAS). *Id.* at 558, 559, 617 A.2d at 1198, 1199. Dr. Milchman then related the specific behaviors embodied in CSAAS to behavior that she observed in the victims, and on this basis she stated that in her expert opinion, she believed that the victims had been sexually abused. *Id.* at 559, 617 A.2d at 1199.

For detailed information concerning the research and theory behind CSAAS, see Roland C. Summit, M.D., *The Child Sexual Abuse Accommodation Syndrome*, 7 CHILD ABUSE & NEGLECT 177 (1983). Dr. Summit, a prominent physician and professor of psychiatry, identified CSAAS as incorporating five symptoms that are commonly observed in victims of child sexual abuse: (1) helplessness; (2) secrecy; (3) delayed, unconvincing, and conflicting disclosure; (4) entrapment and accommodation; and (5) retraction. *Id.* at 181. Dr. Summit described CSAAS in order to provide a "common language" for persons who work to protect child victims of sexual abuse and dispel common myths and misconceptions about the behavior of children who have been sexually abused. *Id.* at 179-80, 191; *see* Myers et al., *supra* note 98, at 67 (citing Summit, *supra*, at 181). CSAAS was not intended to be used as a device to help diagnose abuse. *Id.*

101 *See J.Q.*, 130 N.J. at 579, 617 A.2d at 1209 (quoting Myers et al., *supra* note 98, at 67-68 (footnotes omitted)). The court noted that CSAAS helps to explain why many victims of child sexual abuse delay reporting acts of abuse and later recant their allegations of sexual abuse. *Id.* (quoting Myers et al., *supra* note 98, at 67-68 (footnotes omitted)). Confining the use of CSAAS to its rehabilitative functions, explained the court, permits CSAAS to further "a useful forensic function." *Id.* (quoting Myers et al., *supra* note 98, at 67-68 (footnotes omitted)).

ally abused based upon a comparison of the child's behavior to the behavior commonly observed in victims of child sexual abuse.[102]

The New Jersey Supreme Court based its ruling in *J.Q.* upon an analysis of the purposes for which CSAAS was developed.[103] The court stated that CSAAS was not developed as a diagnostic device, but instead the syndrome assumes that sexual abuse has already occurred and then explains how victims react to that abuse.[104] The New Jersey Supreme Court concluded that CSAAS has not been accepted as a reliable indicator of abuse, and for this reason CSAAS testimony should not be utilized to establish guilt or innocence.[105] The court, however, did recognize that CSAAS has been accepted in the scientific community as a means of identifying and describing behavior commonly found in victims of child sexual abuse.[106] For this reason, the court held, CSAAS testimony may properly be used to rehabilitate the victim's testimony by ex-

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102 *Id.* at 582, 617 A.2d at 1211 (citing Myers et al., *supra* note 98, at 68.) The court stated that CSAAS does not purport to establish child sexual abuse, but is useful in explaining "traits often found in children who have been abused." *Id.* The court asserted that the state was asking CSAAS "'to perform a task it could not accomplish.'" *Id.* (quoting Myers et al., *supra* note 98, at 68). The court explained that while the scientific community appears to accept the clinical theory that CSAAS portrays behavioral traits often found in victims of child sexual abuse, the scientific community has not accepted that the existence of such symptoms in a particular individual proves abuse. *Id.* at 573, 617 A.2d at 1206 (citations omitted).

103 *See id.* at 578-81, 617 A.2d at 1209-10 (citations omitted). The court noted that Dr. Summit developed the theory behind CSAAS in order to improve the child's health, to ensure that abused children receive adequate treatment, and to guarantee that misconceptions about child sexual abuse victims would not impair society's response to those victims. *Id.* at 568, 617 A.2d at 1203. CSAAS, the court concluded, does not attempt to prove that children exhibiting the described symptoms have been sexually abused. *Id.* at 582, 617 A.2d at 1211.

104 *Id.* at 579, 617 A.2d at 1209 (quoting Myers et al., *supra* note 98, at 67-68). CSAAS may be distinguished from Battered Child Syndrome (BCS), which is a device used to diagnose physical abuse. *See* Myers et al., *supra* note 98, at 67. BCS is probative of abuse because it is used to connect the cause of an injury to the type of injury. *Id.* In contrast, CSAAS assumes the presence of sexual abuse and then attempts to explain commonly-observed reactions to such abuse and is therefore not probative of sexual abuse. *Id.* Professor Myers concluded that the confusion stemming from the use of CSAAS evidence arose because some professionals mistakenly transferred their knowledge of BCS to CSAAS. *Id.* (citation omitted).

105 *J.Q.*, 130 N.J. at 578, 617 A.2d at 1209 (citing David McCord, *Expert Psychological Testimony About Child Complainants in Sexual Abuse Prosecutions: A Foray into the Admissibility of Novel Psychological Evidence*, 77 J. CRIM. L. & CRIMINOLOGY 1, 24, 38 (1986)). The court noted that CSAAS was not intended to diagnose sexual abuse, but instead assumes that abuse has occurred and attempts to explain why child victims react in particular ways. *Id.* at 579, 617 A.2d at 1209 (quoting Myers et al., *supra* note 98, at 67-68 (footnotes omitted)).

106 *Id.* at 573, 617 A.2d at 1206 (citing Myers et al., *supra* note 98, at 66-69; Chandra L. Holmes, Comment, *Child Sexual Abuse Accommodation Syndrome: Curing the Effects of a Misdiagnosis in the Law of Evidence*, 25 TULSA L.J. 143, 158-59 (1989)).

plaining that it is common for victims of child sexual abuse to react in ways that may appear inconsistent with their allegations of abuse.[107]

In *State v. Michaels*,[108] the appellate division clarified the issue of whether expert testimony concerning CSAAS is admissible when the expert does not expressly offer an opinion as to whether a particular child was sexually abused.[109] Although the prosecution's expert did not explicitly state her opinion as to the issue of abuse, the *Michaels* court held, her testimony was inadmissible because it was intended to imply such an opinion.[110] The testimony, the court noted, was not focused on explaining why the victims would act in a manner seemingly inconsistent with abuse, but was instead aimed at informing the jury that the symptoms that the expert witness

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107 *Id.* at 579, 617 A.2d at 1209 (citing Myers et al., *supra* note 98, at 68). The New Jersey Supreme Court noted that the use of CSAAS testimony that it advocated in *J.Q.* is in accord with the use that is generally granted to Rape Trauma Syndrome (RTS). *Id.* at 581, 617 A.2d at 1210. The court explained that RTS describes symptoms that victims of rape often experience and, like CSAAS, RTS was developed as a therapeutic tool rather than a diagnostic device. *Id.*; *see also* People v. Bledsoe, 681 P.2d 291, 298, 301 (Cal. 1984) (concluding that RTS testimony is not admissible as evidence that a rape occurred, but may be admissible in cases where the defense suggests that the victim's behavior after the alleged rape is not consistent with her allegations of rape); State v. Saldana, 324 N.W.2d 227, 230-31 (Minn. 1982) (holding that RTS testimony may not be admitted for the purpose of proving that a rape actually occurred); People v. Taylor, 552 N.E.2d 131, 138 (N.Y. 1990) (holding that RTS is not admissible as substantive proof that the victim was raped) .

The court also equated the advocated use of CSAAS testimony to expert evidence concerning Battered Woman's Syndrome (BWS). *J.Q.*, 130 N.J at 574, 617 A.2d at 1206-07 (citing State v. Kelly, 97 N.J. 178, 190-97, 478 A.2d 364, 369-73 (1984)). The *Kelly* court explained that BWS evidence is admissible to allow jurors to overcome common misconceptions that battered women would leave the men who batter them, and that such evidence does not aid jurors in determining whether or not a defendant behaved in a certain manner on a particular occasion. *Kelly*, 97 N.J. at 204, 478 A.2d at 377.

108 264 N.J. Super. 579, 625 A.2d 489 (App. Div. 1993). This is the high-profile case of Margaret Kelly Michaels, the teacher accused of sexually abusing 20 children under her care at Wee Care Nursery School in Maplewood, New Jersey. *Id.* at 585, 625 A.2d at 492.

109 *See id.* at 603, 625 A.2d at 501-02. The defendant's appeal raised the argument, among others, that the trial court erred in admitting expert testimony concerning CSAAS. *Id.* at 587-88, 625 A.2d at 493. The court determined that the expert testimony did not attempt to explain the children's inconsistent behavior, but rather attempted to compare the children's behavior with CSAAS. *Id.* at 603, 625 A.2d at 501.

110 *Id.* at 603-05, 525 A.2d at 501-02. The appellate division based its decision on the New Jersey Supreme Court holding in *J.Q.* *Id.* at 599, 625 A.2d at 499 (citing *J.Q.*, 130 N.J. at 579-80, 617 A.2d at 1209-10). The court reiterated that when CSAAS testimony is used, the expert is expected to testify that the victim's specific behavior, while appearing inconsistent with sexual abuse, may be consistent with such abuse; the expert should not render an opinion as to whether a particular child has been sexually abused. *Id.* (citing *J.Q.*, 130 N.J. at 579-80, 617 A.2d at 1209-10).

observed in the children were consistent with behavior commonly observed in victims of child sexual abuse.[111]

The New Jersey judiciary has taken the most fair and reasonable approach in its position on the admissibility of expert evidence that attempts to compare the victim's behavior to common symptoms found in victims of child sexual abuse.[112] Many commentators support the decision that the court made in *J.Q.*, rejecting the use of CSAAS to prove abuse and advocating its use to explain how victims often react to sexual abuse in ways that appear inconsistent with their allegations of abuse.[113] Also, the courts of

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[111] *Id.* at 603, 625 A.2d at 501. Determining that the harm caused by the admission of this expert testimony could not have been undone by cross-examination, the *Michaels* court held that the impact of the error of admitting this testimony was "so overwhelming" that the defendant's convictions could not stand. *Id.* at 605, 625 A.2d at 502.

[112] *See supra* notes 99-111 and accompanying text (examining the approach the New Jersey judiciary has taken with regard to the admissibility of expert psychological evidence in child sexual abuse cases). The New Jersey judiciary, in setting forth the standards for compelling examinations of child witnesses, has also taken a fair and reasonable approach that is intended to protect the child. *See* State v. D.R.H., 127 N.J. 249, 260-61, 604 A.2d 89, 95 (1992) (holding that a physical examination of a child witness in a sexual abuse case may be compelled only when the defendant sufficiently demonstrates that the examination can produce competent evidence having substantial probative worth, and only when the court is satisfied that the possible adverse consequences to the child witness are clearly outweighed by the defendant's need); State v. R.W., 104 N.J. 14, 22-23, 514 A.2d 1287, 1291 (1986) (holding that in compelling psychological examinations of child witnesses in sexual abuse cases, there is no need to deviate from accepted criteria for determining "substantial need," and that age *per se* cannot be the basis for ordering psychiatric or psychological testing).

[113] *See, e.g.*, Marian D. Hall, *The Role of Psychologists as Experts in Cases Involving Allegations of Child Sexual Abuse*, 23 FAM. L.Q. 451, 463 (1989) (explaining that behavioral science research does not support the conclusion that there is a way to accurately diagnose that a particular child is a victim of sexual abuse); McCord, *supra* note 105, at 67 (concluding that the admissibility of expert opinion testimony should be limited to explaining the unusual behavior of the complainant); Myers et al., *supra* note 98, at 68 (noting that expert testimony concerning the common behaviors observed in victims of child sexual abuse is necessary to instruct jurors on the common misconceptions that surround child sexual abuse and to explain the seemingly self-impeaching behavior of victims of child sexual abuse); Andrew Cohen, Note, *The Unreliability of Expert Testimony on the Typical Characteristics of Sexual Abuse Victims*, 74 GEO. L.J. 429, 447 (1985) (finding that testimony that speaks to typical characteristics of victims of child sexual abuse misleads juries and should be excluded); Holmes, *supra* note 106, at 160-62 (concluding that CSAAS is not a scientifically reliable method of detecting child sexual abuse because the causal connection between CSAAS and abuse is not verifiable due to the fact that it is "impossible to manipulate the variables involved") (citations omitted); Corrine A. LaCroix, Recent Case, 23 SETON HALL L. REV. 1214, 1219 (1993) (praising the *J.Q.* court's decision because "[a]lthough the defense can impeach the credibility and attack the reasoning of the psychologist, the sheer impact of experts testifying could sway the jury in favor of the prosecution"). *But see* Elizabeth V. Baker, Comment, *Psychological Expert Testimony on a Child's Veracity in Child Sexual Abuse Prosecutions*, 50 LA. L. REV. 1039, 1055 (1990) (asserting that experts should be

many states have followed the same approach as the New Jersey Supreme Court in admitting expert testimony concerning behavior commonly observed in sexually abused children.[114]

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permitted to render opinions as to children's veracity in sexual abuse prosecutions where the expert is sufficiently experienced and explains the methods behind the opinion given).

One commentator has listed four serious problems that argue against the use of syndrome evidence as substantive evidence of abuse: (1) a child who has not actually been abused may believe that he or she has been abused; (2) even if the child has actually been abused at some other time, this does not establish that the accused abused the child on the date in question; (3) the syndromes lack a firm scientific foundation because they are based upon clinical intuition rather than hard data; and (4) the symptoms that have been observed in abused children can be the result of a number of other traumatic events that are not related to sexual abuse. *See* DEBRA WHITCOMB, NATIONAL INST. OF JUSTICE, WHEN THE VICTIM IS A CHILD 116 (2d ed. 1992).

[114] *See* State v. Moran, 728 P.2d 248, 254 (Ariz. 1986) (asserting that expert testimony comparing a child's behavior with that of child sexual abuse victims is admissible to explain why recantation is not inconsistent with the occurrence of abuse); People v. Bowker, 249 Cal. Rptr. 886, 892 (Cal. Ct. App. 1988) (ruling that CSAAS evidence is "admissible solely for the purpose of showing that the victim's reactions as demonstrated by the evidence are not inconsistent with having been molested"); Wheat v. State, 527 A.2d 269, 273, 274 (Del. 1987) (holding that expert testimony regarding typical patterns of behavior in child sexual abuse victims is admissible to demonstrate that the complainant's behavior is not inconsistent with the alleged sexual abuse); State v. Black, 537 A.2d 1154, 1156-57 (Me. 1988) (holding inadmissible expert witness testimony identifying the complainant as an abuse victim based on a comparison to sexual abuse victims); People v. Beckley, 456 N.W.2d 391, 399 (Mich. 1990) (holding that evidence concerning the behavioral patterns commonly observed in sexual abuse victims is admissible only to rebut an inference that the complainant's actions were inconsistent with allegations of abuse); State v. Myers, 359 N.W.2d 604, 610 (Minn. 1984) (citation omitted) (holding that expert testimony concerning commonly observed behaviors in child sexual abuse victims is only admissible to demonstrate that the child's behavior is not inconsistent with typical reactions to sexual abuse); State v. Middleton, 657 P.2d 1215, 1221 (Or. 1983) (holding that an expert witness may not give an opinion as to whether a child witness is credible, but may describe the reactions of typical child sexual abuse victims to explain the child witness's inconsistent behavior).

The Pennsylvania judiciary has taken the most conservative position on this issue and will not permit expert testimony concerning the common behavior of sexually abused children to be admitted for any reason, even for the purpose of rehabilitation. *See, e.g.*, Commonwealth v. Sees, 605 A.2d 307, 308-09 (Pa. 1992) (finding error in permitting expert testimony concerning commonly observed behaviors of sexual abuse victims); Commonwealth v. Dunkle, 602 A.2d 830, 834 (Pa. 1992) (citation and footnote omitted) (holding that testimony concerning behavior commonly observed in victims of child sexual abuse is inadmissible).

Other states have allowed the admission of expert opinion as to whether a particular child has been sexually abused. *See* Glendening v. State, 536 So. 2d 212, 220 (Fla. 1988) (holding that an expert witness was entitled to express an opinion as to whether the child had been sexually abused), *cert. denied*, 492 U.S. 907 (1989); State v. Geyman, 729 P.2d 475, 479 (Mont. 1986) (holding that expert testimony that helps the jury to assess the credibility of a child victim of sexual abuse is admissible); Townsend v. State, 734 P.2d 705, 708 (Nev. 1987) (allowing admission of an expert's opin-

CONCLUSION

Society's recent focus of attention toward the disturbing increase in reports of child sexual abuse has compelled our legal system to confront the evidentiary problems inherent in the prosecution of child sexual abuse cases.[115] Unfortunately, the reforms that center upon resolving these issues are in themselves problematic. It is often the case that a revision that seeks to alleviate the trauma suffered by victims and their families, or that attempts to permit the prosecution to use the evidence most valuable to its case, is in conflict with the rights that the accused is entitled to under the United States Constitution.[116] Therefore, courts and lawmakers must be extremely cautious in their efforts to assuage the difficulties associated with the special nature of child sexual abuse cases.[117]

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ion as to whether a child has been sexually abused); State v. Timperio, 528 N.E.2d 594, 596 (Ohio Ct. App. 1987) (permitting an expert witness to offer opinions as to whether a particular child has been sexually abused); State v. Bachman, 446 N.W.2d 271, 275, 276 (S.D. 1989) (citations omitted) (holding that expert testimony comparing the victim's behavior with symptoms found in other victims of child sexual abuse admissible where the expert does not testify that the victims were absolutely telling the truth or were molested by the defendant).

For commentators' attempts to classify the range of decisions concerning the use of expert testimony regarding common behaviors of victims of child sexual abuse, see Elizabeth MacEwen & Peter Tamigi, *A Three Prong Approach to the Admissibility of Expert Testimony on Child Sexual Abuse Syndrome*, 2 ST. JOHN'S J. LEGAL COMMENT. 140 (1987) (dividing state court decisions on whether experts should be permitted to offer opinion testimony concerning the credibility of sexually abused children into three categories: conservative, moderate, and liberal); Serrato, *supra* note 96 (dividing the use of expert testimony along a scale of admissibility).

115 *See supra* notes 1-4 and accompanying text (offering statistical data on the modern increase in reported incidents of child sexual abuse); *supra* notes 5-8 and accompanying text (discussing the problems inherent in the prosecution of child sexual abuse cases).

116 Allowing children to testify via closed circuit television and the creation of a hearsay exception directed toward child victims' out-of-court statements of abuse are particularly troublesome because they may interfere with defendants' right to confront their accusers under the Confrontation Clause. *See* U.S. CONST. amend. VI. *See supra* notes 20-27 and accompanying text (discussing the constitutional limitations upon permitting children to testify outside of the courtroom); *supra* notes 47-54 and accompanying text (addressing the constitutional standards applied to hearsay exceptions specifically tailored to the out-of-court statements of child sexual abuse victims).

117 For example, the New Jersey Supreme Court noted:

> Society must tread a measured path that avoids ignoring the reality of child sexual abuse and avoids as well the possibility of unjust conviction of this most shameful of crimes. In *Maryland v. Craig*. . . four members of the Supreme Court cautioned that courts should be particularly insistent in protecting innocent defendants in child-sexual-abuse cases because of the reliability problems created by children's suggestibility in child-sexual-abuse prosecutions.

The New Jersey judiciary and legislature have successfully addressed the unique problems and issues that arise in child sexual abuse cases by creating a careful balance among the interests of the victims of child sexual abuse and their families, the interest of the state in prosecuting crimes involving child sexual abuse, and the constitutional rights of defendants. First, the legislature has effectively resolved the difficulties that result from the child victim's fear of the accused by enacting a statute that permits the child's testimony to be presented outside of the courtroom when specific requirements are met.[118] The statutory requirements assure that the constitutional rights of defendants will not be violated.[119] Also, the judiciary and the legislature have worked together to develop a hearsay exception that allows children's out-of-court statements concerning abuse to be admitted into evidence under certain circumstances.[120] Again, the requisite balance has been created to ensure that the state may admit what is usually its strongest evidence of abuse only when the constitutional rights of the accused have been adequately protected.[121] Finally, the New Jersey judiciary has protected the truth-seeking role of the trial by carefully inspecting the nature and reliability of expert psychological evidence and determining its proper function at trial.[122]

Child sexual abuse is an emotionally-charged issue. Given the atrocious nature of crimes that involve child sexual abuse, it is understandable that states may choose to address the problems inherent in prosecuting these cases in ways that may threaten the constitutional rights of the accused. Yet, the ways in which New Jersey's legal system has confronted the problems of prosecuting child sexual abuse cases demonstrate that these difficulties can be alleviated without jeopardizing defendants' rights under the Con-

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State v. J.Q., 130 N.J. 554, 562, 617 A.2d 1196, 1200 (1993) (citing Maryland v. Craig, 497 U.S. 836, 868 (1990) (Scalia, J., dissenting)).

118 *See* N.J. STAT. ANN. § 2A:84A-32.4 (West Supp. 1993). For a discussion of § 2A:84A-32.4 and its text, see *supra* notes 19, 28-35, and accompanying text.

119 *See* State v. Crandall, 120 N.J. 649, 656, 577 A.2d 483, 486 (1990) (analyzing the constitutionality of § 2A:84A-32.4 under the requirements set forth by the Supreme Court in *Craig*). For a discussion of *Crandall*, see *supra* notes 28-31 and accompanying text.

120 *See* State v. D.R., 109 N.J. 348, app. 378, 537 A.2d 667, app. 682-83 (1988); N.J. Evid. R. 63(33), N.J. STAT. ANN. § 2A:84A (West Supp. 1993); N.J.R.E. 803(c)(27).

121 For a discussion of the constitutionality of Rule 63(33), see *supra* notes 55-64 and accompanying text.

122 *See* State v. J.Q., 130 N.J. 554, 578-79, 617 A.2d 1196, 1209 (1993) (citing Myers et al., *supra* note 98, at 67-68 (footnotes omitted)). For a detailed discussion of the New Jersey Supreme Court's decision in *State v. J.Q.*, see *supra* notes 99-107 and accompanying text.

stitution. The steps taken by the New Jersey judiciary and legislature to confront the evidentiary problems arising in child sexual abuse cases should serve as an example to other jurisdictions of how necessary reforms may be adequately addressed within the confines of the American legal system.

Dione Marie Enea