What Would Happen If Videotaped Depositions of Sexually Abused Children Were Routinely Admitted in Civil Trials? A Journey Through the Legal Process and Beyond

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I. INTRODUCTION

As all of us are aware, there has been concern throughout our legal system about the trauma that child victims of sexual abuse suffer when testifying at criminal trials. It is likely that these same concerns will follow into the civil arena as civil cases for sexual abuse of child victims become more common. In response, advocates of child victims will propose that video-

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1. Over the last several years, an unprecedented number of sexual molestation claims, particularly involving child sexual abuse, have been pursued in the courts. The costs of defending such actions are substantial, and the jury awards are potentially astronomical. According to a confidential report prepared for U.S. Catholic bishops, it is estimated that the Roman Catholic Church alone could face more than $1 billion in legal claims through 1995 because of lawsuits against priests charged with child molestation.

tapes of child depositions be admitted in trial in place of live testimony. Such evidence may have profound effects on juries and may also alter the role of advocates in our civil system.

This Article, however, is not about the effect of videotaped testimony on a jury,\(^2\) or about whether the advocate of the future will be more of a film editor than an orator, or more of a visual than an oral storyteller. Rather, this Article is about how the possibility of videotaped child depositions offers a promise that the law cannot keep. Video depositions in civil cases promise sexual child abuse victims a kinder, gentler path to compensation. This promise cannot be kept because, pretend as we might, what we create within the categorical world of the law cannot be hermetically sealed off from the outer world. Legal realists are concerned with the seepage of influences from the outer world into the legal domain.\(^3\) Conversely, this Article focuses upon seepage from the legal domain into the outer world.

We will follow the journey of one well-intentioned legally created solution, clothed as a gloss upon the evidentiary rules governing depositions, as it drifts into the world outside.\(^4\) As we follow the video deposition solution, it will interact with the psychology of child molesters and advocates, the economics of daycares, the emergence of working mothers in the American workforce, and the reactions of institutions providing insurance. Yet, at the journey’s end, the solution will be but an empty promise.

This journey begins in the comfortable, self-contained world of the law and legal arguments about the admissibility of a child's deposition in civil sex abuse cases. I will show, in Section II-A, that it is plausible to believe that trial courts will routinely accept such arguments. I will then consider, in Section II-B, why principles of collateral estoppel will not shield the child victim from testifying at trial.

In considering the resulting consequences, I will examine,


\(^{4}\) Some might, however, deny any significant separation between the "real" world, with its manipulation of power, favor trading, and bureaucracies, and the day-to-day world of law. See, e.g., Pierre Schlag, *Normativity and the Politics of Form*, 139 U. PA. L. REV. 801 (1991).
in Section III-A, the broader implications of accepting the evidentiary arguments. I will then explore, in Section III-B, the impact of routine acceptance of these evidentiary arguments on the behavior of the child and his or her parents or guardians, the defense bar, and the plaintiff bar. We will see that more sexual molestation suits will likely be brought and favorably settled for the plaintiff as a result of the alteration in behavior of all three categories of the above players. From here, in Section III-C, I will assess the impact of the projected increase in civil molestation cases and favorable settlements on compensation for victims and deterrence of future child sexual abuse.

The consequences of an increase in civil molestation cases and in favorable plaintiff settlements will affect different categories of defendants in different ways. The first category of defendants consist of individual abusers who are the direct perpetrators of the sexual molestation. These defendants will neither offer sources of compensation nor be deterred from committing further sexual abuse by the prospect of civil suit for reasons we will encounter involving human psychology, economics, and the behavior of the insurance industry.

The second category of defendants consists of noninstitutional vicariously liable defendants. This category includes nonparticipating spouses or significant others who knew or should have known about their mate's behavior yet failed to act. Also included in this category are operators of family home daycares (i.e., daycares conducted in the owner's home, generally involving a few children in addition to the owner's) who negligently hired or supervised employees. We will see that these would-be defendants may change their behavior somewhat to decrease the possibility of molestation in the face of an increased chance of civil suit. However, this group fares little better than the first group of defendants as a source of compensation for many of the same reasons.

The final category of defendants consists of vicariously liable institutional entities. These are for-profit, nonprofit, and employer-sponsored daycare facilities, and state daycare licensing agencies. They face liability for negligent hiring, supervision, licensing, and inspection. Unlike the first two categories of defendants, these institutional defendants both offer sources for compensation and respond to the risk of suit by taking steps to reduce the risk of sexual child abuse. Nevertheless, there are potential downsides to these institutions' risk averse
behavior and their responses are largely intertwined with the behavior of insurance institutions. Thus, the journey leads us to explore the past, present, and future relationship of insurance companies to daycares.

The journey ends with a stark reality. Although more cases may be brought and although daycares and government agencies may respond in ways that will diminish instances of molestation as a result, sources of money will simply not be available to compensate most child victims of sexual abuse.

II. ADMITTING VIDEOTAPED TESTIMONY INTO EVIDENCE

A. The Reasons That Video Depositions Will Be Admitted

There are several reasons why trial courts will readily admit video depositions in civil child molestation suits into evidence.

1. Judicial Concern for Child Welfare

The child's counsel's evidentiary arguments will take place against the backdrop of a legal system with a traditional concern for the welfare of children.\(^5\) Recently this system has become all but obsessed with the well-being of child sexual abuse victims in the litigation process.\(^6\) Of particular concern is the potentially traumatic and psychologically harmful consequences to the child victim of requiring his or her testimony at

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a criminal trial. As one commentator has observed:

Several researchers have determined that traditional court procedures add to a child's psychological scars, producing "system-induced trauma." One study compared a sample of children who had testified in court with a random sample of sex abuse victims and found that 73 percent of the court victims had behavioral problems compared with only 57 percent of the random sample. The researchers attributed the differences to the trauma of testifying in court. Others have also reported that child sex abuse victims who must participate in court proceedings experience greater trauma than those who do not. These differences, however, may be attributable to the fact that it is usually the most serious cases that result in a trial.

Other researchers have found that child sexual abuse victims often suffer from a variety of problems including confusion, depression, shame, and guilt. One commentator relates that many sexually abused children display symptoms such as fear for their safety, feelings of depression and


Some recent commentators have noted, however, that although stressful for some children, the process is not so for others. Gail S. Goodman and Vicki S. Helgeson, Child Sexual Assault: Children's Memories and the Law, in PAPERS FROM A NATIONAL POLICY CONFERENCE ON LEGAL REFORMS IN CHILD SEXUAL ABUSE CASES, A REPORT OF THE AMERICAN BAR ASSOCIATION CHILD SEXUAL ABUSE LAW REFORM PROJECT 41, 53 (1985) [hereinafter, ABA REPORT]; Lucy Berliner, The Child Witness: The Progress and Emerging Limitations, in ABA REPORT, 95, 102 (1985); Buckley, supra, at 648 (1985). One commentator even reported that most children can testify "without much difficulty." Michael H. Graham, The Confrontation Clause, the Hearsay Rule, and Child Sexual Abuse Prosecutions: The State of the Relationship, 72 Minn. L. Rev. 523, 560 n.192 (1988). But such an observation speaks only indirectly to the question of whether the experience causes the child psychological harm. In fact, some commentators suggest that, under some circumstances, participating and testifying in a civil suit is beneficial, as it "empowers" the child-victim. See infra, note 83.
anxiety, embarrassment, "nightmares that have an assaultive content," guilt, and ambivalence. These symptoms can be greatly *aggravated* by forcing a child to testify in open court in front of his or her assailant. A survey of professionals working with child victims revealed that the most frequently mentioned fear of the children was that of facing the defendant.\(^8\)

One cannot believe that the trauma resulting from testifying in a civil trial will be any less.\(^9\)

2. The Civil Context

For a number of reasons, the standards for admitting a video deposition in a civil case will be far less stringent than they would be in a criminal case. First, neither the stigma of the criminal label nor a sanction that threatens to constrain liberty or extinguish life is involved in a civil case.\(^10\) Furthermore, in a civil case, unlike in a criminal proceeding, there is no commitment to give the defendant every reasonable benefit of the doubt,\(^11\) nor a concern for the protection of the individ-

\(^8\) Bjerregaard, *supra* note 6, at 169-70.

\(^9\) Although the legal system unequivocally supports the interests of young children, a court may view children testifying as plaintiffs in civil cases as not raising concerns comparable to those raised in the criminal process. In criminal cases, society is attempting to vindicate itself and to protect other children from a child molester. Unfortunately, the only real witnesses usually available to identify the molester will be the already abused child. John Crewdson, *by Silence Betrayed* 162 (1988). We must, therefore, utilize these children in the criminal process if we are going to achieve our societal end.

Civil cases are different. Arguably, no great societal purpose is at stake; rather, the children and their families simply want money. At some level, a court may believe that any suffering in the civil process is the result of the family's private decision to seek money and therefore does not require the extreme concern that is shown in criminal cases.

However, not all the cases expressing concern about the welfare of young children arose in the context of prosecutions for sexual child abuse. See cases cited *supra* note 5. Moreover, a child has as much of a right as anyone to bring a case to trial. Having done so, the child is subject to harms that would not likely befall an adult in similar circumstances, and the child has as great a need for court protection in a civil case as does a child in a criminal case. There is, therefore, no reason that a court should not be solicitous of the welfare of children in civil cases.

\(^10\) "The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction." *In re* Winship, 397 U.S. 358, 363 (1970).

\(^11\) Several factors influence this conclusion. First, the rights provided to a criminal defendant by the Fifth and Sixth Amendments preclude the prosecution from utilizing the most obvious source of accurate information in the case: the defendant. Furthermore, the prosecution must prove its case to the highest conceivable burden.
nal from governmental power. Civil litigants in fact have no constitutional right to confrontation. Ironically, the criminal defendant’s right to confrontation is the very right that has been the bane of commentators and courts seeking innovative solutions to protecting sexually abused children from the trauma of criminal trials. Even the right of cross-examination, which is part of a litigant’s general right to Due Process,

Finally, society picks up the bill for an indigent defendant’s attorney who is armed with a constitutional arsenal of weapons including cross-examination, compulsory process, and confrontation. Taken together, these factors lead to the overwhelming conclusion that the criminal system was intended to give the defendant every reasonable benefit of the doubt.

The civil litigant does not possess the same battery of criminal defendant rights. As Justice Harlan explained:

In a civil suit between two private parties for money damages, for example, we view it no more serious in general for there to be an erroneous verdict in the defendant’s favor than for there to be an erroneous verdict in the plaintiff’s favor. . . . In a criminal case, on the other hand, we do not view the social disutility of convicting an innocent man as equivalent to the disutility of acquitting someone who is guilty. . . . In this context, I view the requirement of proof beyond a reasonable doubt in a criminal case as bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.


12. In some sense, both the civil and criminal proceedings are concerned with the "truth." The central thrust of the civil process, however, is a fair resolution of the conflicting claims between a private plaintiff and private defendant. A criminal case is quite different. The criminal case involves the power of government. Cf. Browning-Ferris Indust. of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 266 (1989) (in the course of discussing the constitutionality of punitive damages in civil cases, the Court noted, "the primary focus of the Eighth Amendment was the potential for governmental abuse of its 'prosecutorial' power, not concern with the extent or purposes of civil damages."). To be more precise, the criminal case involves a system in which jurors, as members of society, stand between an individual citizen and the government. The criminal process is thus a systematic check on the power of the executive. John B. Mitchell, The Ethics of the Criminal Defense Attorney—New Answers to Old Questions, 32 Stan. L. Rev. 293, 299-302 (1980).

If we allow the government to bring weaker evidence before the jury in criminal cases by removing the crucible of contemporaneous cross-examination, the protection that the jury system offers against the abuse of executive power is weakened. There is no comparable concern with civil litigation.


15. In re Mary S., 230 Cal. Rptr. at 729.
turns out to be quite watered-down in the civil context. Against the backdrop of this watered-down species of cross-examination, courts will be aware that civil defendants in child sex abuse cases will still have a full opportunity to cross-examine at a deposition.

More broadly, because substituting a videotape for live testimony in a criminal case impinges on the constitutional rights of contemporaneous cross-examination and confrontation, and because constitutional rights may only be impaired if truly "necessary," criminal courts apply extremely strict standards

16. Courts and legal commentators appear far more accommodating of situationally located justifications for deviation from a litigant's due process-based cross-examination rights in the civil context than they do when dealing with constitutional confrontation in the criminal arena. For example, in Derewecki v. Penn R.R. Co., 353 F.2d 436, 442 (3d Cir. 1965), the court stated that a right to cross-examination attaches in every adversary proceeding. However, the court admitted the deposition of the plaintiff, who died before the deposition was completed and before opposing counsel could conduct full cross-examination. In admitting the deposition, the court found an "extraordinary situation," weighing the defendant's right to cross-examination against the plaintiff's widow's ability to bring the suit. Id.

Similarly, general evidentiary rules require that a witness's direct examination be stricken if a witness becomes sick or otherwise physically or mentally incapacitated before cross-examination is begun or completed. CHARLES TIPPMAN MCCLMICK, MCCORMICK ON EVIDENCE § 19 at 49 (Edward W. Cleary et al. eds., 1984). However, one commentator has suggested that "[i]n the case of the nonparty witness... at least in civil cases, it is arguable that this result should be qualified so that the judge is directed to exclude unless he is clearly convinced that the incapacity is genuine, in which event he should let the direct testimony stand... He should then be authorized to explain to the jury the weaknesses of such uncross-examined evidence." Id. (citing Note, 27 COLUM. L. REV. 327 (1927)) (emphasis added). The same commentator suggests that in a civil, as opposed to a criminal case, the direct examination of a witness who has died before cross-examination should be allowed to stand on the theory that "common sense tells us that the half-loaf of direct testimony is better than no bread at all." Id. See also id. n.21.

17. Although few constitutional rights are absolute, we tend to take these rights seriously. Common sense dictates that this level of seriousness requires a showing that it is "necessary" to impinge upon a constitutional right.

Not surprisingly, the necessity requirement is specifically reflected in several cases that deal with attempts to protect the interests of young children. Thus, in Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982), although specifically finding that "the protection of minor victims of sex crimes from further trauma" is a compelling state interest, the Supreme Court nevertheless refused to uphold a statute mandating the closing of courtrooms to the press and public in every case where the sexual abuse of a minor was involved. Id. at 608. Rather, the Court required a determination of necessity in the particular case at hand before it would permit First Amendment rights to be circumscribed. Id.

Similarly, in Coy v. Iowa, 487 U.S. 1012 (1988), the Court struck down an innovative attempt to shield a child witness from the trauma of directly confronting an alleged molester because the statute involved permitting this procedure on an across-the-board basis without any specific finding as to the necessity of its use in the particular case. Id. at 1025. In a later case, the Court reiterated its stance in Coy:
before excusing witnesses from presenting their testimony in
person at trial. In contrast, in a civil case, all that is at stake
when substituting video for live testimony are evidentiary
rules underlain by a preference for live testimony. A showing
of "good cause" should be more than sufficient to overcome
this preference. Thus, the differences in constitutional pro-

"[O]ur precedents confirm that a defendant's right to confront accusatory witnesses
may be satisfied absent a physical, face-to-face confrontation at trial only where denial
of such confrontation is necessary to further an important public policy and only
where the reliability of the testimony is otherwise assured." Maryland v. Craig, 110 S.
Ct. 3157, 3166 (1990) (emphasis added).

18. A continuance until a witness can recover from a disability, rather than a
finding of witness unavailability, is the norm in the criminal process. See, e.g., United
States v. Faison, 679 F.2d 292, 297 (3d Cir. 1982); Warren v. United States, 436 A.2d 821,
828 (D.C. 1981); People v. Lombardi, 332 N.Y.S.2d 749, 750-51 (1972), aff'd, 303 N.E.2d
705 (N.Y. 1973), cert. denied, 416 U.S. 906 (1974). Some courts have even required a
showing that the witness will suffer a breakdown or some comparable malady that
makes attendance "relatively impossible." People v. Stritzinger, 668 P.2d 738, 747 (Cal.
generally, Graham, supra note 7, at 557-62:

Witnesses who testify in open court often suffer some emotional distress.
Many, if not most, rape victims suffer severe emotional distress trauma while
testifying, especially when face-to-face with the accused. Presumably, so do
many other groups of victims. Unavailability requires more than merely
showing the possibility of emotional distress or trauma, even more than
showing a likelihood that such emotional distress or trauma will be
substantial or severe: a showing of substantial likelihood of severe emotional
or mental harm is required.

Id. at 560.

19. Hearsay exceptions which require unavailability express a "rule of
preference." 4 J ACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE,
¶ 804(a)(01), at 804-35 (1991). It is preferable to have the declarant available in court;
but, if that cannot be, the admission of the hearsay "is preferable to losing all evidence
from the source." Id. See also FED. R. EVID. 804(b) advisory committee's note:

Subdivision (b). Rule 803 supra, is based upon the assumption that a hearsay
statement falling within one of its exceptions possesses qualities which justify
the conclusion that whether the declarant is available or unavailable is not a
relevant factor in determining admissibility. The instant rule proceeds upon a
different theory: hearsay which admittedly is not equal in quality to
testimony of the declarant on the stand may nevertheless be admitted if the
declarant is unavailable and if his statement meets a specified standard. The
rule expresses preferences: testimony given on the stand in person is
preferred over hearsay, and hearsay, if of the specified quality, is preferred
over complete loss of the evidence of the declarant. The exceptions that
evolved at common law with respect to declarations of unavailable declarants
furnish the basis for the exceptions enumerated in the proposal.

(Emphasis added).

20. "Good cause" is a familiar standard for all those involved in the civil process.
It currently provides the standard for protective orders, FED. R. CIV. P. 26(c), medical
examinations, FED. R. CIV. P. 35, and in the past was the standard for all discovery.
Although requiring a meaningful showing to the court, the "good cause" standard is
tions between criminal and civil cases suggest that video depositions will be admitted in civil cases.

3. Videotape Reliability

One of the strongest arguments for admitting videotapes is that color videotapes are reliable and relatively comparable substitutes for live testimony. Video depositions can fairly present a witness's evidence if appropriate taping procedures are followed. Moreover, as prior recorded testimony, depositions are among the most reliable of all forms of hearsay. Additionally, the defendant will have had the opportunity to

obviously a less demanding standard for unavailability than the "necessity" standard required in criminal cases. See supra note 18 and accompanying text.

This less stringent civil standard is consistent with the entire treatment of civil sexual child abuse cases. "[I]n a civil case, . . . it is easier to find unavailability even when the disability is only temporary." Weinstein & Berger, supra note 19, ¶ 804(a)[01], at 804-45. In civil cases, a less serious disability is accepted as justifying unavailability. McCormick, supra note 16, § 253, at 755 (3d ed. 1984). See, e.g., Crossley v. Lieberman, 888 F.2d 566, 568-69 (3d Cir. 1989) (elderly witness, a heavy smoker who had trouble breathing and who had no car and would therefore have to take public transportation to trial, found unavailable). In fact, the advisory committee's note to Fed. R. Evid. 804(a) states that civil litigants are held to a "lesser standard" in regard to the efforts they must make to procure the attendance of a witness at trial.

21. Contrast this with the cases where the witnesses have been asked to be excluded from giving any testimony at all. See, e.g., Kashishian v. State, 386 A.2d 666 (Del. 1978); State v. Gilbert, 326 N.W.2d 744 (Wis. 1982).


24. Fed. R. Evid. 804(b)(1) provides an exception to the hearsay rule for prior recorded, or "former," testimony:

Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(Emphasis added.)

Depositions generally fulfill the requirements of 804(b)(1). Fed. R. Civ. P. 32(a) analogously permits the deposition of a witness to be "used by any party for any purposes upon a proper showing." Most state jurisdictions have some statutory or common law counterpart to these two sections.

25. Of all the categories of testimony excepted from the hearsay rule, prior recorded testimony is among the most reliable: Attorneys are generally present, an oath is taken, the opportunity for cross-examination is afforded, and a verbatim transcript is made. See Fed. R. Evid. 804(b)(1) advisory committee's note.
cross-examine at the recording of the deposition.\textsuperscript{26} In fact, the principle objection that the commentators to Fed. R. Evid. 804(b)(1) find in a deposition is its absence of information about witness "demeanor."\textsuperscript{27} A videotape of the witness provides much of this missing element. Although watching a video is not the same as viewing a live witness, it is sufficiently similar to provide adequate "demeanor" information.\textsuperscript{28} The reliability of videotaped depositions thus suggests that they will be admitted in civil child molestation cases.

4. Accessible "Unavailability"

A finding that the child is "unavailable" for trial is a

\textsuperscript{26} For a variety of reasons peculiar to these cases, the defense should have little trouble conducting meaningful cross-examination, even though the deposition may take place early in the discovery phase. For example, the issues to which the child will testify will not be very complex, and the defense should be able to easily develop the information it desires. Indeed, the basic facts have likely already been fleshed out and documented in reports and transcripts of a prior related criminal case.

In an effort to develop more effective cross-examination, defense counsel may argue that the court should permit an initial "discovery" deposition before the full-blown videotaping of the child's deposition. Although having some initial appeal, courts should probably reject this claim, or at least limit it, by giving defense counsel the first hour for discovery, taking a half hour break, and then continuing. Such a rejection or limitation should occur because multiplying the formal confrontations with adversary counsel by permitting more than one deposition is likely to add to the stress on the child that the evidentiary arguments sought to avoid.

Note also that, when conducting this cross-examination, defense counsel should be fully aware of the possibility that the child may be declared unavailable at trial and that the deposition, therefore, might be presented to the jury. See infra notes 29-53 and accompanying text.

\textsuperscript{27} In fact, the most significant reservations the commentators express about routinely substituting depositions for live testimony appear to be that the "opportunity to observe demeanor is what in a large measure confers depth and meaning upon oath and cross-examination. Thus in cases under Rule 803, demeanor lacks the significance which it possesses with respect to [live] testimony." See FED. R. EVID. 804(b)(1) advisory committee's notes (emphasis added). Videotaping supplies much of the opportunity to observe demeanor. See infra note 28.

\textsuperscript{28} Most courts and commentators believe that "the effect on jurors of videotaped testimony is comparable to live testimony." GREGORY P. JOSEPH, MODERN VISUAL EVIDENCE, § 2.02 (1991). See also United States v. Binder, 769 F.2d 595, 600 (9th Cir. 1985) ("Videotape testimony is unique. It enables the jury to observe the demeanor and to hear the testimony of the witness. It serves as the functional equivalent of a live witness."); Reber v. General Motors Corp., 669 F. Supp. 717, 720 (E.D. Pa. 1987); Commonwealth v. Stasko, 370 A.2d 350, 355 (Pa. 1977) (videotaped deposition allowed jury opportunity to observe demeanor of witness and judge credibility); Wise, supra note 7, at 656. But see Bjerregaard, supra note 6, at 174-75 (noting that although studies indicate that there is no significant difference between jurors watching live or videotaped testimony, "it may be hazardous to generalize from such conclusions to child sex abuse cases as there have been no comparable studies conducted on child witnesses.").
legally necessary predicate for substituting the child's video deposition for his or her live testimony.\textsuperscript{29} Courts, however, possess a broad range of sources for making this finding. In finding unavailability, the courts can choose\textsuperscript{30} between the numerous state counterparts of either Fed. R. Evid. 804(a)\textsuperscript{51} or Fed. R. Civ. P. 32(a).\textsuperscript{32}

\textsuperscript{29} A finding that the declarant/witness is legally " unavailable" is a predicate to admission of the deposition. See Fed. R. Evid. 804(a). See also Fed. R. Civ. P. 32(a)(3).

\textsuperscript{30} Because courts can choose between Fed. R. Evid. 804(a)(3) and Fed. R. Civ. P. 32(a), it is only natural to question which takes precedence if one appears to permit or forbid something that the other does not. Although a bit strange, the answer appears to be that until Congress acts, they both apply, and a plaintiff may rely upon either one. Scott E. Perwin, Use of Depositions in Federal Trials: Evidence or Procedure?, 16 Litig. 37, 39 (Fall 1989). See also Weinstein & Berger, supra note 19, ¶ 804(b)(1)(01) at 804-71:

Rule 32(a)(3) of the Federal Rules of Civil Procedure and section 3503 of title 18 of the United States Code together with Rule 15 of the Rules of Criminal Procedure, govern the use of depositions in civil and criminal cases. They create of their own force exceptions to the hearsay rule in the case of unavailable deponents, which Rule 802 continues. As promulgated by the Supreme Court, Rule 804(b)(1) would have applied to depositions only to the extent that they are offered in a proceeding different from the one in which they are taken. Congress made the rule applicable to depositions taken in the same proceeding as well.

(Emphasis added, footnotes omitted).

The two rules, however, intersect. The 1970 Amendment of Rule 32(a) amended the rule to read, "[a]t trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition, or who had reasonable notice thereof. . . ." Fed. R. Civ. P. 32(a) (emphasis added); Fed. R. Civ. P. 32 advisory committee's note. The advisory committee note makes it clear that the content of the deposition must satisfy the evidence code. 48 F.R.D. 487, 520, Fed. R. Civ. P. 32 advisory committee's note. Accord, Stroud v. Dorr-Oliver, Inc., 542 P.2d 1112, 1114 (Ariz. 1975), reh'g denied, 544 P.2d 1089 (Ariz. 1976).

\textsuperscript{31} Fed. R. Evid. 804(a) provides:

Definition of Unavailability. "Unavailability as a witness" includes situations in which the declarant:

(1) Is exempted by ruling of the judge on the ground of privilege from testifying concerning the subject matter of his statement; or
(2) Persists in refusing to testify concerning the subject matter of his statement despite an order of the judge to do so; or
(3) Testifies to lack of memory of the subject matter of his statement; or
(4) Is unable to be present or to testify at a hearing because of death or then existing physical or mental illness or infirmity; or
(5) Is absent from the hearing and the proponent of his statement has been unable to procure his attendance by process or other reasonable means.

(Emphasis added).

\textsuperscript{32} Fed. R. Civ. P. 32(a)(3) provides in part:

The deposition of a witness, whether or not a party, may be used by a party for any purpose if the court finds: (A) that the witness is dead; or (B) that the witness is at a greater distance than 100 miles from the place of trial.
These rules provide a broad range of categories upon which a court may rest its finding of unavailability. For example, unavailability will be found if the child testifies to lack of memory. Some child witnesses may have inadequate memories by the time of trial through repression, the stress of trial, or the mere passage of time. Additionally, the child may be found incompetent to testify at trial and thus unavailable.

(Emphasis added).

As you can see, Fed. R. Civ. P. 32(a)(3) does not include the grounds of lack of memory, refusal to answer, or privilege that are found in Fed. R. Evid. 804(a). One plausible inference from this distinction is that the civil rule focuses principally upon the physical unavailability of the witness whereas the evidence rule concerns the unavailability of witness's testimony. Weinstein & Berger, supra note 19, ¶ 804(a)[01], at 804-36; McCormick, supra note 16, § 253, at 753. The distinction between Fed. R. Civ. P. 32 and Fed. R. Evid. 804 may carry implications for unavailability analyses under Fed. R. Civ. P. 32. See infra note 49.

33. Lack of memory is specifically provided for in Fed. R. Evid. 804(a)(3). See State v. Slider, 38 Wash. App. 689, 694, 688 P.2d 538, 541 (1984) (child unavailable because of lack of memory), review denied, 103 Wash. 2d 1013 (1985). See also United States v. Amaya, 533 F.2d 188, 191 (5th Cir. 1976) (witness declared unavailable due to memory loss from which he was not likely to recover), cert. denied, 429 U.S. 1101 (1977); Walden v. Sears, Roebuck and Co., 654 F.2d 443, 446 (5th Cir. 1981) (error not to find child unavailable who had no real memory of accident at time of trial); Weinstein & Berger, supra note 19, ¶ 804(a)[01], at 804-42.

If a witness's memory is only partial, then the witness will be unavailable as to those portions not remembered. McCormick, supra note 16, § 253, at 755. See, e.g., United States v. MacDonald, 688 F.2d 224, 233 n. 14 (4th Cir. 1982) (declarant testified at length but was "unavailable" as to parts where "she claimed a loss of memory"), cert. denied, 459 U.S. 1103 (1983).

34. See generally Legislative Innovations, supra note 7, at 807; Note, Minnesota's Hearsay Exception for Child Victims of Sexual Abuse, 11 WM. MITCHELL L. REV. 799, 802, 806 (1985) [hereinafter Note, Minnesota]. High stress reduces the ability to retrieve information. Gail S. Goodman & Vicki S. Helgeson, Child Sexual Assault: Children's Memory and the Law, in ABA REPORT, supra note 7, at 53. Over time children's memories fade, but perhaps no more than adults. Interestingly, adults "fill-in" their memories over time in order to make their stories remain coherent. Younger children do not. Id. at 53. Thus, ironically, children's testimony may be more accurate over time but less credible.

35. Although not specifically listed under either Fed. R. Civ. P. 32(a)(3) or Fed. R. Evid. 804(a), a witness who lacks testamentary capacity is generally considered "unavailable." See Haggins v. Warden, Fort Pillow State Farm, 715 F.2d 1050, 1055 (6th Cir. 1983)("since declarant in this case was ruled incompetent to testify, she was clearly unavailable"), cert. denied, 464 U.S. 1071 (1984); State v. Ryan, 103 Wash. 2d

This notion makes sense. If ruled incompetent, a "witness" cannot even take the stand. FED. R. EVID. 104(a). Furthermore, "unavailability" refers to the unavailability of a witness's testimony and not to the physical presence of a witness. WEINSTEIN & BERGER, supra note 19, ¶ 804(a)(1), at 804-36; MCCORMICK, supra note 16, § 253, at 753. An individual present who, as a matter of law, cannot tell truth from falsehood and cannot get, retain, or express just impressions of the subject matter discussed, can hardly be considered an "available" witness.

Although competent at the time of the deposition, a particular child witness may be declared incompetent at trial for at least two reasons. First, courts have always been concerned that the child's memory may no longer be sufficient. The child's ability to remember the central event when a significant period of time has elapsed between the event and the trial is critical. See, e.g., McCale v. Lynch, 110 Wash. 444, 449, 188 P. 517, 518-19 (1920) (incompetent because of lapse of time and extreme suffering which "erased" memory). But see Kalberg v. Bon Marche, 64 Wash. 452, 454, 117 P. 227, 227-28 (1911) (competent in spite of three-year lapse between event and trial). Second, the child may "freeze" on the witness stand and become uncommunicative. See, e.g., State v. Gitchel, 41 Wash. App. 820, 826, 706 P.2d 1091, 1094 (1985); State v. Shephard, 484 A.2d 1330, 1333 (N.J. Super. 1984); See also Note, Minnesota, supra note 34, at 806.

In any event, the plaintiff should bring a competency determination in those jurisdictions where either a witness must understand the oath or where children under a certain age are not presumed competent. See John B. Meyers, The Testimonial Competence of Children, 25 J. FAM. L. 287, 306-07 (1986-87) Even in jurisdictions following the federal rule that all witnesses are competent or in jurisdictions with statutory schemes declaring that child abuse victims are competent, judges still make competency determinations. Id. at 297-305, 307-08.

A competency determination should be made for at least two reasons. First, a deponent is a witness who must undergo direct and cross-examination while under oath. FED. R. CIV. P. 28, 30(c), 30(f). All of these elements require attributes of competence. See, e.g., Stowers v. Carp, 172 N.E.2d 370, 377 (Ill. App. 1961) (party had no right to take child's deposition unless competency decision made first); Bennett v. Ross, 120 N.Y.S.2d 283, 283 (1950). Second, regardless of any finding of unavailability, a finding that the deposed child was competent at the time of giving the deposition is predicate to the admission of that deposition at trial. Parrott v. Wilson, 707 F.2d 1262, 1269 (11th Cir. 1983) (emphasis added), cert. denied, 464 U.S. 936 (1983); Huff v. White Motor Corp., 609 F.2d 286, 292 (7th Cir. 1979); McCutcheon v. Brownfield, 2 Wash. App. 348, 355, 467 P.2d 868, 873 (1970), review denied, 78 Wash. 2d 993 (1970).

Several rationales support the position that a competency determination should be made at the time of deposition. First, when a deposition is presented to a jury, the deponent is "testifying" as a witness. A witness must be competent. See State v. Wilson, 103 N.E.2d 552, 555, 556 (Ohio 1952) (deposition of child not admissible because no showing that witness was competent at the time of deposition). Second, the deposition is hearsay. Falling under a recognized hearsay exception does not facially mean that all of the concerns underlying the hearsay rule will be met. The exceptions themselves assume that the out-of-court declarant was competent at the time of making the statement. Dean Wigmore notes that "the extrajudicial statements may be inadmissible because of their failure to fulfill the ordinary rules about qualifications, even though they may meet the requirements of a hearsay exception." 5 JOHN H. WIGMORE, WIGMORE ON EVIDENCE § 1424, at 255 (James H. Chadbourn ed. 1974). See also State v. Ryan, 103 Wash. 2d 165, 173, 691 P.2d 197, 203 (1984) ("if the declarant was
Although competent at the time of deposition, a child may subsequently be found incompetent at trial. For instance, the child's memory may no longer be sufficient, or the child may "freeze" on the witness stand and become uncommunicative. Also, the child may refuse to testify out of fear of the defendant. Adults who, in fear of the defendant, have refused to testify despite a court order, have been found unavailable. A young child's fear of possible retaliation potentially has at least as great an impact and may result in a similar refusal to testify.

not competent at the time of making the statements, the statements may not be introduced through hearsay repetition"); Katrin E. Frank, Comment, Confronting Child Victims of Sex Abuse: The Unconstitutionality of the Sexual Abuse Hearsay Exception, 7 U. Puget Sound L. Rev. 387, 393-94 (1984); Charles F. Stafford, The Child As a Witness, 37 WASH. L. REV. 303, 306-07 (1962).

Third, and somewhat related to the second rationale, the various categories of unavailability are all premised upon the underlying assumption that, were it not for the reason causing the unavailability, the declarant could have been a witness. See Frank, supra, at 393; Wigmore, supra § 1445, at 304 ("If the declarant would have been disqualified to take the stand by reason of infancy . . . his extra-judicial declaration must also be inadmissible.") (quote taken from discussion of unavailability).

36. When considering admission of the video deposition, the court will generally look at the child's competence at the time of the taking of the deposition and not at the time of trial. See supra note 35. For this reason, counsel normally will want the competency hearing to be contemporaneous with the deposition. In fact, in State v. Wilson, 103 N.E.2d 552, 556-57 (Ohio 1952), the court stated that the trial court was incapable of determining at trial whether or not a child was competent at the time of giving his deposition. The Ohio Supreme Court stated that "[t]yped answers to attorneys' questions read from a deposition cannot convey to the court the full information to which the court is entitled, and the competency of the child cannot be so established." Id. at 556.

In the case of videotaped depositions, the court would, of course, have more before it than "typed answers." It would have a color videotape. Although giving more information than the bare transcript, even a video would seem inadequate to the task. A competency determination generally involves the court in actively examining the child. Myers, supra note 35, at 337-46.

Admittedly, some courts make competency determinations regarding a declarant at the time of a deposition using only the deposition and/or testimony about the declarant's mental state at the relevant time. See McCutcheon, 2 Wash. App. at 355, 467 P.2d at 873 (competence can be discerned from nature of questions and answers at deposition or expert testimony). See also Parrott, 707 F.2d at 1269 (no evidence of incompetency at time of deposition despite examination of record); Huff, 609 F.2d at 292 (testimony shows declarant incompetent at time of deposition). However, all of these cases involved adults who were presumed competent.

In addition, even if the court could in theory determine competency from a video, the court should not necessarily do so. Because part of the competency decision is backward looking anyway, the further the competency decision is from the event, the less accurate it is.

37. See supra note 34 and accompanying text.
Perhaps the broadest and most amorphous category of unavailability available to trial courts is the “then existing mental illness or infirmity” category.\textsuperscript{39} Initially, courts applied this category to those who were too ill to come into court\textsuperscript{40} and to those who could walk into court but were insane.\textsuperscript{41} In the past decade, courts have taken a bit of a conceptual leap and applied this category to people who would become physically or mentally ill from testifying itself.\textsuperscript{42} This category of

\textsuperscript{39} Both FED. R. EVID. 804(a)(4) and FED. R. CIV. P. 32(a)(3)(C) specifically posit findings of “illness” or “infirmity” as legitimate predicates for admission of a deposition that then qualifies as prior recorded testimony under 804(b)(1). See supra notes 31-32.

\textsuperscript{40} These witnesses were truly physically unavailable. See, e.g., United States v. Rhodes, 713 F.2d 463 (9th Cir. 1983) (in hospital with heart attack and took Fifth Amendment), cert. denied, 464 U.S. 1012 (1983) and cert. denied, 465 U.S. 1038 (1984); United States v. Faison, 679 F.2d 292, 296 (3d Cir. 1982) (heart attack, undergoing surgery), aff’d, 725 F.2d 671 (3d Cir. 1983); Norburn v. Mackie, 141 S.E.2d 877, 879 (N.C. 1965) (stomach condition made long trip to court detrimental to witness’s health). But see Vigoda v. Barton, 204 N.E.2d 441, 446 (Mass. 1965) (no showing seventy-two-year-old too sick to come into court).

\textsuperscript{41} Insanity is actually a competence problem resulting in unavailability of the witness’s evidence. See Parrott v. Wilson, 707 F.2d 1262, 1268 (11th Cir. 1983) (witness who was delusional since accident was unavailable), cert. denied, 464 U.S. 936 (1983); State v. Williams, 9 Wash. App. 663, 665, 513 P.2d 1045, 1046 (1973) (witness had breakdown on stand, became incomprehensible, and therefore unavailable due to incompetency), rev’d on other grounds, 84 Wash. 2d 853, 529 P.2d 1088 (1975); State v. Wahle, 298 N.W.2d 795, 798 (S.D. 1980) (declarant involuntarily committed to mental institution). Cf. State v. Maestas, 584 P.2d 182, 189 (N.M. 1978) (mental problems made testimony inadequate).


This set of cases, however, constitutes quite a jump from its predecessors. Indeed, in considering a finding of unavailability on the grounds that the trauma from testifying itself would cause the witness harm, one court recognized that it was embarking on a relatively novel path. Warren v. United States, 436 A.2d 821, 827 (D.C. 1981).

Courts initially found unavailability under the illness rubric in the most concrete context. Witnesses were unavailable who were too ill to come into court. See supra note 40 and accompanying text. These witnesses were unavailable in a palpable physical sense. Courts did not have to take a large step from there to find a witness unavailable who, although physically capable of walking into the courtroom, was insane. See supra note 41 and accompanying text. The issue in cases of insanity was really one of legal competence. If a person could not function as a witness, the court had little interest in the production of the witness’s body. If the court wanted the witness’s information, it therefore would have to settle for a second best source such as a deposition taken at the time the witness was competent.

In contrast, under the latest line of cases, if the very act of testifying would make the witness physically or mentally ill, the witness would be found unavailable. This is
unavailability, combined with a declaration or two from some mental health professionals, should fit like the proverbial glove with the desire to protect sexual child abuse victims from the trauma they might suffer from testifying at trial. In theory, courts could find the child unavailable as soon as the deposition was completed, even though years before trial. Such a finding could be made on grounds that, because the stress caused by remaining in the process itself is harmful to the child’s health, the specter of the proceeding hanging overhead is an obstacle to the child’s progress in therapy. Although no court has yet gone this far, if a court were so inclined, it could

a very different focus than the previous focus on the unavailability of the witness’s testimony. The new concern appears to be a humanitarian one, balancing the importance of live testimony against the witness’s health and finding in the balance that it is simply not worth risking the witness’s health. Although one could argue that the older cases were also motivated by humanitarian concerns, it is more doctrinally significant that the new category of cases employs a new vocabulary: “Harms from testifying.” This vocabulary is far more amorphous, especially in the psychological realm, than inquiries into a witness’s physical presence.

43. Plaintiff will still need to make a showing of “good cause.” See supra note 20 and accompanying text. If Maryland v. Craig, 110 S. Ct. 3157 (1990), is any guide, however, the required showing may be quite minimal. In Craig, the Supreme Court upheld a trial court finding that rested exclusively on conclusory expert declarations and an absence of a court interview of the child. Id. at 3161, 3171.

44. The court can also rely upon what I call trauma-induced hybrid grounds. Such grounds include incompetency as a result of trauma. Cf. Maryland v. Craig, 110 S. Ct. 3157 (1990) (trauma will cause the child to become uncommunicative). Trauma-induced hybrid grounds also include fear inducing a refusal to testify. People v. Rojas, 542 P.2d 229, 234, 236 (Cal. 1975) (when witness testified to “desperate fear” for himself and his family, court held that “mental infirmity” included a mental state induced by fear which impels a witness to refuse to testify).

45. A legislatively enacted exception to the hearsay rule would not have a comparable effect. Generally, the evidence admitted through such an exception would be simple statements of identity and wrongdoing (“he touched me here”) rather than the full range of information that may be required in a civil case. See infra Section II-B. More importantly, the child would still be available to be called to the stand. See infra Section III-B.

46. One may ask whether this finding of unavailability will only be made if the child is undergoing, or about to undergo, therapy. As a factual matter, most children bringing suit will be in counseling, if only because plaintiff’s counsel will send them for evaluation and counseling. Alternatively, the mental health professional doing the evaluation may refer the child to a separate professional for counseling. If the child is not in therapy, however, there may be difficulties persuading the trial court of the child’s unavailability.

In theory, whether or not the child is in counseling should not have this effect on the finding. After all, the real point is that the child must go through a “healing” process and removing the child from the litigation process will further this end. Yet therapy provides the court with something concrete onto which it can tie notions of harm from the process itself. In any event, even the child who is not in therapy will almost certainly need evidence from a mental health professional to succeed in showing unavailability.
add this type of unavailability to Fed. R. Evid. 804(a), read it into Fed. R. Evid. 804(a)(4), invoke the “exceptional circumstances” exception in Fed. R. Civ. P. 32(a)(3)(E), or designate

47. A number of arguments can be made that the grounds listed under Fed. R. Evid. 804(a) are not exclusive. McCormick states: "In principle probably anything which constitutes unavailability in fact ought to be considered adequate." McCormick, supra note 16, § 253, at 754. Fed. R. Evid. 804(a) specifically “includes situations,” but is not limited to the situations explicitly stated. Courts also seem to accept grounds not specifically listed under Fed. R. Evid. 804(a). See, e.g., Haggins v. Warden, Fort Pillow State Farm, 715 F.2d 1050, 1055 (6th Cir. 1983) (child who is incompetent is “unavailable”), cert. denied, 464 U.S. 1071 (1984); United States v. Iron Shell, 633 F.2d 77, 87 (8th Cir. 1980) (child “unavailable” when cannot be effectively cross-examined), cert. denied, 450 U.S. 1001 (1981).

There are counter arguments. McCormick went on to say “the rules have grown up around certain recurring fact situations, and the problem is therefore approached in that pattern.” McCormick, supra note 16, § 253, at 754. Further, in contrast to the language of Fed. R. Evid. 804(a), Fed. R. Evid. 901(b) explicitly provides that the listed methods of authentication are “by way of illustration only, and not by way of limitation.” Finally, one could argue that the “catch-all” provisions, Fed. R. Evid. 803(25) and 804(b)(5), provide the sole mechanisms for creating new hearsay exceptions.

These counter arguments can be met with plausible responses. First, McCormick’s first statement that “in principle” anything which produces unavailability should be adequate is a legal principle. His second statement is merely a factual-historical observation. The fact that the drafters of Fed. R. Evid. 901 did not want the reader to think the stated authentication techniques were exclusive cannot be used to infer that grounds included under Fed. R. Evid. 804(a) were exclusive. The drafters merely listed in 804(a) the historically accepted grounds to which they had become accustomed. Last, harm to the child is not a new evidence “exception”; it is merely a new ground for unavailability which can bring the existing evidence exceptions under Fed. R. Evid. 804 into play.

48. Fed. R. Evid. 102 states that “[t]hese rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained in proceedings justly determined.” (emphasis added).

Permitting parties to argue that the trial itself would cause psychological harm, as opposed to arguing that the proposed witness was too mentally ill to testify, clearly broadened the existing interpretation of the “then existing mental illness and infirmity” clause of Fed. R. Evid. 804(a)(4). See supra note 42. Plaintiff’s attempt to have the child declared unavailable when the process, and not just an appearance at trial, causes the child psychological harm seems a further reasonable application of the policies expressed in Fed. R. Evid. 102 as applied to Fed. R. Evid. 804(a)(4).

49. Fed. R. Civ. P. 32(a)(3)(E) has a nice, open-textured phrasing that is amenable to an argument that asks the court to take a novel position: “[U]pon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.” Fed. R. Civ. P. 32(a)(3)(E).

Words like “interest of justice” provide an ideal vocabulary for asking a court to go beyond the existing bounds of doctrinal interpretation. Also, plaintiff may be reluctant to attempt to squeeze an argument into 804(a). See supra notes 47, 48. Indeed, courts may well feel some discomfort expanding the scope of unavailability
under 804(a) when to do so would ease the admission of both reliable and unreliable 804 exceptions.

FED. R. CIV. P. 32(a), on the other hand, deals only with depositions. There are two problems in invoking FED. R. CIV. P. 32(a)(3)(E), however. The phrase "exceptional circumstances" provides the first problem. "Exceptional" could be equated with "necessary" and thus undermine the "good cause" analysis. See supra note 20. Certainly, something about the particular case must distinguish it from the routine. A requirement of uniqueness would require that the moving party present good cause to believe that there is something significantly different about the particular case that merits special treatment. This requirement itself raises problems. If courts admit videotaped depositions into evidence, will not findings of unavailability be relatively routine and therefore, by our own definition, be not exceptional?

Arguably, this analysis confuses how we treat a category of litigants with how we treat members of that category. Hence, as is germane for our purposes, a court may find the category of young sexual child abuse victims in the civil process to be an "exceptional" class of litigants and still approach findings of unavailability as relatively routine once a child is found to fall within the class.

The second problem of invoking the exceptional circumstances exception has already been referred to briefly. FED. R. CIV. P. 32 appears to focus upon the physical unavailability of the person rather than on the unavailability of his testimony. See supra note 32. In child sexual abuse cases, however, the children can come into court; the plaintiff is merely arguing that the court should not force them. The very few cases decided under FED. R. CIV. P. 32(a)(3)(E) and its predecessor, FED. R. CIV. P. 26(d)(3), do not clearly aid plaintiff's position. Most smack of physical unavailability: Huff v. Marine Tank Testing Corp., 631 F.2d 1140, 1142-43 (4th Cir. 1980) (witnesses promise to come and then fail to show up); Reber v. General Motors Corp., 669 F. Supp. 717, 720 (E.D. Pa. 1987) (witnesses are expected by all concerned to be out-of-state at the time of trial and unexpectedly return); Odell v. Miller, 10 F.R.D. 528, 529 (W.D. Mich., 1950) (witnesses flee their state of residence where the trial is being held and refuse to reenter because they would be "arrested under a warrant or attachment" from a local court); Stremel v. Sterling, 564 P.2d 559 (Kan. Ct. App. 1977) (witnesses are subpoenaed, but do not show up for trial).

Note, however, that the court could have made the witness in Reber, a doctor, testify. Rather, the court placed heavy emphasis on the "Doctor's busy schedule of surgery." Reber, 669 F. Supp. 717. A busy schedule does not really constitute physical unavailability. Similarly, another court used the exceptional circumstances exception to admit a deposition taken out of the jury's presence, though the witness was clearly available, in order to "expedite the trial" and "avoid confusion of the jury by introduction of irrelevant testimony." Lebeck v. William A. Jarvis, Inc., 145 F. Supp. 706, 724 (E.D. Pa. 1956), rev'd, 250 F.2d 285 (3rd Cir. 1957).

Even though many of these cases appear to involve a lack of physical presence, at no time did any of these courts make any pronouncement that the scope of FED. R. CIV. P. 32(a)(3)(E) or its predecessor was limited to problems of literal physical unavailability. The judges merely decided the cases before them.

It is surely not unreasonable to read FED. R. CIV. P. 32(a)(3)(E) as empowering the court with discretion to deal with those situations not explicitly covered by FED. R. CIV. P. 32(a)(3)(A)-(D). In fact, as one of the first courts to interpret the predecessor of this section noted, "The quoted rule shows by its terms the solicitude disclosed in the rules generally for trials on oral testimony and the disposition to avoid trial on depositions alone where it can properly be avoided or where injustice or unfairness will not result." Klepal v. Pennsylvania R.R. Co., 229 F.2d 610, 612 (2d Cir. 1956) (emphasis added).

Although physical unavailability is certainly a situation where the less desirable alternative of presenting deposition over live testimony cannot "properly be avoided,"
the deposition as one to perpetuate testimony.\textsuperscript{50}

In conclusion, several factors suggest that videotaped depositions will be admitted in civil child sexual abuse suits. First, the court system is emotionally predisposed in the child's favor.\textsuperscript{51} Second, the court system is dealing with evidentiary

other less defined grounds can fall under "unfair." As plaintiff's counsel would argue, "Is it just or fair to make a child who has already suffered deeply suffer further when nothing really is gained by making her stay in the process?"

50. FED. R. CIV. P. 27(c) provides, "[t]his rule does not limit the power of a court to entertain an action to perpetuate testimony." Under this rule, the court retains the former equity power of courts to perpetuate testimony. Shore v. ACandS, Inc., 644 F.2d 386, 389 (5th Cir. 1981). Courts have exercised this power when no other means were available to save testimony which otherwise might be lost. See Arizona v. California, 292 U.S. 341, 348 (1933).

Some literalists may have difficulty applying the concept of perpetuating testimony to the grounds of trauma from being in the process. To such people, perpetuation implies that there is a risk that the testimony will be lost unless it is recorded. Specifically, the witness may leave the jurisdiction or may die.

The ground for finding unavailability in child sexual abuse cases does not really carry the sense of loss by absence or death. There is not really a risk that the child will be physically unavailable at the time trial starts. In some sense, to see this ground as one akin to the type of physical unavailability that underlies the traditional deposition to perpetuate testimony begs the question. In other words, the child will only be unavailable if the court makes the legal determination that the child does not have to attend the trial. On the other hand, unavailability under FED. R. EVID. 804 was expanded beyond the concept of the witness being physically or mentally unavailable to the situation where the desire for the witness's testimony was balanced against the potential physical harm to the witness from attending. See supra, note 42 and accompanying text. It would not be a terrible stretch to carry the same analysis into FED. R. CIV. P. 27.

Note that if the court designates the deposition as one to perpetuate testimony, a contemporaneous decision on competence will be required because one of the prerequisites to preserving testimony under this equity power is a showing that the testimony "will be competent evidence." Arizona v. California, 292 U.S. 341, 348 (1933).

51. The defendant will likely have already pled guilty or been convicted of criminal charges at the time of the civil suit. The judge will therefore believe that the child was molested by the defendant.

If the defendant has not pled guilty, charges have not been filed, or a conviction is on direct appeal, the defendant's Fifth Amendment rights will affect the progress of the civil suit. First, most courts will not penalize a defendant who raises the Fifth Amendment in answering a complaint or in responding to discovery. See, e.g., National Acceptance Co. v. Bathalter, 705 F.2d 924, 926-27 (7th Cir. 1983); Note, \textit{Use of the Privilege Against Self-Incrimination in Civil Litigation}, 52 VIRG. L. REV. 322, 331-32 (1966) [hereinafter Note, Self-Incrimination]. The court may penalize the defendant if he raises the privilege in conjunction with an affirmative defense because this puts the defendant in a position somewhat analogous to the plaintiff who cannot raise the Fifth Amendment without facing the risk that his case will be dismissed. Note, \textit{Self-Incrimination, supra}, at 332. Further, unlike the criminal defendant, the civil defendant has no right to refuse to take the stand. If he takes the Fifth Amendment on cross-examination, he will be penalized in various ways from striking his direct testimony, Annest v. Annest, 49 Wash. 2d 62, 64, 298 P.2d 483, 484 (1956), to permitting adverse comment to the jury, Ikeda v. Curtis, 43 Wash. 2d 449, 459, 261 P.2d 684, 690
preferences rather than constitutional norms. Furthermore, videotaped depositions do not seem to prejudice the defendant.\textsuperscript{52} Finally, the court is armed with an extensive arsenal of legal categories of unavailability predicated on factual findings and on necessarily broad discretion in assessing the legal significance of those findings.\textsuperscript{53} All considered, the courts will likely routinely accept the arguments for the admission of videotaped depositions.

**B. The Relevance of a Prior Criminal Prosecution**

Assuming that the arguments for the admission of videotaped depositions are accepted, it may seem, from first impressions, that efforts to gain admission of depositions will be

(1953). \textit{Cf.} Morris v. McClellan, 45 So. 641, 645 (Ala. 1908) (plaintiff may comment to jury on defendant’s refusal to answer certain interrogatories). Courts do not, however, find a waiver of the privilege corresponding to the scope of direct examination. \textit{Note, Self-Incrimination, supra,} at 328. This lack of waiver is presumably because a civil defendant has no choice about testifying. For an argument that all of the burdens on a claim of constitutionally-based privilege are unconstitutional, see \textit{Note, Self-Incrimination, supra,} at 335-41.

In light of the defendant’s Fifth Amendment rights, one might expect a court to liberally treat a defense motion that seeks a continuance until the criminal case is over. This continuance could be for a long time and would perhaps add to the plaintiff’s arguments seeking early release of the child from the process. \textsuperscript{52} \textit{See supra} note 28 and accompanying text. The defendant may also actually achieve more probing cross-examination in the intimate environment of a deposition. \textit{Cf.} Paula E. & Samuel M. Hill, \textit{Note, Videotaping Children’s Testimony: An Empirical View}, 85 Mich. L. Rev. 809, 809 (1987). The child will probably also have less impact on tape than if the jury saw him or her live. \textit{See} Lucy Berliner, \textit{The Child Witness: The Progress and Emerging Limitations, in ABA Report, supra} note 7, at 101; \textit{Note, Legislative Innovations, supra} note 7, at 816.

\textsuperscript{53} Once a finding of unavailability is made, an unresolved question remains. May plaintiff’s counsel subsequently exercise the option to present the child’s live testimony at trial? From another perspective, when, if ever, should the court rule that plaintiff is estopped from making this choice? To present the child’s live testimony after a finding of unavailability, plaintiff’s counsel should be required to make at least some showing of changed circumstances as well as a lack of prejudice to the defendant.

If the plaintiff can make such a showing, why cannot the defendant? If we permit the defendant this option, serious consequences follow. For example, if the court found the child unavailable long before trial, in theory the defense would have almost endless opportunities to return to court for evidentiary hearings to demonstrate that the child should not currently be found unavailable. To allow the defendant such opportunities would begin unraveling the very objectives that led to finding the child unavailable in the first place. Yet, it seems hard to avoid this result unless we can distinguish the plaintiff’s position from that of the defense. The positions can be distinguished on the ground that, although allowing the defense the possibility of reopening the issue may harm the child by making his or her release from the process continually uncertain, allowing plaintiff’s counsel this option cannot harm the child because the option will only be exercised when those loyal to the child have determined that no harm will result.
unnecessary in civil suits because the child will not need to testify anyway. After all, with rare exceptions, a prior criminal plea or conviction will proceed the civil suit. This prior plea or conviction appears to constitute a collateral bar on relitigating the issue of whether the defendant molested the child and therefore obviates the need for the child’s testimony.

However, this is unlikely to be the result in most child molestation suits. In contrast to the federal court system where a prior criminal conviction constitutes issue preclusion in a subsequent civil proceeding,54 a prior criminal conviction in most state courts does not even constitute issue preclusion as to identical issues.55 Because the vast majority of civil sexual abuse cases will arise in state and not federal court, the plaintiff will generally not have the benefit of collateral estoppel.

In states where issue preclusion is inapplicable in these circumstances, the defendant’s prior experience with the criminal process may be admitted at trial. Indeed, some states allow the conviction to be admitted as “some evidence.”56 Others admit it as “prima facie” evidence57 or as evidence admissible under the state equivalent of Fed. R. Evid. 803(22).58 Still others admit a plea as a party admission59 or as an admission against interest.60

Why then will the prior conviction not be sufficient to provide the plaintiff with all the evidence needed on the issue of molestation and therefore obviate the need for the child’s testimony? Surely, when a civil jury hears about a prior criminal plea, or a conviction at a criminal trial, it will have no problem finding that the molestation took place. In fact, this evidence is likely to be more conclusively persuasive of molestation

58. “Evidence of a final judgment, entered after a trial or upon a plea of guilty . . . adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment. . . .” FED. R. EVID. 803(22) (Judgment of Previous Conviction) (emphasis added).  
than, for example, a six-year-old’s rambling testimony covering the same matter.

The admission of prior pleas or convictions, however, does not simply eliminate the need for the child to testify. The problem is two-fold. First, because we are talking about the use of the prior plea or trial verdict as mere evidence, and not as a procedural bar to even raising the issue, the issue of molestation is still in play. This means that the defendant can still call the child to the stand regarding the issue of sexual abuse. But why would the defense do that? Surely as a tactical matter, the last thing that defense counsel would want to do is call before the jurors an innocent child whom his or her client has been found guilty by a jury of, or admitted to, molesting.

Although this reasoning makes sense, the point is that regardless of the wisdom of actually calling the child to the stand, the defendant’s counsel can threaten to call the child to the stand. This threat is a significant one; parent and child concern about the child having to testify in court is frequently a serious impediment to the initial filing of a civil complaint and to the carrying of that complaint to its conclusion.

Even if one questions the decency of a defense attorney who would exploit such a threat, one will be hard pressed to find an ethical violation. The threat is a by-product of the normal functioning of the litigation process: civil plaintiffs may be called to the stand by their adversaries. It will not be easy to claim that opposing counsel has crossed the bounds of ethical conduct.

Ethical violations will be especially hard to prove because the defense attorney is unlikely to say anything like “I am going to put that kid on the stand and make his life hell unless you drop this case or settle for peanuts.” Rather, counsel merely will be noncommittal: “I really can’t say at this point that we will not call the child to the stand. I’d rather not put the child through that if it can be avoided, but it may be necessary. Some of it depends upon how things play out in the rest of the discovery and our eventual strategy, and I’m not at liberty to discuss my strategy with you. I’m sure you understand that would be a betrayal of my duties of advocacy and confidentiality to my client.” Thus, the trial court’s admission of a defendant’s prior plea or conviction does not eliminate defense counsels’ ethical use of child testimony.
Second, even in a jurisdiction where collateral estoppel applies and the litigation of the molestation issue is barred, there are a number of reasons why the child may still need to take the stand at trial. First, collateral estoppel bars only defendants and those in privity with the defendant.\textsuperscript{61} The main defendant in the actual case, however, may be a daycare owner whom the plaintiff is claiming negligently hired or supervised employees. The main defendant may also be a state licensing agency that has allegedly inadequately investigated a daycare in issuing a license or in examining a subsequent complaint.

In addition, reliance on collateral estoppel may be of no avail in multiple-count criminal cases, such as a daycare situation where a number of children have been molested. If the defendant has entered into a plea bargain, the plea will likely be to one or two counts in exchange for a number of the other counts being dismissed. Consequently, in a subsequent civil case, those children whose cases were dismissed in the plea will not be able to claim collateral estoppel.

Further, collateral estoppel bars relitigation of the "identical issues" only.\textsuperscript{62} Thus, although a plea or conviction at a criminal trial would bar relitigating the issue of molestation, a number of other issues may exist in the civil case that are not encompassed within the criminal conviction and about which the child may need to testify. For example, as part of a case based upon negligent supervision, the child may need to describe who was where and when things took place. Without this testimony, plaintiff may lack sufficient evidence to prove that a particular daycare was improperly run.

As another example of issues requiring child testimony, the child's testimony may be relevant on the extent of the defendant's insurance coverage. In this regard, suppose that a defendant molested a single child repeatedly over the course of a year. The defendant will likely be charged with only a single count of molestation in a complaint alleging, for example, "Between November 6, 1989 and December 1, 1990, the defendant . . . ." Any plea or jury verdict in such a case will result only in a single conviction. Insurance policies, however, gener-

\textsuperscript{61} Tomlinson v. Lafkowitz, 334 F.2d 262, 264 (5th Cir. 1964), cert. denied, 379 U.S. 962 (1965).

\textsuperscript{62} See Emich Motors Co. v. General Motors Corp., 340 U.S. 558, 564 (1951); Hyslop v. United States, 261 F.2d 786, 790 (8th Cir. 1959).
ally pay per "occurrence."63 Because the insurance company will be the only practical source to satisfy a damage award in most sexual abuse cases,64 the extent of the company's liability will be a significant issue for the plaintiff. After all, the principal reason to bring a civil suit is to get money. No doubt counsel for the plaintiff and counsel for the insurance company in our hypothetical will argue over whether repeated molestation is "one continuous" or "a discrete number of separate" occurrences. In the likely event that the court finds each molestation a separate "occurrence," information as to the number of separate molestations will likely have to be supplied by the child.65

In conclusion, although at first blush a criminal defendant's prior plea or conviction would seem to be a collateral bar on the molestation issue in a civil suit, such a conclusion is not necessarily true in the state courts. Even if a trial court admits a prior plea or conviction into evidence in a civil suit, the child victim may still have to testify. This is because defense counsel may need to call the child. Additionally, plaintiff's counsel may call the child for reasons of defendant privity, multiple-count criminal cases, or other issues requiring child testimony. If the child's testimony is required, videotaped depositions become a viable alternative to live testimony for the reasons previously discussed.

63. In most homeowners or comprehensive general liability policies, you will find language such as, "The Company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damage because of personal injury . . . caused by an occurrence." Noel McKibbin, Note, Defending Sexual Molestation Claims Under A Comprehensive General Liability Policy: Issues of Scope, Occurrence, and Expert Witness Testimony, 39 Drake L. Rev. 477, 499 n.154 (1989-90) (citations omitted).

"[A]n occurrence is defined as an accident including continuous or repeated exposure to conditions, which result in bodily injury . . . neither expected nor intended from the standpoint of the insured." Id. at 495 (citations omitted).

64. See infra Section III-C.

65. The child's testimony might be required on the issue of damages. This is less likely, however, than the necessity of testimony regarding the number of separate molestations. Although the damages case may have more impact if the jury is exposed to the child throughout the trial rather than just through a video tape, it is difficult to imagine a great number of cases where the child's testimony on the issue of damages is truly needed.

In addition to the testimony of relatives, teachers, and others who can describe changes in the child's behavior in some detail, the child's story will be told to the jury through the testimony of a mental health expert. The child's hearsay statements probably will be admissible as forming part of the basis for the expert's opinion on the nature and extent of emotional harm. See Fed. R. Evid. 703.
III. THE CONSEQUENCES OF ADMITTING VIDEOTAPED DEPOSITIONS

A. A Brief Exploration of the Broader, Systemic Implications

Most of this Article is concerned with the eventual implications of admitting videotaped depositions upon the interests of abused children. As already discussed, in suits seeking compensation for sexually abused children, video depositions are unlikely to prejudice civil defendants.66 In fact, the defense may fare better without the live presence of the child victim. But routine acceptance of the reasons for the admission of videotaped depositions has broader potential consequences that transcend the particular arena of child sexual abuse cases.

From the macro-perspective, changes in evidentiary rules are not likely to create significant changes in our society and culture. As we have seen, other forces such as economics, human psychology, and institutional behavior act as powerful constraints on such possibilities.67 However, such evidentiary changes will affect the legal system. Whatever one thinks about the notion of law as a "seamless web," changes in one part of the law tend to affect other parts of the law rather like unraveling a thread.68 Here, the thread offered by accepting the reasons for the admission of videotaped depositions could, in the absence of care, ultimately loosen our commitment to live testimony at civil trials.

Thus, one consequence of accepting the evidentiary arguments for the admission of videotaped depositions is that such acceptance carries the seeds of destruction for a fundamental operating principle of our litigation system: the preference for live testimony.69 The reasons for the admission of videotaped depositions would seem to apply to all children who underwent traumatic experiences whether from sexual abuse or some frightening accident. Given this, the rationales should seemingly also apply to any child witness who can make the proper showing.

Taking the argument one step further, some may argue that testifying in open court at trial could be harmful to cer-

66. See supra note 28 and accompanying text.
67. The law, however, can also serve as an influence and constraint on these forces.
68. The law's threadlike nature is particularly true given that we entrust so much of our reasoning methodology to analogy.
69. See supra note 17.
tain adults, such as those who were raped or who witnessed some horrible accident, or who were the victims of sexual discrimination. Why should they not be let out of the process if they make some "good cause" showing that testifying in court could be too traumatic? If we allow this, we have seemingly embarked on a path leading to trial by video.  

Trial by video, however, is not an inevitable result of accepting the reasons for the admission of videotaped testimony in child sexual abuse cases. Whether the potential sweep of the arguments will be confined to cases of child sexual abuse first depends upon how "good" courts will require good cause to be. Although individual judges may vary, this standard has previously provided enough resistance to prevent litigants from moving too easily through passages at which the judges were gatekeepers.

Fed. R. Civ. P. 26(c) provides for the issuance of protective orders upon a showing of good cause. In applying this standard, courts place the "burden . . . upon the movant to show the necessity of its issuance, which contemplates 'a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements' . . . ." Any attorney who has tried to obtain a protective order from a federal judge in discovery knows that this language has real bite in practice. One can obtain protective orders with the proper showing, but they are far from routinely exercised prerogatives.

Furthermore, words do not exist in a vacuum. Words are mediated through an interrelationship between cultural, personal, and historical contexts. Currently, we understand that psychological harm to sexually abused children might often be exacerbated by the trial process. Judges will likely possess this understanding when assessing the good cause showings. They will also know that, although we tend to characterize a three-year-old and a sixteen-year-old as "children," they do not nec-

70. Trial by video may be inevitable in any event considering the current acceptance of video transcripts in the place of stenographic ones. Martha Freedman, In Camera Proceedings, 10 Cal. Law. 26 (Nov. 1990).


73. The seriousness with which courts take "good cause" is in fact implicitly illustrated by the removal of that standard from Fed. R. Civ. P. 34 in 1970 so that document discovery would be brought in line with the far more liberal standard of "reasonably calculated to lead to the discovery of admissible evidence" found in Fed. R. Civ. P. 26(b)(1). See Fed. R. Civ. P. 34 advisory committee notes.
necessarily belong in the same category. Although a judge may routinely find good cause for unavailability when younger children are involved, the finding may not be so automatic when an older teenager asks to be excused from trial.\textsuperscript{74}

The same reluctance to find good cause applies to adults who attempt to get out of the process. Unless the judge is simply looking for any excuse to sanction trial by video, an adult will bear a heavy burden in convincing the court that trial is so harmful to the adult’s emotional health that the court should excuse him or her from testifying other than in a deposition. Courts will be acutely aware of the difference between a trial being an unpleasant experience as opposed to one which truly risks an adult’s physical or mental health.

Additionally, a judge is likely to feel that a defense attorney can obtain far more useful information cross-examining an adult in front of a jury than the attorney could from cross-examining a young child. For example, we are comfortable drawing inferences from the demeanor of adults under the crucible of cross-examination. But we are not so comfortable drawing the same inferences if a five-year-old squirms and looks down when being cross-examined. For this reason, courts will hesitate to apply anything but a stringent test of good cause to a claim seeking to have an adult party or witness found unavailable.

Thus, the admission of videotaped depositions in child sexual abuse cases presents understandable concerns about the elimination of live testimony at trial. However, the admission of child depositions in these cases is unlikely to unleash a torrent of videotaped depositions of non-parties in other contexts. This is because any finding of “unavailability” will require a showing of good cause. The difficulty in making a good cause showing, the intuition of judges, and the rare instances of harm to adults in testifying suggest that courts will rarely find good cause for the admission of videotaped depositions in lieu of live testimony.

\textbf{B. How Releasing a Child From Testifying at Trial Will Affect the Behavior of the Various Interested Players}

If courts routinely admit videotaped depositions into evidence, the child will not have to testify at trial and may even

\textsuperscript{74} Note that, generally, child sexual abuse victims in daycares will tend to be younger children.
be out of the process at a very early stage following a deposition.\textsuperscript{75} The following discussion explores how this might affect the various interested players in the process: children, parents or guardians, defense attorneys, and plaintiff attorneys.

1. The Child and the Child's Parents or Guardians

Understandably, parents and guardians often hesitate to put their children through the trauma of testifying at a criminal trial.\textsuperscript{76} One might be cynical and posit that the promise of a large financial reward through a civil suit may change these adults' views about putting their darlings through the trauma of trial. After all, the civil process deals with money whereas the criminal process appeals to the desire for justice, the protection of other children, and the call to civic duty.

While I will not deny that the cynical view may describe some adults, I do not believe that it describes very many. The thought of putting a child who has been sexually abused through the strain of trial,\textsuperscript{77} especially if the child has already gone through the criminal process, is likely to make most parents feel that the physical, mental, and emotional cost of further litigation outweighs the benefit of immersing their child in further litigation. The child, of course, will not be as young by the time the civil case actually gets to trial. The aging of the child, however, will probably make such a trial even more traumatic because with age generally comes additional self-awareness. The child may not want to have a constant reminder of the sexual abuse hanging over his or her head for years to come and may not relish facing the continual specter of that day when the child must walk into a courtroom, take the stand, go through every gruesome detail again, and then face cross-examination.\textsuperscript{78}

\textsuperscript{75} See \textit{supra} notes 29-53 and accompanying text for a discussion regarding child unavailability due to the trauma of being "in the process."

\textsuperscript{76} Romanoff, \textit{supra} note 6, at 921-22.

\textsuperscript{77} But see opinions of some experts that many children do not find testifying at trial difficult. See \textit{supra} note 7.

\textsuperscript{78} The pressure that facing trial puts on plaintiffs is obviously exacerbated when the trial focuses on a traumatic event:

General M. Stern, the Arnold & Porter attorney who orchestrated the case for plaintiffs, describes how his concern for the psychological well-being of his clients affected his decision to settle the case in his book entitled \textit{The Buffalo Creek Disaster}:

I knew there were some major disadvantages to the plaintiffs in having to go through a lengthy and harrowing trial. This made me wonder again whether any settlement that did not air all Pittston's wrongdoing in a public
Even if the child does not object to the initial lawsuit being filed, the child or parents may raise objections over time. Indeed, filing a lawsuit does not really involve the child because an attorney merely sends a piece of paper to another attorney. As the trial nears, however, the child or parents may perceive the reality of child testimony and balk at participating.

If the courts readily admit videotaped depositions, the situation changes. The child will have to testify at a deposition and not at a trial. Limiting a child's participation to depositional testimony, however, will affect the participants' behavior only if facing a deposition carries less trauma and foreboding than testifying at trial.

Is a deposition really less traumatizing and foreboding than testimony at a trial? One could contend that depositions are even worse than trials because defense counsel has far more latitude in questioning and, without the presence of a judge, can be even more abusive than in court. Also, to the extent that the focus of the case shifts to depositions, one could argue that it brings the dreaded event closer to the date of initiating the case. Under such circumstances, parents may be even less willing to bring these suits. After all, it is one thing when a potential trial is three years away and "probably will not happen anyway because the defendants will surely settle" and quite another when a potential deposition is around the corner. Further, the child will likely be at an earlier stage of therapy and, accordingly, be more psychologically vulnerable than might be the case years later when the child is both older and far more advanced in the therapy process. Although these arguments have some plausibility, none is ultimately convincing.

Initially, even if giving evidence at a deposition and at a trial were really the same, most of us do not see the two experiences as equivalent. The image of trial is deeply embedded in our cultural awareness while the image of depositions are not. Most plaintiffs will respond to this image of trial.

In fact, the distinction between the two proceedings is well

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trial could possibly be in the best interest of all those who had suffered for so many years at the hands of the coal companies. On the other hand, a public trial would certainly not be in the best interest of the plaintiffs, who would have to be paraded up, one by one, in front of the jury and in front of the press to tell all their psychiatric problems.

Parker, supra note 6, at 659 (notes omitted).
justified. The formality and symbolism of the courtroom is extremely intimidating. Individuals who enter into the area occupied by judge, jury, and often several attorneys feel this intimidation. Also, the courtroom is a vast, often imposing, space not at all like a small conference room where depositions take place.

Although it is true that defense attorneys can, in theory, be just as, if not more, abusive in depositions than in formal court, there are a number of reasons why attorneys will not be abusive in a deposition. First, as a tactical matter, defense counsel will generally try to make it seem that she and the child are just conversing. Second, the child's attorney can stop the deposition and seek court protection. Third, the defense will be extremely hesitant to overstep the appropriate bounds because the deposition is on videotape and therefore packaged in real time rather than on a paper record. This hesitation will be especially true considering that the entire procedure has been set up to protect the child from the trauma that often accompanies trial. Also, because this is a civil case, a variety of measures can be taken to make the atmosphere less disturbing to the child. In the proper case, defense counsel can probably be kept out of the deposition room altogether by having a judge or mental health professional ask questions submitted by counsel. The defendant can also be kept out of the deposition room if his or her presence would overly disturb the child.

By taking the child out of the litigation process once the deposition is completed, the child's life can continue without


80. In a case reported in the New York Times, a judge ordered that a three-year-old victim of an abduction have her testimony taken by a psychiatrist. Questions were posed by the judge, prosecution, and defense counsel who were standing behind a one-way window and were repeated by the psychiatrist who heard the questions over an earphone. N.Y. TIMES, Nov. 7, 1986, at C-1.

81. FED. R. CIV. P. 26(c)(5) empowers the court to make a protective order for "good cause" that "discovery be conducted with no one present except persons designated by the court." See, e.g., Galella v. Onassis, 487 F.2d 986, 996 (2d Cir. 1973) (plaintiff photographer who had history of harassing defendant not permitted at defendant's deposition). Cf. also, In re Mary S., 230 Cal. Rptr. 726, 727 (Cal. App. 1986) (father not permitted to be in room with children testifying in dependency hearing); In re Katrina L., 247 Cal. Rptr. 754, 759 (Cal. Ct. App. 1988) (father not permitted to be in room with children testifying at dependency hearing).

82. Unless the court finds the child unavailable on the "trauma from the process" theory, there will be a hearing on unavailability near trial. This could involve an interview of the child by the court with some questions by counsel and/or declarations from mental health experts and family.
the fear of courtroom testimony and its constant reminder of the child's experience. To be sure, the parents will still be involved in the case, but their involvement will make the case something that vaguely exists in the background; there will be a letter from an attorney here and an overheard fragment of a conversation there. Under these circumstances, parents and children should be much more willing to bring these suits.  

83. Espousing a variant on the notion of litigation as catharsis, some have offered the theory that carrying a civil case to a conclusion can help counter the psychologically destructive state of powerlessness from which incest victims often suffer. See, e.g., Margaret J. Allen, Comment, Tort Remedies For Incestuous Abuse, 13 GOLDEN GATE U. L. REV. 609, 617 nn.53 & 55 (1983). To the extent that acceptance of the arguments for unavailability leads to more cases being brought, "empowerment" should become more prevalent. As generally put forth, the theory of empowerment rests on three assumptions: (1) in the criminal process, the state and not the child confronts the father with the child remaining in a subordinate role just like at home; (2) by the time most children file civil suit they will be adults living away from home; and (3) at this stage of his or her life, the child has little need for the protection from his or her father that criminal prosecution offers but can benefit from payment for his or her injuries. See, e.g., id. at 617 n.55.

Although the theory of empowerment has certain appeal, the theory is problematic when viewed in the context of the legal reasons for releasing the "child" from the litigation trial process. First, the proponents of the empowerment theory focus on cases of incest and particularly those cases in which the child is now much older. Even if empowerment takes place in those cases, it is not clear that it will work equally well when the transgressor is a babysitter or an employee of a daycare, let alone when the only defendant in court is the owner of a daycare or members of the state licensing agency who have been accused of negligence. Furthermore, the possibility of empowerment does not have equal force if the child is still young.

Second, the criminal process has far more clearly labeled the molester as "bad" than the civil process ever will. That, in fact, is the essence of the criminal process. Thus, having the state on the plaintiff's side in a criminal prosecution would seemingly give the child victim a tremendous sense of power and vindication. Additionally, in general, the plaintiff will be as subordinate to the civil litigator conducting the case as she was to the prosecutor as a young child. This might be even more so given the fact that much of the case will likely not involve the plaintiff-defendant relationship at all but rather focus on the conduct of some daycare supervisor or members of some state licensing agencies.

Third, the plaintiff in a civil suit will not have the satisfaction of looking eyeball to eyeball with the deviant family member in front of a jury if the evidentiary reasons for admitting the video deposition are accepted. Plaintiffs will have their deposition taken, and they will be involved no more. But see supra note 82, regarding the possibility that the child may have to appear at a hearing near the time of trial to determine "unavailability." Thereafter his or her interaction with the case will be more akin to one who has made an application for money and now awaits the result in the mail.

Fourth, whatever participation the plaintiff has will not necessarily be all that positive. This is a civil case, and damages will become an issue. See McKibbin, supra note 63, at 480, 489. Much of the cross-examination at the deposition and/or trial will be directed at bringing out information about damages. The defense attorney will often make it painfully clear to the plaintiff that the attorney intends to argue that the plaintiff is exaggerating the extent of damages in a calculated performance of
2. The Defense Attorney

Based upon my own work and conversations with civil litigators in the field, defense attorneys are acutely aware of plaintiffs' reticence at putting the child through the trauma of trial. The attorneys realize, or at least believe, that even if a civil child sexual abuse case is filed, the plaintiff may drop the case or settle for a relatively low sum in order to avoid trial as the day of trial approaches. This knowledge is significant leverage and makes it rational for the defense attorney to wait long into the process before considering settlement. Because we are generally talking about very large damage claims, even the expense of full discovery and attorney time is small compared to the potential damage award avoided if the plaintiffs voluntarily dismiss or greatly reduce their demands.

Make no mistake, however, defense attorneys are not villains in this game. Even as representatives of child molesters, they are aware that, as the saying goes, these types of charges are easily brought and difficult to refute. This perception is compounded by the fact that improperly conducted interviews with the child can dramatically bias the child's perceptions and truthfulness. Although most of these cases will follow criminal prosecution, defense counsel may still believe that her client was wrongly convicted and that the civil suit only continues the injustice. Further, even if counsel believes that her client molested the child, the issue of appropriate damages still exists. All defense counsel I have spoken with agree without hesitation that child molestation is despicable. The nature of the act, however, does not mean that the plaintiff is entitled to be rich for life.

Moreover, in reality, defense attorneys often represent a daycare owner or a state agency rather than the child molester. In this context, defense attorneys are particularly

unmitigated greed. Moreover, in an incest situation, the plaintiff's vindication may be at the expense of others he or she cares about. As we will see, the only source generally available for compensating the victim in child sexual abuse cases will be the private assets of the defendant. These assets, such as they exist, will likely be intertwined with the entire family's finances. To the extent that there are other family members the plaintiff cares about dependent on these finances, the sensation of victory may again not be that pure.

Last, of course, is what perhaps should have been said first. The empowerment theory assumes that there is someone who can pay the damages and, as we will see, such defendants are very few and extremely far between.

84. See McKibbin, supra note 63, at 485.
85. Id. at 486, 502-07.
sensitive to what they see as the almost innate instincts of the plaintiff’s attorney to look for the deep pockets and then to create a theory to justify digging in. In other words, they see equities on their side. They see a client who has totally legitimate interests that they are there to protect.

If the courts routinely accept the evidentiary arguments for unavailability, however, defense attorneys will know that once the child has given a deposition, the plaintiff has its “witness” for trial. Because videotaped depositions take away much of defense counsels’ leverage, we can expect defense counsel to make earlier, larger settlements.

3. The Plaintiff’s Attorney

Plaintiffs cannot try their cases without an attorney who will take it, and good attorneys are not that easy to find. As discussed in the next section, few cases exist in the spectrum of child sexual abuse cases in which the defendant, or rather the defendant’s insurance company, will have the resources to satisfy a damage judgment. Generally, the cases that offer a realistic possibility of compensation will involve negligent hiring or supervision claims against a daycare or negligent licensing claims against a state agency.

Although plaintiffs’ attorneys will probably take these cases at a contingent rate generous to the attorney, and they can anticipate potentially high damage awards, attorneys might hesitate to accept these cases. To begin with, child molestation cases are not easy. Working with child witnesses is a special skill that is not within the province of most tort litigator’s abilities. Further, the parents themselves may insist on joining as plaintiffs, claiming damages for their own pain and suffering. This leaves the plaintiff’s attorney with the problem of keeping the jury focused on the image of an innocent child who has been hurt and at the same time keeping the defense attorney from trying to refocus the case on the image of greedy adults

86. “The tort system allows for compensation to injured parties through lawsuits and, far more importantly, through claims for resolution by liability insurance companies. Indeed, of the millions of insurance claims filed each year, typically only two percent are resolved through litigation.” Robert E. Litan, et al., The U.S. Liability System: Background and Trends, in LIABILITY: PERSPECTIVES AND POLICY 7 (Robert E. Litan & Clifford Winston eds., 1988). “[J]ury awards represent only the tip of the tort system and may not even accurately reflect the actual levels of compensation received by plaintiffs.” Id. at 7-8.
trying to hit the jackpot.\textsuperscript{87} If the state is involved, plaintiffs' attorneys may face claims of immunity,\textsuperscript{88} as well as drawn out, complex discovery battles over governmental privilege when counsel tries to get access to the state's records.\textsuperscript{89}

Also, as is becoming the norm in civil litigation, these cases will tend to be somewhat expensive. Depositions of numerous daycare employees, children, and parents may be involved. Experts will surely be needed; perhaps some experts will be needed to work with the children throughout the entire litigation process as well as be available to testify at trial on everything from damages to the existence of sexual abuse syndrome.\textsuperscript{90} Although the plaintiff will eventually be liable for these costs out of the proceeds of any judgment, the attorney will almost surely have to advance the expenses until then and "eat" the expenses if the suit is not successful.

Finally, the plaintiff's attorney will weigh heavily the alternative value of his or her time. Litigators are currently billing between $100 and $200 dollars an hour and up. Those whose practices principally rely upon contingent fees translate their work into the same, if not far higher, billing rate. Under these circumstances, the attorney will not be willing to expend the type of effort that these cases require unless success seems likely. The inference from this discussion is that if a plaintiff's

\textsuperscript{87} In a paradoxical twist on this theme, a judge dismissed criminal sexual assault charges partly on the grounds that the child's parents and psychologists were biased by the prospect of a $40 million civil suit that had been filed against the defendant. John Gillie & Elaine Porterfield, Judge Throws Out All Charges in the Sortland Day-Care Case, MORNING NEWS TRIB. (Tacoma, Wash.), Nov. 28, 1990, at A1.

If the parents are plaintiffs their bias is clear. Not only does this allow for the change in focus referred to above, but it may tend to impeach the parents as key witnesses regarding their information that supports the child's case. Also, the defense may be able to introduce a whole series of side issues regarding, for example, the parents' knowledge and behavior, and argue that all this is relevant to possible contributory negligence on the parents' part.

Parents may be important witnesses in these cases regarding a number of issues: (1) damages, (2) circumstances from which one can infer molestation (i.e., change in behavior of child), and (3) information that an expert can rely on in testifying regarding damages and in offering an opinion that the child's behavior is consistent with abuse. Even if the parents were not plaintiffs, the defendant would want to cross-examine them on their financial interest. After all, the jury will understand that they will have some control over an award given to, for example, a three-year-old.


\textsuperscript{89} For an example of how complex and convoluted litigation against the government can be, see Penn v. Ritchie, 480 U.S. 39, 57-61 (1987).

attorney is going to commit to one of these cases, the attorney does not want to think that the plaintiffs will back out mid-stream or will try to encourage a "cheap" settlement. If either of these things happen, the value of the attorney's considerable time and efforts, as well as costs advanced, will be greatly diminished, if not lost.

On the other hand, if videotaped depositions are routinely admitted, plaintiffs' attorneys should be more willing to take child sexual abuse cases because they will know the cases will not fold. They also will know that the defense attorneys will not have the leverage of the parents', and perhaps the child's, desire not to go to trial. Once the attorney has the deposition, the child as a witness is no longer an issue. The leverage in bargaining shifts to the plaintiff. Plaintiff attorneys know that defense attorneys, when forced to face the "reality" of the child's testimony, will be more amenable to and more generous in settlement.92

In conclusion, if the courts admit videotaped child testimony and children are out of the process at the deposition stage, the interested parties will be affected in different ways. Children, parents, and guardians will be much more willing to bring suits. Defense attorneys will be willing to make earlier and larger settlements. Plaintiffs' attorneys will know that defense attorneys are so inclined, and thus plaintiffs' attorneys will be in a better bargaining position. Considering the interaction between the parties, the result will be more civil child sexual abuse suits with higher settlements and more judgments for plaintiffs.

91. For example, under the Model Rules of Professional Conduct, attorneys can advance or guarantee "expenses of litigation," but only if "the client ultimately remains liable" for these costs. Model Rules of Professional Conduct Rule 1.18(a)(3)(e) (1984). Not surprisingly, all attorneys I know make this clear in their written agreements. Even without such written agreement, an attorney who is discharged, which is in effect what would happen if the client refused to continue with the case, can probably sue for both "expenses advanced" and "quantum meruit." Lawyer's Manual on Professional Conduct (ABA/BNA) 801:3301 (Opinion 6 of the 1981 Indiana Bar Commission).

On the other hand, the reality may be that no attorney would want to sue the parents of a sexually abused child who wanted out of the case because the child could not emotionally continue.

92. From the standpoint of the mythical "wider" society, this result is a mixed bag. More suits will likely be filed, raising the costs of the civil system that eventually must be borne by taxpayers or come out of some other service budget. On the other hand, to the extent the cases will be more likely to settle early, the cost of the process, especially trial, will be reduced.
C. Consequences of Admitting Child Videotape Depositions: More Settlements and Judgments for Plaintiffs

As the last section indicates, if abused children are routinely found unavailable and their depositions are admitted in place of their live testimony, more children and parents are likely to file child sexual abuse cases. These cases tend to be extremely sympathetic, so one can expect that many of these cases will be settled in advance of trial. Those that do go to trial are likely to result in verdicts for the plaintiff.

Generally, the fact of molestation will be a given, leaving the jury only with questions concerning the "reasonableness" of supervision, hiring, or some licensing process under some negligence theory. In making this decision, it is not unlikely that juries may be influenced by the uncontested reality that an innocent child has been harmed.

Victorious cases are likely to result in relatively high damage awards. These high damage awards receive publicity in newspapers and are noted in various plaintiff attorney publications. Thus, a cycle is created. More civil plaintiffs will pursue child sex abuse claims. More attorneys will take these cases. Plaintiffs will achieve higher settlements as the promise of high jury verdicts is further implanted in the public and professional consciousness. In addition, plaintiffs will achieve higher jury verdicts in cases that do go to trial. Completing the cycle, higher settlements and jury verdicts will cause more plaintiffs to pursue child sex abuse claims.

93. I have not discussed such devices as two-way video because their use still envisions that the child will appear for trial, and I have only considered evidentiary postures that result in effectively removing the child from the process. To the extent, however, that in a particular case the reticence of plaintiff to go to trial stems, not from a general aversion to the child taking the stand, but from a fear of confronting the molester, permitting the child to testify through a two-way video will accomplish results analogous to substituting the video deposition. The point is that either mechanism removes the source of plaintiff's reluctance to go to trial.

94. Six-figure verdicts, adding up to millions when several child victims are involved, have been recorded. See, e.g., Dietmar Grellmann, Note, Insurance Coverage For Child Sexual Abuse Under California Law: Should Intent to Harm Be Specifically Proven or Imputed as A Matter of Law?, 18 SW. U. L. REV. 171, 172 (1988); Allen, supra note 83, at 618; McKibbin, supra note 63 at 478; State Shares Guilt In Abuse at Daycare, TACOMA NEWS TRIB. (Tacoma, Wash.), Mar. 25, 1988, at B1.

Tort reform legislation, to the extent that it puts a cap on general damages, might effect the size of some child abuse verdicts. The impact of such legislation, however, should not be overestimated for several reasons. First, many jurisdictions do not have such legislation. Second, these cases still carry significant special damages. Third, even those jurisdictions with tort reform legislation still cap general damages in six figures. Fourth, these cases often involve multiple plaintiffs.
Will the mere acceptance of child videotaped depositions have such substantial results? I believe so. To make an impact, the admission of testimony does not initially have to affect a large volume of cases. The change must merely make a handful of cases successful that would not have been successful otherwise. Child sexual abuse cases are highly visible and involve large sums of money. Each additional judgment or settlement for a plaintiff may have significance for the process. An increased willingness to bring these cases could result in greater compensation for the child victims and greater deterrence of child sexual abuse. The following sections explore the extent to which these possibilities might be realized.

1. Compensating the Victim

Because of the severe physical, psychological, and financial harm suffered by the victims, it would be hard to deny that a traditional tort justification of compensation comfortably applies in these sexual abuse cases. In addition, by compensating the child victim of sexual abuse, we are vindicating more than a private interest; there may be public benefits to the private compensation of victims in these cases. In many cases, society would bear the cost for counseling child victims if a private defendant did not pay. Such counseling may lessen the social costs that would follow if the child did not receive early treatment and as a result became a dysfunctional adult.

Compensation, however, envisions that there is some

95. See, e.g., Litan, supra note 86, at 3.
96. This abuse causes enormous physical and psychological harm. Children experience guilt, shame, hostility, and low self-esteem. These problems become more complex as the child grows up and experiences feelings of isolation, mistrust, and sexual dysfunction. Statistics show that prostitutes and substance abusers tend to have been sexually abused as children. Professional help is available for sexually abused children or adults abused as children. The damage is so severe, however, that years of expensive treatment are often required. Hourly rates of $100 or more for individual professional counseling are not uncommon. In addition, many victims of child sexual abuse have such severe emotional problems as adults that they cannot afford treatment; abuse renders them so emotionally damaged that they are unable to maintain a job [sic] and must therefore rely on the strained resources provided by private health insurance, or [state variations on Medicare, or existing state funds for victims of violent crimes]. Grellmann, supra note 94, at 172 (notes omitted).
97. Compensation allows for early treatment which "may offer the only real hope for breaking the cycle [of the molested becoming the molester]." See Joseph R. Long II, Note, N.N. Moraine Mutual Insurance Co.: The Liability Insurance Intentional Injury Exclusion in Cases of Child Sexual Abuse, 1991 Wis. L. Rev. 139, 141.
defendant who can do the compensating. Who are the potential defendants and where will they get money to satisfy these enormous judgments? A court can accept all of the videotaped depositions that one can conjure; but, civil cases are about money, and if there is no one with money, everything in this article is merely storytelling, a bit of intellectual diversion.

Potential defendants vary in both their sources for liability and potential to provide compensation. These defendants can be organized into general groups. For the sake of simplicity, I will term these three groups A, B, and C.

Group A defendants are the individual abusers. This group includes the actual perpetrators of child sexual abuse: the incestuous family member,\textsuperscript{98} the deviant employee working at a daycare center or a school, and the off-kilter babysitter. Litigation against members of Group A will focus on theories of assault, battery, and intentional infliction of emotional distress.\textsuperscript{99}

Group B defendants are vicariously liable noninstitutional

\textsuperscript{98} According to a recent study, approximately 75\% of child molesters are parents or close relatives. McKibbin, supra note 63, at 483.

\textsuperscript{99} In bringing suits against direct perpetrators, plaintiffs may face a number of substantive issues. There are statute of limitations problems for all plaintiffs over 18. See infra note 184 and accompanying text. Unless the court applies a "date of discovery," as opposed to "date of injury," test to begin the statute running, almost all these claims will be time-barred. Allen, supra note 83, at 628-31; Christine McCormick, Comment, Litigating Incest Torts Under Homeowner’s Insurance Policies, 18 Golden Gate U. L. Rev. 539, 543-44 (1988).

Plaintiffs may also face defendants raising the tort defense of consent. A court following the majority rule that this is not a defense as to at least young minors, however, will reject this defense as a matter of law.

Defendant cites authorities to the effect that generally consent is a defense to a willful tort, with which we have no disagreement. But we do not see them as having any application to the instant situation for two reasons: because the plaintiff was a minor and incapable of giving consent to acts of this nature; and because the defendant is precluded from taking advantage of any consent he seduced or coerced her into giving to engage in such activities. It would be an agreement for him to perpetrate a crime in violation of the protections our statute affords minors by prohibiting contributing to their delinquency, and would be so contrary to commonly accepted standards of decency and morality that any consensual agreement to engage in such conduct would be rejected by the law as against public policy and void. Wherefore, it is our conclusion that the court was justified in refusing defendant’s request to instruct the jury that if the plaintiff consented she could not recover.

Elkington v. Foust, 618 P.2d 37, 40 (Utah 1980) (notes omitted).

Also, defendant may claim intrafamily immunity as a bar to suit. Although parent-child immunity has been widely criticized and abrogated in many jurisdictions, some vestiges remain. Allen, supra note 83, at 633-35.
defendants. This group includes nonparticipating spouses or significant others of Group A members who knew or should have known about the individual abuser's conduct. It also includes the owners of family home daycares. These family home daycares generally accept a few children in addition to the daycare operator's own children and do business out of the operator's own home.100 Allegations that are variants on the theme of negligent supervision or negligent control will characterize civil complaints against the members of Group B.

Group C defendants are the vicariously liable institutional defendants. This group includes out-of-home daycare operations, daycare centers, and state licensing agencies. Here the complaint will include such allegations as negligent hiring, negligent supervision, negligent or inadequate licensing procedures, and negligent investigation.101

Assuming that courts accept videotaped child depositions and an ever-increasing number of civil actions are brought against the members of these groups, where will the money for a settlement or a plaintiff's verdict come from? As you might expect, the answer varies with each group.

a. Compensation From Individual Abusers

Group A defendants, typically family members, daycare employees, or babysitters, have only two potential sources from which to satisfy a judgment: private wealth or a home-

100. In 1985 an estimated two-thirds of the children in daycare were in these family home daycares. Irene Pave, The Insurance Crisis That Could Cripple Daycare, BUS. WK., June 17, 1985, at 114, 116. This statistic may not be greatly changed today. For example, according to information from a recent interview with an officer of the National Association of Daycare Providers, of 20,000 daycares in Texas, 15,000 were family home daycares, and of the 1,600 daycares in Missouri, 800 were family-run. Note that Texas, Florida, and California have the highest concentrations of daycares in the country. (The interviews cited hereafter took place under a condition of anonymity. Therefore, formal citations are omitted.)

101. See, e.g., Andrade v. Ellefson, 391 N.W.2d 836 (Minn. 1986); Brasel v. Children's Servs. Div., 642 P.2d 696 (Or. Ct. App. 1982); State Shares Guilt in Abuse at Daycare, TACOMA NEWS TRIB. (Tacoma, Wash.), Mar. 3, 1988, at A1. See also DeShaney v. Winnebago County Social Servs., 489 U.S. 189 (1989) (While holding that 42 U.S.C. § 1983 was not available to the plaintiff, the court notes that "[i]t may well be that, by voluntarily undertaking to protect Joshua against a danger it concededly played no part in creating, the State acquired a duty under state tort law to provide him with adequate protection against danger."). Id. at 201. These types of claims will be defended by establishing that the institution conducted reasonable background checks and afforded adequate supervision to avoid foreseeable harms and/or that there is no respondeat superior relation with the actual transgressor. McKibbin, supra note 63, at 486, 497-98.
owner's insurance policy. As to private wealth, there are obvi-
ously not many Group A defendants who can satisfy a six-
figure judgment. Although some individuals undoubtedly
exist, and some fraction of those individuals might molest chil-
dren, the pool is probably not large enough to provide a mean-
ingful source of compensation in the larger scheme.

That leaves homeowner's insurance. In almost every
case where a homeowner's policy has been looked to as a
source of compensation for a sexually abused child, however,
the insurance company has successfully avoided liability on the
claim.

Insurance companies have avoided compensating child vic-
tims in a number of ways. Some courts have held that the
child sex abuse claim is outside of the scope of the home-
owner's policy. Insurers are able to do this because many
homeowner insurance policies limit coverage to losses from
"occurrences." These courts have held that the term "occur-
rences" refers to acts of negligence and that molesting a child
is not a negligent act.

Most of the courts that find for the insurance company in
child molestation cases, however, have held that the case trig-
gers one of the exclusions from coverage in the insurance con-
tract. A claim against a family member might be excluded
because many policies do not cover harm to residents of the
insured premises. Molestation by a daycare employee that
took place in a nearby parking lot might not be covered
because the policy only covers acts occurring on the prem-
ises. Still other policies exclude harms caused by felonies.

(Utah 1980) ($42,000 damages against former boss who married his secretary and then
molested stepdaughter).

103. Insurance is likely the only source for compensating the child victim. See
Long, supra note 97, at 140 (noting that "the abuser's liability insurance may be the
only effective means of paying for the [expensive] specialized treatment that the child
might need").

104. Generally, the insurance company brings a declaratory judgment action
requesting a ruling that it is not obligated to pay, and the court grants a judgment in
favor of the insurance company at a summary judgment motion. See, e.g., Allstate Ins.

105. See supra note 63 and accompanying text.

supra note 63 and accompanying text.


1988).

Finally, some preclude coverage against any individual convicted of a serious sexual offense.

The insurance company's principal avenue out of liability under these homeowner policies, however, falls under the exclusion for acts done with "intent to injure."\(^{110}\) The general rule that courts across the country traditionally have applied in interpreting the "intent to injure" exclusion requires both an intent to do the injurious act and an intent to cause serious injury.\(^{111}\) This latter requirement focused on the insured's subjective intent.\(^{112}\) In so focusing, courts have recognized that they were not assessing liability for tort, but rather were assessing coverage on an insurance policy.\(^{113}\)

Consistent with this traditional approach, insured defendants in child molestation cases have attempted to combat insurance company assertions of the "intent to injure" exclusion with expert psychological testimony to the effect that, in the defendants' twisted minds, they believed that they were not harming the children and that their act was really one of love and affection.\(^{114}\) Though such a position may not find sympathy with most of us, it does comport with some views in the expert community as to how some child molesters might

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\(^{110}\) The Comprehensive General Liability policy excludes "bodily injury expected or intended from the standpoint of the insured." McKibbin, supra note 63, at 496. For a thorough and thoughtful discussion of the "intentional injury" exclusion, see Long, supra note 97.


\(^{112}\) McIntyre, 652 F. Supp. at 1193-94.

\(^{113}\) See, e.g., Congregation of Rodef Sholom of Marin v. American Motorists Ins. Co., 154 Cal. Rptr. 348, 351 (Cal. Ct. App. 1979); McCormick, supra note 99, at 558. This is consistent with the general approach of courts towards insurance contracts. Courts strictly interpret insurance contracts to favor the insured probably because insurance contracts are generally boilerplate agreements over which the insured has little bargaining leverage and because insurance contracts are the product of an industry largely exempt from the constraints of federal antitrust law. See McCarron-Ferguson Act of 1945, 15 U.S.C. §§ 1011-15 (1984); see 13 APPLEMAN, INSURANCE LAW AND PRACTICE, §§ 7401-07 (1979); 2 GEORGE J. COUCH, CYCLOPEDIA OF INSURANCE LAW 2d, § 15:74, at 341-47 (1984).

\(^{114}\) See, e.g., CNA Ins. v. McGinnis, 666 S.W.2d 689, 690-91 (Ark. 1984); Grange Ins. Ass'n v. Authier, 45 Wash. App. 383, 386, 725 P.2d 642, 643 (1986). For additional citations for the proposition that true pedophiles do not necessarily intend to harm their victims, see Long, supra note 97, at 147, 157-59.
think. Nonetheless, when policy holders sue insurance companies for failure to pay in child sex abuse cases, most courts have granted summary judgment in favor of the insurance companies refusing to even consider any evidence concerning the abuser's subjective intent.

In reaching this result, courts tend to rely on one of three forms of legal vocabulary. Some speak in the tort language of "natural and probable consequences." These courts have little trouble finding that harm to a child is the natural and probable consequence of sexually abusing that child. Others talk in the vocabulary of inferring harm "as a matter of law," while still others argue that the harm is "against public policy." The result of all three approaches is the same. Coverage is denied the defendant and recovery is thereby denied the child.

Whatever the talk of "public policy," the reality is that the court is likely taking money from an innocent, abused child.

116. See, e.g., cases cited infra notes 117-19.

For a brief period, a third court dealt with the issue as a question of evidentiary burdens. For this federal court, sexual abuse was presumed to be willful and intentional unless the defendant presented "credible testimony" that he or she did not intend to harm the child or that he or she was suffering from diminished capacity such that an intent to injure could not be formed. State Farm Fire & Cas. Co. v. Estate of Jenner, 856 F.2d 1359, 1364-65 (9th Cir. 1988). This third approach, which gave the trial court at summary judgment a great deal of power to decide what is credible testimony, was abandoned on rehearing in light of contrary positions taken by the relevant state supreme court and a sister federal appellate court. State Farm and Cas. Co. v. Estate of Jenner, 874 F.2d 604, 607 (9th Cir. 1989) (citing Fire Ins. Exchange v. Abbott, 251 Cal. Rptr. 620 (Cal. Ct. App. 1988) and State Farm Fire & Cas. Co. v. Abraio, 874 F.2d 619 (9th Cir. 1988)). Both Abbott and Abraio found an irrebuttable presumption that intent to injure followed from an act of sexual molestation.

121. See In re James A., 505 A.2d 1386, 1389 (R.I. 1986); MacKinnon, 471 A.2d at 1168 (public policy favors insuring intentional tortfeasors in order to compensate children). See also Congregation of Rodef Sholom of Marin v. American Motorists Ins. Co., 154 Cal. Rptr. 348, 352-51 (Cal. Ct. App. 1979) (strong public interest in compensating victims "reinforces the well-settled principle that such exclusionary clauses should be interpreted as narrowly as possible").
Why then have courts denied coverage under these home-owner policies? Certainly the doctrinal approach that they had already developed to interpret the scope of the "intent to injure" exclusion could at least have allowed the insured defendant to get past summary judgment.

Much of what is really going on is, I believe, moral disgust. Most judges simply cannot bring themselves to find that the sentence "the man sexually molested the three-year old girl, but meant her no harm whatsoever" is anything but literal nonsense.\(^{122}\) In addition to denying coverage based on moral disgust, some courts, as noted above, deny coverage due to "public policy."\(^ {123}\) We do not want wrongdoers to be insured for their intentional misconduct. Such coverage might encourage them to do what they otherwise would not risk because they know that, even if they get caught, they will get off the hook without having to pay anything for their intentional wrongdoing.

This has a nice ring to it until you try to apply it to the child molester. Child molestation is not motivated by economics. Because no economic benefit is received from the abuse, no windfall is obtained if the molester is covered by insurance. As for taking the sting out of any penalty carried by a damage award,\(^ {124}\) in these circumstances a judgment for damages is the least consequential penalty that this person might face. Shame, guilt, and the likelihood that there has been a criminal conviction labelling the defendant as a child molester for life and placing him or her into prison for a substantial period of time will likely suffice. As a matter of pure public policy, it

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\(^{122}\) See, e.g., Zordan v. Page, 500 So. 2d 608, 613 (Fla. Dist. Ct. App. 1986) ("one may have a first, visceral reaction which is strongly adverse to any conclusion that a person who engages in sexual fondling of a child may be covered by liability insurance"). Admittedly, it is hard for most of us to think of sexual abuse as accidental. Because we abhor pedophiles' behavior, "we reflexively treat it as if it were an intentional evil." Long, supra note 97, at 169 (footnote omitted). Our notions of "intentionally" include both purpose and knowledge. See, e.g., MODEL PENAL CODE § 2.02 (1985). How then could the abuser not "know" they were harming the child? There would have to be something totally wrong with their mind. Of course, that is the point.


seems more attractive to compensate the injured child.\textsuperscript{125}

Courts may also justify the exclusion of intentionally caused injuries from insurance policies by consideration of the economics of the insurance business.\textsuperscript{126} This perhaps provides some rejoinder to our initial inclination to compensate the child at the insurance company's expense. Insurance companies use risk analysis to create profit.\textsuperscript{127} Intentional acts designed to cause injury do not fall within the "actuary calculations of the random occurrence; thus they are excluded from these calculations."\textsuperscript{128}

Translated into legal vocabulary, an insurance policy is a contract. The insurance company agrees to take certain risks. It specifically does not agree to take other risks. Sympathies aside, a deal is a deal, and that is the end of it. To some extent, however, what the deal is will be a matter of interpretation for the court.

Courts could therefore admit evidence of a defendant's subjective intent in these declaratory judgment proceedings. Even if the courts admitted this evidence, however, the consequences would be minimal. First, denying a summary judgment motion to the insurance company does not mean that a jury will buy the defendant's position that he or she did not intend to harm. Jurors are not likely to be any different than judges in their reaction to this argument. Unless they are swayed by a belief that finding against the insurance company is the only way that the child will be compensated, defendants are not all that likely to win a large portion of these declaratory judgment cases at trial on the merits.

Second, whether or not insurance companies currently calculate the risks of molestation in their homeowner's insurance policies, as a practical matter, they are certainly capable of adding these risks into their actuarial calculus. If, however, these risks are not already calculated by the company when issuing the policy, someone will have to pay for the increased risk. There is little mystery regarding who that someone will be.

This leads to the strongest argument for not allowing juries to rule that child molestation is included in a home-

\begin{itemize}
\item \textsuperscript{125} See supra note 121. See also Griggs, supra note 123, at 541.
\item \textsuperscript{126} Griggs, supra note 123, at 527-28.
\item \textsuperscript{127} Id. at 527.
\item \textsuperscript{128} Id. at 528.
\end{itemize}
owner’s insurance policy. The basic premise for this type of insurance is cost-spreading among the pool of people on whom the insured against risk is likely to fall. Put simply, all of us who have homeowner insurance policies split the cost of insuring against each other’s potential losses. I can afford an insurance premium that may never give me a payback, but I cannot afford to pay out a huge lump sum should random disaster strike. You or I might feel very differently about subsidizing the risk that someone will molest a child, generally their own. This is because neither of us will likely see a risk that one of us covered by the policy will molest a child. We may well be offended that such a possibility were even suggested and might hesitate to pay a premium to subsidize that risk in other households.\footnote{See, e.g., Rodriguez v. Williams, 42 Wash. App. 633, 636, 713 P.2d 135, 137 (1986) (in discussing homeowner’s insurance and child sexual abuse, the court noted, “[t]he average person purchasing homeowner’s insurance would cringe at the very suggestion that he was paying for such coverage”), aff’d, 107 Wash. 2d 381, 729 P.2d 627 (1986).}

If courts allow child sexual abuse to be covered by homeowner policies, they sanction a form of private “charity” in which Party A contributes money through an insurance premium to compensate children who might be molested by Party B.\footnote{Of course, if courts begin to interpret homeowner’s insurance policies this way, insurance companies will specifically exclude such coverage on all new or renewed policies, leaving only those molesters who have older policies with resources to pay any judgment.} Party A may not be willing to do this. Party A may not even agree that this is an efficient method for compensating abused children.\footnote{Also, one may well ask how far we will take this. Will we sanction suits for “awful parenting” with accompanying claims against insurance companies? Perhaps we should.}

Speculation aside, however, when all the dust in this area settles, there is one significant point that is clear: Overwhelmingly, there will be no source of money to satisfy judgments against defendants in Group A.

b. Compensation From Vicariously Liable Noninstitutional Defendants

Initially, we may think that plaintiffs will be more successful in seeking compensation from the nonparticipating spouse or significant other and the family home daycare owners that comprise Group B. One might think that the spouse or signifi-
cant other who negligently failed to observe or restrain the actual molester will be covered by insurance, because his or her transgression is within the realm of negligence, the very type of risks these policies were meant to cover.

The spouse or significant other's act, however, will likely be excluded from the homeowner's insurance policy. The existence of coverage in this situation will depend upon whether the exclusions in the policy refer to "the insured" as opposed to "an insured" or "any insured." If the policy refers to the former, the exclusion will not apply to the spouse or significant other and coverage will be found.\textsuperscript{132} If the latter, insurance coverage will be denied.\textsuperscript{133} As a matter of textual interpretation, this might make some superficial sense. When the exclusion only applies to "the" insured, it leaves the possibility open that other insureds under the policy who did not commit an act of intentional harm would be covered by insurance. But substituting the "an/any" language, one could suppose this first inference negated.

The problem is that the spouse or significant other is not seeking insurance coverage as one vicariously liable for the actual abuser's intentional action. Rather, that person is seeking coverage for his or her own negligence. Courts, however, have seemingly not considered this interpretation. Not surprisingly, any existing insurance policy that does not now use the "an/any" formulation will by anyone's standards qualify as a genuine museum piece. Thus, the only possible source of compensation for the abused child from the spouse or significant other would be private assets, and it is no more likely that this category of defendants will have sufficient resources than those in Group A.

Children seeking recovery from small family-owned home daycare operations fare no better. These are run by people who take in a few kids in order to supplement their incomes. Financially, these daycare operators are in relatively the same positions as defendants in Group A. They typically operate on too small a scale to afford commercial insurance even if it were available to them.\textsuperscript{134} Even in those instances in which insur-


\textsuperscript{133} \textit{See}, \textit{e.g.}, Allstate Ins. Co. v. Gilbert, 852 F.2d 449, 453-54 (9th Cir. 1988). \textit{See also} Grady & McKee, \textit{supra} note 111.

\textsuperscript{134} I will discuss this and the general issue of insurance within the daycare industry later. For purposes of this section, it is sufficient to point out that in today's
The bottom line is that there will be no insurance coverage for sexual abuse in these family home daycares. Unless the home itself has substantial equity that can be used to satisfy the judgment, the plaintiff has no source of compensation. In short, there is not likely to be any more money available from defendants in Group B than there was from those in Group A.

c. Compensation From Vicariously Liable Institutional Defendants

The independent daycares and state licensing agencies that comprise Group C may offer plaintiffs some deep pockets. Commercial policies are available to for-profit daycares and for even nonprofit daycares that operate as part of a larger facility. With rare exceptions, these policies exclude child sexual abuse. A few companies, however, are beginning to offer a sexual abuse rider with a limited ceiling on coverage.

In addition, employers are beginning to offer on or near-market almost no major insurance company will offer liability coverage to a family home daycare in either a commercial policy or as a "business endorsement." An "endorsement" is an additional coverage on a standard policy in which the insurer agrees to provide, generally, for an additional premium to their homeowner's insurance. A business endorsement on a homeowner's policy would add coverage for business activities conducted at home. See infra notes 199-202 and accompanying text for discussion of why insurance companies do not like to insure family daycares.

These observations are based upon my interviews with daycare operators and associations, and members of the insurance industry, as well as the UNITED STATES DEPT. LABOR, REPORT OF THE INSURANCE INFORMATION INSTITUTE TO THE DIRECTOR OF THE TASK FORCE ON CHILDCARE LIABILITY INSURANCE (1989) [hereinafter INSURANCE INSTITUTE]. The Institute was retained by the Department of Labor to assess the availability of insurance for daycare. The Institute conducted this task by sending a survey to three national trade associations for insurance.

According to the report, these associations "constituted virtually the entire universe of insurance intermediaries" likely to provide this coverage. The report consists of several documents: a cover memo from M. Rosenberg, supporting memos from M.C. Keegan-Ayer, and various responses to the survey, including a 'focus group' report of National Association of Professional Insurance Agents (NAPIA). The report is available from J. Rochman, Insurance Information Institute, 1101 17th Street N. W., Suite 408, Washington, DC 20036.

Because almost all jurisdictions provide a homestead exemption which bars resorting to a home as an asset to satisfy "debts," the plaintiff can only recover any amount over the homestead exemption. See, e.g., Allen v. Crane, 116 N.W. 392 (Mich. 1908).

See infra note 202 and accompanying text.

site daycare. This phenomenon is likely to rapidly increase in the near future. These employers, who will likely be held responsible for the welfare of employees' children at any daycare that they run or even recommend, have both commercial policies and the assets of their businesses as sources of compensation. Furthermore, suits against state agencies for failures in their licensing and/or investigative processes are also economically feasible. Plaintiffs suing agencies can go after state funds.

However, assuming both an increase in suits and the fact that some of these suits will be brought against Group C members, many of the insurance resources available to Group C will begin to dry up as insurance companies stop offering coverage for sexual abuse or price the coverage out of reach of most of the market. Thus, there is no guaranteed recovery, even against institutional defendants.

139. See, e.g., Michael Schacher, FAA Opens Chicago-Area Daycare Facility, BUS. INS., July 3, 1989, at 6; Genetech Daycare, BUS. INS., July 3, 1989, at 6. Generally, only large organizations will sponsor on or near-site daycare. As to these, there is no problem adding daycare to their insurance, especially if the company already is paying a high premium. Many companies, however, prefer "voucher" systems where they give their employees vouchers to apply to the daycare of their choice. These voucher systems avoid both potential liability and the general headaches of dealing with daycare. INSURANCE INSTITUTE, supra note 135. See also Jim Szmanski & Jerry Dyer, Taking Care of Baby, MORNING NEWS TRIB. (Tacoma, Wash.) Nov. 11, 1991, at C7. A study of Washington state employers shows that 16% offered or considered child care benefits for their workers. Id. However, only 2.4% offer employee sponsored daycare. Id.

140. Roger Bornes, Childcare Grabs Benefits Spotlight, NAT'L UNDERWRITER (Property & Cas./Risk & Benefits Management Edition), Apr. 10, 1989, at 23. See also INSURANCE INSTITUTE, supra note 135 (employer-sponsored daycare grew from 5% to 10% of the daycare insurance market between 1987 and 1989).

141. Kari Berman, Employer-Sponsored Daycare Holds Risks, BUS. INS., Oct. 10, 1988, at 20. Most employers who provide on or near-site daycare do so through an independent contractor with whom they have "hold harmless" agreements. INSURANCE INSTITUTE, supra note 135. To the extent that the independent contractor neither can obtain insurance for child sexual abuse nor has assets to cover any judgment, however, the hold harmless agreement does not protect the company from this risk.

142. Child sexual abuse is least likely to happen in these Group C facilities; see infra notes 157-60 and accompanying text. Yet, historical experience leads one to believe that it would not take more than a few big losses to convince insurance companies to abandon coverage for sexual abuse at these facilities. See infra notes 174-91 and accompanying text.

143. To understand why it is likely that insurance companies would respond this way, even if most of the suits were unsuccessful and/or they maintained their profit margins as a result of a corresponding increase in facilities paying premiums, see Section III-C(4)(b).

144. Even if the price of such insurance skyrocketed, daycares would not be driven
d. Summary

The immediate consequence of accepting the evidentiary arguments for the admission of videotaped child testimony is that there will be a larger number of suits with higher settlements and judgments for plaintiffs. However, the sources for satisfying these settlements and judgments are not terribly promising for those who wish to bring suits for sexual child abuse. Indeed, suits against defendants in Group C are the only suits that make any economic sense to initiate. To the extent the use of videotaped depositions increases the number of these civil suits and the size of the settlements, the increase will occur solely in Group C suits.

As a result, few children that have been molested will be compensated. Those receiving compensation first must choose to bring suit and then find an attorney who is willing to represent them. Second, those who are compensated must have been molested in one of the limited number of daycare facilities that are insured for child molesting or have substantial assets.\(^1\)\(^4\)\(^5\) A child may also recover where the state has blundered in its licensing and supervision functions. One might question whether this is an efficient or just way to provide injured children with the treatment and counselling that they will require.\(^1\)\(^4\)\(^6\)

out of the market. As long as general liability insurance is available, it is hard to imagine that daycares currently in operation will close because they cannot get the special rider or that new daycares will not enter the market on this account. In theory, federal or state legislatures could use taxpayer money to form an insurance pool or order insurance companies to form pools to subsidize insurance for child sexual abuse. In the first case, costs will be broadly distributed among the taxpayers. In the second, the insurance companies will pass the costs onto those carrying other forms of insurance.

But will the lack of sexual abuse insurance be so important that legislatures will step in? It is not likely. Inevitably, accidents will happen when young children are playing. Liability insurance seems essential. In contrast to accidents, child molestation hardly seems inevitable, and every daycare has a strong incentive to do everything it can to avoid it happening. See infra note 156.

It would seem peculiar if parents/consumers began to distinguish among the daycares to which they are willing to send their children based upon which could economically insure against sexual child abuse. To the extent that this would be a significant competitive criteria, however, only very large chain-type daycares could compete.

\(^1\)\(^4\)\(^5\). This, of course, assumes that insurance coverage is still being offered for sexual abuse, or the facility has sufficient assets to pay the judgment. If the latter is true, and the daycare does not have the resources of a national daycare that may be able to self-insure, the lawsuit may drive the facility out of existence. Depending on the circumstances, this result may be viewed as good or bad.

\(^1\)\(^4\)\(^6\). The efficiency and fairness of the current tort system as a mechanism for
2. Deterrence: Discouraging Child Sexual Abuse

Not surprisingly, the deterrent effect of admitting child videotaped testimony also varies with the three groups of defendants.

a. Deterring the Individual Abuser

Group A defendants are unlikely to be deterred by the possibility of a civil suit. They have not been discouraged by the possibility of being labelled as child molesters within our society or the risk of a felony conviction. Nor have they been deterred by the threat of long prison sentences in enclosed environments with very dangerous people who, incidentally, view child molesters as the lowest form of life on earth. To boot, only in exceptional cases will individual sex abusers have enough assets to economically justify someone bringing a civil suit against them. In summary, even if individual sex abusers cared about a possible civil judgment, which is unlikely, the threat of civil litigation would be a rational deterrent to only a small minority.

b. Deterring the Nonparticipating Spouse and the Family Home Daycare Operator

Group B is a mixed bag, consisting of both nonparticipating spouses and home daycare operators. Some might believe...
that nonparticipating spouses will not be affected by the risk of civil litigation.\textsuperscript{149} After all, personal motivations alone should have been strong enough to cause the spouse or significant other to intercede. Their lack of intervention indicates the presence of even stronger personal motivations that made them unwilling to “see” or act on the abuse. It is hard to believe that fear of losing money would add much into the balance.

Others may argue that the nonparticipating spouse might be pushed to action when confronted with the risk of losing his or her home and possessions. Unlike the actual abuser, the nonparticipating spouse has not displayed indifference to far greater risk than economic loss. Nor is the spouse motivated by satiating deviant sexual desires. Under this view, the likelihood that the plaintiff would not find it economically viable to bring suit is outweighed by the spouse’s belief that such a suit is possible.\textsuperscript{150}

Initially, family home daycare providers appear more likely to be deterred by the potential risk of civil litigation. To the extent that the abuse is carried out by an employee, as opposed to a family member,\textsuperscript{151} home daycare providers who fear civil litigation may take more care in screening and supervising their employees. This, in turn, might reduce the instances of molestation.

Also, some home daycare providers cannot afford or cannot even obtain insurance.\textsuperscript{152} If it appears that suits are becoming more prevalent, even if very few are against home daycares, some of those who are currently willing to risk being uninsured might decide that it is no longer worth the worry and fold their tents. Such closures might indirectly cause a decline in the instances of child abuse by reducing the opportunities in which it can take place.\textsuperscript{153}

In reality, a home daycare owner is unlikely to be motivated by the lack of insurance since most home daycares cur-

\begin{itemize}
\item \textsuperscript{149} \textit{But see infra} notes 174-180 and accompanying text, for a discussion of some economic considerations.
\item \textsuperscript{150} One reason that a suit is unlikely is that an attorney must believe that the potential award is great enough to justify taking the case on contingency and fronting the costs.
\item \textsuperscript{151} Many, if not most, home daycares, however, have no employees. They are run by the owner of the residence.
\item \textsuperscript{152} \textit{See infra} note 202 and accompanying text.
\item \textsuperscript{153} This proposition is based on the assumption that the children do not return to daycares with higher per capita instances of molestation than these daycares.
\end{itemize}
rently carry on business without insurance.\textsuperscript{154} This fact counterbalances the deterrent effect of the increased risk of litigation. To the extent that these daycares are not insured, they are not compelled to follow insurance requirements that reduce the chances of sexual abuse. Further, liability insurance is a precondition for many state licensing schemes.\textsuperscript{155} Those daycares unable to afford or obtain insurance cannot be licensed in these states. As a result, most continue their operations without licensing, thus forgoing the accompanying state licensing and inspection standards that reduce the possibility of sexual abuse.

We cannot draw an absolute conclusion regarding the deterrent effect caused by an increase in litigation against nonparticipating spouses and family daycare providers. Although the increased risk of liability may push some nonparticipating spouses to action, others will remain unwilling or unable to act. The increased risk of litigation is likely to cause family daycare providers to screen employees more carefully. Because most family daycare providers do not have insurance, some will leave the business rather than risk suit. However, most providers will stay in business without insurance and will, therefore, not face the very insurance requirements that tend to reduce the chances of abuse.

c. \textit{Deterring Institutional Daycares and State Licensing Facilities}

The commercial daycares, nonprofit daycares, and employer sponsored daycares that constitute Group C already have very strong motives to avoid the possibility of child molestation even without the risk of lawsuit. Commercial daycares seek to minimize risk to their business reputation.\textsuperscript{156}

\textsuperscript{154} This proposition is based on interviews with daycare operators and associations across the country.

\textsuperscript{155} Licensing requirements vary greatly throughout the country: In some, licensing is not mandatory; in others, it is. In some, licensing involves registering and paying a small fee; in others, rigorous requirements must be met. In some, no insurance is required; in others, it is a precondition. Based on interviews with child care licensing inspector, Thurston County, Washington on Sept. 11, 1990. See also Greg J. Matis, \textit{Dilemma in Daycare: The Virtues of Administrative Accommodation}, 57 U. CHI. L. REV. 573, 575-79 (1990) (current licensing regulations vary from state to state with little uniformity; many states totally or partially exempt churches—among the largest single daycare providers in the nation—from regulation).

\textsuperscript{156} Individuals have noneconomic, at least nonlitigation-focused, reasons to avoid doing harm. Sugarman, supra note 146, at 128-130. Most of the noneconomic concerns attributed to Group C apply equally to Group B owners of family home daycares.
Even without a lawsuit, community knowledge that children in their care have been molested would rank above even a hepatitis epidemic for keeping potential customers from walking through their doors. Also, in most states these institutions have to be licensed in order to function. Because instances of child molestation could cost a commercial daycare its license, it has a strong incentive to avoid child abuse instances.

Employer operated daycares have additional motivation to avoid the risk of child molestation, even absent the threat of litigation. An instance of child molestation at an employer provided daycare would almost certainly damage employee morale and productivity. It could also destroy the business reputation of the firm. Thus, nonlitigation reasons already exist that should deter commercial and employer operated daycares from allowing molestation.

When an increase in the economic risk of lawsuits is added to nonlitigation deterrents, these Group C potential defendants are likely to behave in ways that further reduce the risk of sexual child abuse. They are likely to do this in a variety of ways. First, these potential defendants likely will create safer facilities, constructed to reduce the risk of child abuse. Thus, some daycares will operate within a large, single room that has no barrier behind which an adult could isolate a child from the rest of the group. Group C potential defendants are also likely to adopt policies that reduce the chances of sexual abuse. They will take more care in screening and supervising their employees. At the very least, employees with prior records of sexual abuse will not be hired. These results

157. Group C defendants have responded in ways analogous to automobile manufacturers and drivers faced with deterrent measures. See Walter J. Blum & Harry Kalven, Jr., The Empty Cabinet of Dr. Calabresi: Auto Accidents and General Deterrence, in PERSPECTIVES ON TORT LAW 192 (R. Rabin ed., 1990) (general deterrence in auto arena leads to the increased discovery of safety techniques, the improvement of driving, and the substitution of safer activities).

158. Berman, supra note 141, at 18.

159. The Board of Directors of one daycare interviewed has adopted a policy that no employee can transport a child in his or her own car, and no single supervisor can leave the daycare with a child.

160. Legislation may enable this approach. For example, the law in Washington allows all "businesses and organizations providing services to children" to obtain criminal records of prospective employees or volunteers. WASH. REV. CODE §§ 43.43.830, 43.43.832 (1990). See also, e.g., ARIZ. REV. STAT. ANN. § 36-883.02 (1986 & Supp. 1990) (daycare employees must register, be fingerprinted, and certify not convicted of listed crime); COLO. REV. STAT. § 26-6-107 (1)(a)(I) (1986 & Supp. 1990) (daycare employees to be fingerprinted to allow for investigation of employee); ILL.
seem to be positive; however, there are potential downsides.

For example, increased screening also raises potential problems. If those doing the screening for daycare jobs become too risk averse, they will tend not to hire otherwise qualified people. A specific risk is that they will refuse to hire those who appear as a "proxy" for child molesters. Increased screening and supervision, as well as possible construction to produce safer facilities, may carry their own negatives. The costs of screening, supervising, and improving daycares may have a particularly negative economic impact on nonprofit daycares.

Of all of the daycare facilities outside of family homes, only a small percentage are commercial, for-profit, or employer provided daycares. Most daycare facilities are associated with a school, a church, or some other nonprofit organization. Most of these run on a "shoe string" budget and often provide daycare services for lower-income parents. This daycare service is sometimes provided at no fee, but more often at a cost which is far lower than that charged in for-profit daycares.

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REV. STAT. ch. 23, ¶ 2214.1 (1988) (daycare employees subject to criminal background investigation).

161. A proxy is a person who represents a stereotype of the provider's view of a person likely to molest a child. For a good discussion of the concept of and problem with "proxies," see RICHARD A. POSNER, THE ECONOMICS OF JUSTICE 345, 367-71 (1983).

Specifically, employers might respond to the cultural archetype of child molesters as men and perhaps gays and, as a result, discriminate against men in the hiring process. Correspondingly, as more suits are brought, men may gradually take themselves out of the daycare job market for fear of working in a situation where they will be accused because they fit the archetype.

162. With increased screening, at least one company has emerged that offers pre-employment screening to daycares. See McKibbin, supra note 63, at 485. The effectiveness of such screening, and the risks that it carries, depends on whether there is a convincing scientific basis for such predictive screening.

163. As of 1985, for-profit daycares served only 4% of the child daycare market. Pave, supra note 100, at 116.


165. This is based on interviews with daycare associations and providers. See also Linda Kocolowski, "Why Me?" Ask Daycare Operators, NAT'L UNDERWRITER (Property & Cas./Risk Benefits Management Ins. Edition) 1985, at 32 [hereinafter Kocolowski, Why Me?] ("Except for the large daycare chains—like KinderCare which had net income of $160 million in 1984—most of the estimated 20 million children in daycare in the United States are in nonprofit centers associated with churches or other community-based organizations"). In fact, churches are among the largest daycare providers in the country. Matis, supra note 155, at 575.

166. See Pave, supra note 100, at 114 (author discusses plight of daycare center serving "low-income minority and migrant workers").
If the costs associated with screening, supervision, and improvement of the facilities become substantial, most of these daycares will not be able to absorb the costs and thus will be unable to subsidize the parents' interests in a safer facility for their children. On the other hand, shifting the cost to the parents may have serious consequences. If the additional cost is substantial, many of these lower-income parents will be unable to afford daycare. If they cannot find some family member to watch their children, they may have to leave their jobs.167

Employer provided daycares also face negative effects from the increased risk of economic liability in a child molestation claim. In light of the lack of sufficient insurance coverage for sexual child abuse, employers might decide that on or near-site daycare is not worth the economic risk. Such employers may cease providing on or near-site daycare for their employees. Others may choose never to establish or support such daycares.168 By eliminating the activity, the employer eliminates the risk attendant with that activity.

The risk, however, is not eliminated without cost. In theory, businesses will calculate the loss of job satisfaction and productivity that is incurred by not providing on or near-site daycare for their employees. They will similarly calculate the loss of potentially valuable employees who will not work for a company that does not provide such daycare.169 The result of these calculations will then be balanced against the economic cost of liability from potential lawsuits. Theoretically, whatever decision they make will, therefore, be economically rational. However, that is rarely how the world works. More

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167. Of course, parents' employers could raise salaries to cover the increased expense of daycare. Many of these particular parents, however, are in the pool of hourly workers with salaries fixed by job description. An employer will not likely deviate from these job description categories in order to cover inflated child care costs for a few individuals. One could argue that this simply means that, in an economic sense, this person's value as a full-time parent is greater than his or her value as a member of the work force. But this view takes too static a look at the entire situation. To one who wants to enter the work place, a job provides a sense of worth and individual satisfaction that is transferred back to the family. A job also provides an image to other family members about the desirability of productive work.

168. The companies may, of course, still offer some form of "voucher" system. See supra note 139.

169. Twenty-nine percent of working parents interviewed in a recent survey who had a child under twelve had given up a job or promotion because of the lack of qualified child care. A. Hoggerty, Lawmakers Eye Child Care, Parental Leave, Nat'l Underwriter (Life Health Finan. Serv. Edition), Oct. 11, 1989, at 28. Of course, that does not mean that none of those parents would have accepted vouchers if on or near-site care was not offered.
likely, a vice president will talk to a vice president, someone will say something in a management meeting, and the decision to terminate daycare services will be based upon some emotional gestalt. Of course, even with increased risk of suit, employers may continue to provide daycare services. On-site daycare may eventually be thought of as akin to a right that employers have to provide in labor contracts, even without comparable concessions by labor. The risk will then be partially subsidized by reducing profits. In other words, shareholders and other investors will pay. Under these circumstances, one can imagine a large, successful lawsuit leading to lay-offs. Even outside the formal labor situation, the significance of working parents in the work force might be so great, and their insistence on daycare that is accessible during work so pervasive, that businesses will simply have to bite the bullet, pay for whatever insurance coverage they can, put their assets on the line, and rely on techniques such as screening to reduce their risks.

Another possible negative consequence of increased liability to potential Group C defendants might be that the businesses would consider requiring their employees to be self-insurers against the risk of child molestation. Businesses might require employees to sign a waiver of the right to sue the company as a condition of the company providing on or near-site child care. In theory, the parents/employees would

170. Interestingly, the Insurance Institute speculated that the only medium and smaller-sized employers who would demand insurance for on-site daycare were those with either special employee requirements such as hospitals and other 24-hour operations or factories in remote locations where daycare is otherwise unavailable. INSURANCE INSTITUTE, supra note 135. BE&K Construction Company has set up Bekare, a daycare operating out of trailers at each construction site. Claudia H. Deutsch, Getting Women Down to the Site, N.Y. TIMES, Mar. 11, 1990, at F1.

171. Such a waiver may not be valid. Unless appointed as guardian, a parent generally has no authority “to compromise or release claims or causes of action belonging to the child.” Loesch v. Vassiliades, 86 A.2d 14, 15 (N.J. 1952); see also Salmeron v. United States, 724 F.2d 1357 (9th Cir. 1983). In fact, even an appointed guardian needs the agreement of the court to enter into a binding settlement of the child’s claims. Loesch, 86 A.2d at 15.

In some respects, the daycare waiver is analogous to the parent’s waiver in the litigation situation. In both cases the child obtains a benefit in return for insuring the other party against a class of risk. In the litigation situation, the child receives certain compensation without the risk of losing or even having to go through a trial, and the defendant gains insurance against the risk of even greater loss, public exposure, and other potential negatives. In the daycare situation, the child attends a daycare where his or her parents are accessible, while daycare operator is insured against the risk of a future lawsuit.

Arguably, however, there are distinctions between the two situations which may
balance the economic and emotional benefit to them and their family of on-site, employer-provided daycare against the emotional cost of not having regular access to their child during the day.

But this abstracted calculus does not reflect reality. As a self-insurer, the parents will not be in the position to avoid the risk of molestation unless they leave their jobs every five minutes to inspect the daycares. Also, this abstract calculus misses all the main points that support on-site or near-site daycare to employee or employer. Parents want to have access to their younger children during the work day. This is a philosophy of parenting, not of economics. Companies, on the other hand, need to be able to attract women and, increasingly, other varieties of single parents. Additionally, they want their employees to feel good about the company. The old “sign this waiver” notion is not likely to accomplish either of these goals of employer or employee or to instill much confidence in the daycare for that matter.

Finally, state agencies charged with licensing and supervising daycares will also be affected by the potential increase in the number of civil lawsuits. The agencies will tend to conduct licensing procedures more carefully. This may also cause agencies to become too risk-aversive and deny licenses to otherwise appropriate daycare facilities. Legislation might be passed articulating in detail procedures for screening the applicants for licenses, supervising the applicants, and for the structural requirements for daycare facilities.

The agencies will also tend to be more careful in conducting their investigation and enforcement activities. Correspondingly, the legislature may perceive that the costs of the lawsuits are greater than the money that is needed for the nec-

support permitting parental waiver in the daycare situation. First, the potential conflict of interest that may be involved when parents bargain over a money settlement for their child would not seem to arise in the daycare situation. Second, the substance of the waiver seems different. In contrast to the litigation situation, no actual cause of action is involved in the daycare waiver. The child has suffered no harm and is statistically unlikely to do so.

Third, the child seems to receive something different. The child does not need to settle his or her claim to obtain compensation in the litigation situation because he or she can go to trial. This is not so with the daycare situation. Without a waiver, there will be no on-site daycare for the child. Of course, courts still might find such waivers void as against public policy, to the extent that they believe that such waivers decrease the incentive of daycares to reduce the risk of sexual abuse.

172. Cf. supra note 155.
necessary agency supervision. If so, it may budget more money for agency investigation and enforcement.

Like more care in the licensing process, intensification at the investigative and enforcement end will also tend to reduce the incidents of sexual abuse in daycares. If increased funds are put into these agencies, of course, the money has to come from somewhere.

Who pays for the increased cost of investigation and enforcement? There are only two choices. The costs can be passed on to the taxpayers through a revenue measure on the theory that if taxpayers don't pay for improved agency supervision now, they will have to pay a much greater cost in legal judgments later. If private insurance is involved, and the insurer will continue to cover child sexual abuse, then citizens will pay in the form of increased premiums. Alternatively, the money can come from the existing budget of some other agency or governmental service.

We have seen that an increased risk of economic liability is likely to cause Group C potential defendants to change their ways to reduce the risk of child molestation. Such changes include improved facility design, employee screening, and employee supervision. Such increased liability, however, is a double-edged sword. Risk adverse daycares may hesitate to hire well qualified people. Nonprofit and employer operated daycares may be put out of business by increasing costs. In addition, employer operated daycares may cause parents to become self-insurers. Finally, state agencies may spend more money licensing and inspecting daycares. Again, we must consider the sweeping impact increased economic risk is likely to have when evaluating the admissibility of videotaped testimony in civil child molestation trials.

3. Consequences of Accepting Videotaped Testimony on the Behavior of Insurance Companies

All of the categories in Group C will respond to the risk of increased liability through lawsuits by acting to decrease the risk of loss from potential sexual child abuse. However, the response of the insurance companies, the principal protectors against ultimate loss, will be the major factor in fully assessing the consequences of an increase in the number of successful plaintiff suits for sexual child abuse. As such, it will be helpful to first briefly review the history of the relationship between
insurance companies and daycares before assessing the likely
effect of insurance on deterring sexual child abuse. We begin
with the so-called "insurance crisis" of 1984-1985,173 then look
at the present, speculate on the future, and finally return to
the subject of insurance and deterrence.

a. The "Insurance Crisis" of 1984-1985

The 1984-1985 year saw, not only a cry for tort reform,174
but also a sharp contraction in the availability of liability cov-
verage.175 During that period, many insurers completely
stopped providing liability insurance to daycares.176 Of the few
insurers that remained in the market, most raised premiums at
extraordinary rates; a 300% to 500% hike was not unusual.177
In a poll conducted by Business Insurance magazine during
this time, of 250 daycares polled, two-thirds had experienced
cancellation, non-renewal or huge premium hikes.178 Daycares
that lost their insurance in states requiring liability insurance
for licensing were immediately put out of business.179 Others
closed shop for obvious economic reasons. They could not
afford the premiums, nor could they pass the cost on to their
customers.180

There is no doubt that some of the sensationalist publicity

173. Some have disputed the existence of an insurance crisis brought on by the
tort system. According to these people, the insurance companies paid the price of cut-
throat competition, bad investments, and plummeting interest rates. Priest, supra note
146, at 214.

174. For a very carefully researched article that questions both the assumptions
underlying the tort reform movement and the relationship of subsequent legislative
"solutions" to the underlying problems, see Sanders & Joyce, supra note 147.

175. This quote from a business magazine of that era should give some flavoring:
In the glory days of 1978 to 1983, underwriters took on lots of business to get
premium income they could invest. Now that interest rates have fallen and
the insurers face bills for calamities ranging from Bhopal to toxic shock, they
are cutting back on low-return, high-risk specialities. These include
malpractice and product liability along with child care.

Pave, supra note 100, at 114.

176. See Litan, supra note 86, at 1 ("... and [for] daycare centers, coverage is
simply no longer available in some areas."); LeRoux, supra note 164.

177. Linda Kocolowski, 300-500% Premium Hikes Are Reported in the Tightening
Daycare Liability Market, NAT'L UNDERWRITER (Property & Cas./Risks Benefits


179. Id.

180. The issue became one of scale, with only the larger daycares able to pass the
premium hikes on to their clients. Kocolowski, Why Me?, supra note 165, at 4. But see
supra note 134 and infra notes 199-202 and accompanying text, discussing how most
family home daycares continue without insurance.
about sex abuse cases in daycares, as opposed to any true actuarial losses, contributed to the insurance companies’ dramatic response to daycares.\textsuperscript{181} There were, however, specific characteristics of the daycare market that made the insurance companies uneasy. First, tort law tolled the normal statute of limitations and allowed children to sue for injuries up until the time they were eighteen.\textsuperscript{182} That meant that an insurance company could face a multi-million dollar lawsuit fifteen years after the alleged abuse of a three-year-old. This filled the companies with the worst feeling that an insurance company can know: total uncertainty.\textsuperscript{183}

The feeling of uncertainty was exacerbated by the fact that companies did not have a very extensive history regarding claims from daycares and therefore could not make confident actuarial projections.\textsuperscript{184} Insurance companies faced additional uncertainty because these cases potentially carried very high losses, including the archetype of unpredictability, “pain and suffering.” As one representative of the insurance industry so eloquently put it, “suppose five kids are molested, twice each year [over the course of a year]. One pervert could lose you $10 million.”\textsuperscript{185}

Other factors made insurance companies view daycares as risky ventures. The coming 1986 Tax Reform Act contained provisions which discouraged carrying large loss reserves.\textsuperscript{186} This discouraged insurance companies from taking on a lot of

\textsuperscript{181} See Kocolowski, \textit{Why Me?}, supra note 165, at 2.
\textsuperscript{182} '[A]ll [the underwriters] can see is the long tail of liability, because we're dealing with, for the most part, kids under 5 years old. They can file a lawsuit until they reach the age of majority. That long a statute of limitations makes insurers very nervous.' Kocolowski, \textit{Why Me?}, supra note 165, at 32. See, e.g., Jessica H. v. Allstate Ins. Co., 202 Cal. Rptr. 239, 240-41 (Cal. Ct. App. 1984). See also 51 Am. JUR. 2D Limitation of Actions § 182 (1970).
\textsuperscript{183} “So far no company has had to pay a big day-care settlement. ‘But you don’t have to lose a case to see it coming,’ says Elizabeth Krupnick, a spokeswoman for Aetna Life and Casualty Co.” Pave, supra note 100, at 114. See also Kari Berman, \textit{Daycare Liability Coverage Available, But Limited}, Bus. Ins., Oct. 10, 1988, at 17 (insurance companies are still worried about the potential for child abuse cases); Kocolowski, \textit{Why Me?}, supra note 165; McKibbin, supra note 63, at 480 (“Based upon these incident rates [of total molestations per year,] the risk exposure of the insurance industry may be conservatively estimated at $250,000,000 annually.”).
\textsuperscript{184} “There’s no question that they [insurance companies] have very little historic data on instances of child abuse or settlements of child abuse claims originating from daycare centers.” Kocolowski, \textit{Why Me?}, supra note 165, at 32.
\textsuperscript{185} Pave, supra note 100, at 114.
\textsuperscript{186} As a result of the 1986 Tax Law, insurance companies had to discount their loss reserves. Berman, supra note 141, at 18.
potential long-term risk. Additionally, these daycares, many of which were of the family home variety, did not bring in very large premiums.\(^{187}\) Taken together, the enormous risks of insuring daycares provided insurers with a choice: stop covering daycares\(^{188}\) or make daycares pay through the roof.

The insurance industry's choice, however, was not made in a vacuum. It took place against the backdrop of the feminization of the American workplace. Forty-five percent of America's workers were women, seventy percent of whom were in their child-bearing years.\(^{189}\) The number of working mothers with children under six nearly doubled from 1970 to 1987.\(^{190}\) Without daycares, how were women going to be able to stay in the work force in large numbers?

What solved the crisis? State legislatures provided part of the solution. Some required all insurance companies doing business in the state to join a joint underwriting association.\(^{191}\)


\(^{188}\) Additionally, the major provider of daycare insurance, Mission Insurance Co. of California, suddenly withdrew from the market in 1985. Mission previously drove several other national companies out of the daycare insurance business by underpricing them, sometimes by as much as 50%. (Interestingly, when Mission was subsequently declared insolvent, an audit by the California Insurance Commissioner revealed that Mission had been selling below cost.) The withdrawal of Mission left thousands of daycares scrambling for coverage in a generally constriciting market from which all other national providers had previously withdrawn. INSURANCE INSTITUTE, *supra* note 135.

\(^{189}\) Roger Barnes, *Childcare Grabs Benefits Spotlight*, NAT'L UNDERWRITER (Property & Cas./Risks Benefits Management Ins. Edition), Apr. 10, 1989, at 23. The study cited defined "child bearing" years as ages 25-34. *Id.*

\(^{190}\) Matis, *supra* note 155, at 577 n.21.

\(^{191}\) See, e.g., WASH. REV. CODE §§ 48.88.010-48.88.070 (1989). The Washington statute was specifically designed to address the unavailability of liability insurance for daycare providers. It ordered the insurance commissioner to establish a nonprofit joint underwriting association for daycare insurance. All insurance companies providing property and casualty insurance in the state are required to be members. WASH. REV. CODE § 48.88.040 (1989). Day care licensees can apply to the association to purchase insurance. The association is required to offer applicants a policy with limits of at least one hundred thousand dollars per occurrence. WASH. REV. CODE § 48.88.050 (1989).

South Carolina has pursued a similar solution. S.C. CODE ANN. §§ 38-89-10 through 38-89-190 (Law. Co-op. 1985) (Supp. 1990). As in Washington, the purpose of requiring membership in the joint underwriting association was to address the availability of daycare liability insurance. S.C. CODE ANN. § 38-89-20. In South Carolina, the joint underwriting association is only activated when the insurance commission finds and declares the existance of an emergency. S.C. CODE ANN. § 38-89-20. The South Carolina statute does not specify a minimum dollar amount of coverage per occurrence, but requires the association to issue policies if the applicant meets the association's underwriting standards. S.C. CODE ANN. § 38-89-50.

In addition, at least one state statute provides for daycare centers to join in pools as self-insurers. In addition to action taken by state legislatures, Congress contemplated but rejected a federal reinsurance program for daycares.

b. Past the "Crises," to Today and Beyond

By early 1986, however, the word was out that liability insurance for daycares was readily available and that the only obstacle to obtaining insurance was its cost. This expense, in turn, was apparently only a real problem for family home daycares. By 1990, it appears that employer-sponsored daycare is very affordable, running between $60 and $180 per child per year, with most employers paying near the lower end of the cost spectrum.

The transformation occurred because the insurance industry realized it could generate profits while minimizing its risk. When insurance companies assessed the actuarial reality of the childcare market, they realized that it was potentially profitable as long as they eliminated the risk of "adverse selection" by eliminating the only true high-risk members of the market: the small family home daycares.

In truth, the companies had good reasons for this conclusion. Insurance agents indicate that most of the instances of

193. See Berman, supra note 141, at 17. These federal programs, which are still under periodic consideration to date, face critics who argue that such a program will allow a larger number of unsafe daycares to operate. Id. See also Linda Kocologski, Daycare Liability Insurance Woes Prompt Federal and State Inquiries, NAT'L UNDERWRITER (Property & Cas./Ins. Edition), Jul. 19, 1985, at 1.
194. Robert A. Finlayson, Regulation Not Necessary to Ensure Availability: Report, BUS. INS., Mar. 24, 1986, at 12. This article was principally based upon the initial survey of the Insurance Information Institute, supra note 135.
195. Finlayson, supra, note 194, at 12.
197. Much of the following discussion is based on interviews with representatives of insurance companies and insurance agents.
198. "Adverse Selection is the tendency for high risks to buy more coverage than low risks at any given rate." Scott E. Harrington, Prices and Profits in the Liability Insurance Market, in LIABILITY: PERSPECTIVES AND POLICY 46 (Robert E. Litan & Clifford Winston eds.). To the extent that most of the half-dozen or so providers that operate on a national level have huge deductibles, they act in effect as self-insurers and import adverse selection into the daycare insurance market.
199. Representatives of nationally-recognized insurance companies support this conclusion almost unanimously. Interviews with insurance company representatives and agents, week of Sept. 12, 1990.
child abuse in daycares have taken place in these family home situations. This, in itself, is not surprising. Since the vast majority of children who were in daycares five years ago were in family run daycare facilities, one would expect that statistically the vast majority of abuse cases would arise in these facilities.

In addition to the sheer numbers, however, there are other factors that increase the risk of family owned daycares. These daycares operate out of the owner's private home. Homes are rife with opportunities for adults to isolate children away from others. There are very few employees, and therefore there are not many adults around to watch each other. Employees tend to be neither intensely screened, nor carefully trained. As a result of assessing these risks, the insurance companies explicitly excluded sexual child abuse from all of their policies.

In addition, at about the time that insurance companies began to realize that they had a product which was very low risk and for which there was high demand, the economic cycle in which insurance companies appear to regularly find themselves began to shift from a "hard" to a "soft" market.

200. See supra note 100 and accompanying text.
201. "[F]ollowing a rash of day-care center child abuse incidents, all day-care center liability policies now specifically exclude coverage for child abuse and molestation." Berman, supra note 141, at 17. See also INSURANCE INSTITUTE, supra note 135. See also Monique Parsons, Daycare Liability Cover Available, BUS. INS., Sept. 4, 1989, at 26.
202. This was also not an area where insurance companies were likely to face the so-called problem of "moral hazard." "Moral hazard" is the concept that the mere fact of being insured will make people less risk adverse and therefore make it more likely that they will commit acts for which the insurance company will be eventually liable to compensate. Harrington, supra note 198, at 47. This concept is not likely to apply here. As previously discussed, economic risks do not concern the molester, and the business has incentive enough to prevent having a child molested in their care. Additionally, insurance will not be a disincentive to the children's parents to carefully investigate the daycare to which they send their children. Some parents will no doubt be more or less careful in selecting the daycare, but whatever standard of care they take will be a function of who they are as parents and how they generally deal with the world rather than whether the daycare has an insurance policy.
203. "Soft markets" are those that offer "readily available coverage at falling prices." Harrington, supra note 198, at 77. In contrast, "hard markets" are those in which parties have trouble obtaining coverage and face high prices. Id. Although the insurance industry views hard versus soft market cycles as accepted wisdom, the phenomenon is not really explained by either theory or empirical study. Id. This study was sponsored by the Brookings Institute to ask, "[w]hy would rational, profit-maximizing firms have a persistent tendency in the first place to price business below cost so that retrenchment en masse is inevitably needed to avoid financial collapse?" Id. at 78. The study answers by simply calling for more research, finds flaws with all, and ends. Id. at 91. See also Sanders & Joyce, supra note 147, at 214 n.32 ("No one
Unlike a hard market, in which the capacity for insurance con-
stricts, in a soft market insurance companies will tend to take
a far more expansive view of providing insurance coverage. In
those areas where the market is soft, insurers are "offering
coverage for anything they can get their hands on because the
business is not premiums, but the money that companies are
making on the investment with the premiums." What does
all of this mean in specific terms for daycares across the coun-
try today?

First, it is impossible to generalize about what is happen-
ing across the country. Most of the preferred companies still
do not insure daycares. Those that do are typically insuring
large commercial facilities, sometimes national corporations,
or providing coverage under the umbrella policies of such
established institutions as churches or medical centers.

Insurance companies uniformly exclude child sex abuse
coverage for all but their most valued customers. As the mar-
et becomes more competitive, more companies offer riders
that cover sex abuse. Such a rider is not extraordinarily
expensive if the daycare provider can qualify. For example,
one agent reported that if a daycare had five years experience
without any significant claims, on a $2,000 a year policy for lia-
bility coverage, a sexual abuse rider could be purchased for an
additional ten to twenty percent. The rider, however, gener-
ally would have a ceiling far below the policy limits. For
example, in a $500,000 liability policy, the sexual abuse rider
may be limited to $50,000 per occurrence, or even per insur-

doubts the existence of the [insurance] cycle, but the reasons for its existence remain
subject to speculation."). Perhaps then it is not so surprising that I had difficulty
obtaining a single, coherent explanation of how insurance companies are responding to
the daycare market.

204. Interview with representative of nationally-recognized insurance company.
Sept. 12, 1990.

205. "Preferred" companies take traditional risks; they are the companies whose
names the general public recognizes as "insurance companies."

206. For example, according to an interview with a member of the Washington
State Insurance Commission on September 5, 1990, of 633 carriers which sold property
casualty in the state, only 21 underwrote daycares. Carriers wrote $523,000 in
premiums on daycare insurance, whereas they wrote $3 billion in other property
casualty markets. This is somewhat revealing in that the Pacific Northwest is
considered a very soft market. On the other hand, insurance for employer-sponsored
daycare is readily available.

207. The national daycares are, however, effectively self-insurers; supra note 192.

208. Interview with agent of nationally recognized insurer. (Week of Sept. 12,
ance period.\textsuperscript{209}

Most of the coverage for daycare facilities is provided by so-called "surplus line" companies.\textsuperscript{210} These are companies who are statutorily authorized to offer coverage to people who have been turned down by the so-called "preferred" companies.\textsuperscript{211} While surplus line companies are willing to insure categories of risk that the preferred companies will not, they charge much higher premiums for taking that risk. The cost of obtaining insurance may differ vastly between facilities because the ratings of daycares for insurance risk and the accompanying cost of coverage is extremely individualized, with the rates sometimes differing dramatically from facility to facility. Claims history, nature of the physical facilities, types of activities, number of children for which the facility is licensed, professional versus volunteer staff, and child-staff ratio all play into the equation.\textsuperscript{212} While a $2,000 premium per year for a daycare facility is not uncommon, some pay $8,000 and others $13,000. Remember that this coverage specifically excludes sexual child abuse, unless the company offers a rider and the daycare is among a select group that can qualify.

This does not seem to concern most daycare operators. Their personal experiences cause them to be more concerned about liability for accidents than for sexual abuse.\textsuperscript{213} While increased competition for the daycare insurance business has

\textsuperscript{209} Generally this is only intended to be enough to cover legal expenses, not any damage award. \textsc{Insurance Institute}, supra note 135.

\textsuperscript{210} Interestingly, there are many surplus line companies and, if a daycare finds an agent that represents these companies, the daycare can likely find coverage. The problem, especially among smaller daycare facilities and family home daycares, is that the owners only know about the preferred companies, and when they get turned down, they do not know where to turn.

\textsuperscript{211} See, e.g., \textsc{Wash. Rev. Code} § 48.15.040 (1989).

\textsuperscript{212} This list is based on interviews with agents representing surplus line companies insuring daycares. According to the report of the Insurance Information Institute the factors that affect affordability include:

\begin{itemize}
  \item ratio of staff to children
  \item number and ages of children
  \item location of facility (not only as far as the region of the country and city, but also whether the facility is in a suburban setting or on a busy city street corner)
  \item outside activities (i.e., additional sports activities, field trips)
  \item transportation involved
\end{itemize}

\textsuperscript{213} Owners see the choice of operating a daycare facility without any liability insurance as a very serious matter, but not for the reasons one might imagine. The smaller daycare operators with whom I spoke believed that they were very careful in taking care of the children. Although the smaller daycares saw it as inevitable that some children would get hurt in accidents, they felt that the employees of the daycare
begun to bring the cost of liability insurance down, there are still operators that have trouble paying for liability insurance.

What about the family home daycares that, as of 1985, supposedly accommodated two-thirds of our nation’s children who were in daycare? A few surplus line companies will provide family home daycares with a liability rider on their homeowner policy if they have both a good claims history and only a few children in the daycare. Most companies, however, will not give a “business endorsement” on the homeowner’s policy of the daycare owner.

Almost all insurers will refuse to provide family home daycares with commercial insurance, even if it were possible for someone watching four or five kids at a time to pay thousands of dollars in insurance. As for the relatively small number of family home daycares that are able to obtain liability insurance, almost all liability policies exclude sexual child abuse. In summary, liability insurance is extremely hard for family home daycares to find, and when they do find it, it invariably excludes sexual child abuse and generally costs far more than the owner can afford.

would not be found at fault. The operators were less concerned with the ultimate cost of paying a judgment than with the costs of our very expensive legal system.

214. This is based on interviews with agents and insurance company employees. One daycare owner told me that her insurance premium had been “cut in half” the last year. See also INSURANCE INSTITUTE, supra note 135.

215. See supra note 100.

216. However, in 1986 the insurance industry developed standardized language for attachments to homeowners’ insurance policies to make it easier for providers of family-home daycare to shop for insurance. INSURANCE INSTITUTE, supra note 135. According to interviews with agents and daycare providers, the good intentions have not been realized.

For a definition of business endorsement, see supra note 134.

217. According to an interview with an agent who handled surplus line companies, a few family home daycares have successfully threatened to cancel their policies and leave their agents unless the daycares were given liability coverage. More typically, home daycares have found their homeowner’s insurance cancelled when companies learn that they are running daycares. Although liability from such a business is specifically excluded from every homeowner’s policy, companies are not willing to take the chance that they could be dragged into court and have a judge who is sympathetic to the plaintiff interpret the policy without the exclusion.

218. As to the infinitesimally small number of policies that cover sexual child abuse in family home daycares, the coverage for abuse either has an extremely low ceiling or the coverage is limited to acts by employees. Because most family home daycares do not have any employees, the cost is obviously too high for too little return for even those owners who can obtain these rare coverages.

219. Agents view the matter somewhat differently than the family home daycare owners. As one agent who represented surplus line companies put it: “They want $65.00 riders on their homeowner’s, or a full commercial policy with ‘all the bells and
Given the problem that family home daycares have obtaining insurance and given the number of children that these homes care for, one would expect to have heard a serious clamor over the situation similar to the public outcry in the mid-80's. The absence of such outcry suggests a number of possibilities. First, some daycares may have folded because of their inability to pay. Second, some may be functioning without insurance and, in those jurisdictions requiring insurance as a condition for licensing, are unlicensed. Third, daycares may be responding to what all of us perceive to be a significant rise in the number of children entering daycare over the past five years. Fourth, national and state associations may have formed to offer either referral sources to available insurers or actual insurance pools in which the home daycares can participate at comparatively low premiums. Finally, daycare facilities may have filled some of the void resulting from the exodus of family home daycares from the business.

In reality, all five of these factors have helped daycares to cope with the realities of the insurance market. The most significant appear to be the formation of local, state, and national associations to assist family home daycares (and smaller daycare facilities), and the startling reality already discussed that the vast majority of family home daycares are operating without any liability insurance.

What then awaits daycares in the future? Large commercial daycares will not likely face any serious difficulties. In fact, if insurance costs rise, they may find themselves taking over more market share because costs of remaining in and entering into the business are too great for the small scale organization. The fate of smaller daycare facilities will

whistles' for $150.00. They don't get it. Those days of insurance at those rates are gone, and they're never coming back. For God's sake, they're paying $6.00 for a movie now. . . ."

220. These range from truly national organizations, such as the National Association of Daycare Providers, headquartered in Dallas, Texas with members in 30 states, to organizations working in a single county, such as the Thurston County Child Care Action Counsel in Washington State. The National Association, a nonprofit organization which subsists on member dues, offers relatively inexpensive sexual abuse excluded liability insurance to its qualifying members. For daycare facilities, the charge is a function of both the number of children for which the facility is licensed and the ceiling on coverage: $100,000 coverage, $12/child; $500,000 coverage, $24/child. Family home daycares pay $150 for $100,000 per policy period coverage.

221. If this scenario comes to fruition, something may be lost. Many of these smaller daycare facilities no doubt gave the type of caring supervision that might be lacking in more institutionalized centers. However, some of this caring may be gained
depend to an extent on whether the insurance market is soft or hard. Associations will play increasingly important roles both as insurers and as lobbying groups. States are likely to intensify their licensing requirements for all persons taking care of children that are not members of their own family.\textsuperscript{222}

c. The Interplay Between Insurance and Deterrence

This journey through the history and future of daycare and liability insurance provides a background for assessing the extent to which the insurance process can itself serve as an instrument for reducing the risk of sexual child abuse.\textsuperscript{223} First, insurance companies now impose fairly strict standards on the daycares they do insure.\textsuperscript{224} Many of these standards specifically relate to the physical safety of the child. Others, such as guidelines for screening employees that require prior criminal records be checked and necessary ratios of staff to children be kept, tend to reduce the possibility of sexual child abuse.

Second, the riders available for sexual child abuse have a relatively low ceiling on liability. Even daycares that have been able to obtain these riders risk exceeding the policy limit if suit is brought. These daycares retain a strong economic incentive to carefully screen and supervise their employees.

Third, the daycares know that they can lose their insurance if they have any problems resulting in serious claims. If

\textsuperscript{222} If these licensing requirements include minimum liability insurance, and if the states provide resources that enable them to uncover those family home daycares that are not licensed, we will likely face another round of talks about government subsidized daycare insurance. Even if daycare in the workplace increases, however, all of the daycare facilities currently in operation could not absorb the number of children that would be released if the majority of family home daycares in this country were closed.

\textsuperscript{223} If insurers threaten "cancellation and nonrenewal" or require "safety measures . . . as a condition of coverage," liability insurance itself can reinforce deterrence. Sugarman, supra note 146, at 137.

\textsuperscript{224} See Berman, supra note 141, at 18. As an example, the National Association of Daycare Providers' requirements for coverage include: the owner or director must have three years experience; the daycare must have no significant history of lawsuits; it must be licensed and it must follow all requirements imposed by the state legislature and appropriate agencies; it must have written procedures for early release of a child or release to a nonparent; it must offer safety measures and specified minimum square footage per child. See supra note 138. Also, according to the report of the Insurance Information Institute, rates were lower in states with strict licensing and inspection standards; supra note 135.
insurance is a licensing requirement, failure to insure means going out of business.

But what happens if the evidentiary arguments are accepted and more civil child abuse cases are successfully prosecuted? For daycares, nothing as disastrous as what happened in the mid-80s should ensue. At this date, insurance companies have clearly delineated general liability for accidents from liability for child sexual abuse. Increases in the number and costs of judgments for child sexual abuse should only affect insurance companies who have issued a special rider for that loss. Therefore, there is no reason why the general liability insurance policy should be affected at all, and it is that policy that is necessary for daycares to function. Because the standards insurance companies impose on daycares to obtain liability insurance include measures that also discourage sexual abuse, not much deterrence will be lost even if companies cease offering riders.

That is all well and good for the insurance and daycare industries, but what about the abused child? After all, concern for child welfare was the basis for even proposing the evidentiary arguments for videotaped depositions. In spite of an increased risk of liability due to the admission of videotaped testimony, both commercial and family daycares are likely to have either no sexual abuse coverage or expensive, limited coverage. In either case, although the child may be more likely to win a judgment against the defendant, his or her opportunity to collect on that judgment will remain elusive.

IV. CONCLUSION: SOME FINAL CONSEQUENCES AND A FABLE

This journey began with the presumption that courts are more and more likely to admit videotaped depositions in civil child abuse litigation. The admission of this evidence is likely to have wide ranging results. It may have a broad, systemic effect on our adversarial values. In particular, the admission of such evidence may effect our preference for live trials. In addition, releasing a child from testifying at a trial will effect the interests of parents, children, and attorneys. Admitting this evidence may increase the number of child abuse suits that

225. To the extent that some daycares are covered under umbrella policies of a larger organization such as a school or hospital, and to the extent that the policies cover all torts, including sexual abuse, the daycares will likely see specific exclusions added to policies at the time of renewal.
are brought; it may also lead to higher settlements and more judgments for plaintiffs. However, such suits are only likely to result in compensation when they are brought against institutional defendants. Thus, many children who obtain judgments will be left without compensation.

Nor does the journey reveal that the threat of litigation resulting from the admission of videotaped testimony in civil child abuse cases will have a clear deterrent effect on defendants. Individual abusers, who appear to be unmotivated by existing deterrents, are unlikely to be more motivated by the increased risk of litigation. In contrast, some spouses and family daycares may be more likely to be deterred. Institutional daycares are the most likely defendants to be deterred by the admission of this testimony. However, the fact that few daycares are insured negatively affects deterrence because such daycares do not have to cope with insurance requirements.

Although the economic risk of more lawsuits is likely to reduce the risk of child abuse, there are potential drawbacks to such incentives. The primary drawback is that daycares may not be able to afford the cost of increased screening and supervision and may close their doors. Other potential daycares, fearing the risks, may never open their doors. Thus, although the introduction of video depositions holds the promise of increased compensation for victims and deterrence of future harm, in reality the admission of this testimony may result in a decrease in the availability of daycare, an increase in the cost of existing daycare, with little or no increased compensation for the children and no clear deterrent effect.

In many ways, our journey has been a fable, a fable about what sometimes happens when the projects of our best moral impulses look to the litigation system for realization. The fable begins with characters clearly delineated along the lines of good and evil. There is the strong, good judge who is willing to follow a path through the evidentiary rules to help the good, innocent child obtain redress from the bad, evil child molester. Lawyers become involved in the next part of the fable, and the bad, evil child molester all but disappears, perhaps leaving behind him questions about the fairness of trial by video. At least, however, we have the good, innocent child for whom the path to redress has been cleared.

Then, something funny happens. The good, strong judge, the good, innocent child, the attorneys (who are just attor-
neys), just like the bad evil child molester before them, all but disappear from the story. In their place are institutions—large, national daycares and huge insurance companies. The only people left are good, innocent parents of small children, many of whom cannot afford substantial daycare costs.

Worse yet, we find that the good, innocent child, except in an extremely narrow set of circumstances, will not gain any economic redress after all, will not be empowered by the process, and is unlikely to have his or her actions in bringing suit add much of anything to deterring other acts of child molestation. In fact, eventually the good, strong judge's decision to help the good, innocent child will likely wind up with there being less money available to compensate children who have been sexually molested. The decision may even eliminate the availability of daycare to the children of some of the good, innocent mothers, particularly those who are part of or are sole providers for lower income families. At this point, the journey appears bleak.

Where should the journey end? Some may argue that because the admission of this testimony does not clearly help the child in the long run, we should not encourage the child to bring these cases. The choice, however, is not strictly ours. The child has the right to bring these cases. That being so, it makes little sense to force a child to go through an emotionally traumatic episode when less traumatic alternatives are available that do not really harm the child or prejudice defendants.

Others may argue that the journey should end in a world where the law does not make unkeepable promises to children.

226. In fairness, however, the potential consequences of admitting videotaped testimony are not immediately and apparently dire. In other words, even if suits for sexual child abuse are brought against daycares, and insurance is not provided to satisfy these suits, most daycares will still function. But what if the admission of videotaped testimony would result in the unavailability of general liability insurance and therefore the closure of most daycares in this country? In such circumstances, we might discourage child sexual abuse suits in our legal system. I doubt, however, that we would discourage the results through a manipulation of the evidentiary law. Instead, we would likely alter the substantive law either in defining burdens or granting immunity to certain parties.

Although some rules of evidence are responses to business practices, the evidence law has changed in regard to business in general. We do not have the "insurance business" exception or the "industries that would be susceptible to undesirable financial disorientation if we were to allow suits to be brought easily against them" exception. Playing with the general principles of evidence law that are involved in the admission of videotaped testimony would obviously begin to distort the entire body of law. For this reason alone, the courts will not likely take this approach in dealing with a problem whose solution appears to be to discourage only certain types of lawsuits.
That, however, is not a realistic goal. We propose to use the law to solve problems, and we cannot invoke the law to solve problems without making some promises about costs, alternatives, and results.

Instead, the journey will end with an acknowledgment that the law will make promises. But, before making these promises through the admission of child videotaped testimony, we should look beyond our legal texts, arguments, culture, and conventions to the world outside. We should try to gauge how social, psychological, and economic forces are likely to buffet our legal solutions to see if anything will be left of these promises once the child’s journey through the legal process and beyond has come to an end.