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VIDEOTAPING INVESTIGATIVE INTERVIEWS OF CHILDREN IN CASES OF CHILD SEXUAL ABUSE: ONE COMMUNITY'S APPROACH

FRANK E. VANDERVORT*

Legal scholars have long debated the efficacy and necessity of videotaping investigative interviews with children when allegations of child sexual abuse have surfaced. This debate has been advanced from the perspectives of adversaries in the criminal justice system, prosecutors and defense advocates. Absent from this debate has been the perspective of the broader community. This debate has failed to consider how other investigative tools might be used in conjunction with videotaping to advance the interests of the community. Moreover, the debate about videotaping has taken place with little actual data. This Article seeks to accomplish two goals. First, it seeks to consider the interests of the broader community in the debate about whether investigative interviews of children in cases of suspected child sexual abuse should be videotaped. Second, this Article presents both quantitative and qualitative data from a single county's longstanding use of a protocol for investigating these difficult cases. The author concludes that videotaping, when used as one element of an integrated protocol for investigating child sexual abuse, can serve the interests of the community.

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I. INTRODUCTION

Despite recent encouraging signs that child sexual abuse may be on the decline, it remains a critical social problem.¹ Proving child sexual abuse in criminal proceedings is notoriously difficult.² Because of a lack of physical or medical evidence in most cases,³ and because these offenses by their nature typically take place in private, often the statements of the child who is the alleged victim are critically important, and perhaps the only, evidence.⁴ Debate about how to capture the courtroom testimony of child witnesses, and its efficacy, has been vigorous for two decades.⁵ That debate has been most pointed when child sexual abuse is alleged.⁶ Since the mid-

¹ See generally DAVID FINKLEHOR & LISA M. JONES, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, EXPLANATIONS FOR THE DECLINE IN CHILD SEXUAL ABUSE CASES (2004).

² *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987); Michael W. Weber, *The Assessment of Child Abuse: A Primary Function of Child Protective Services*, in THE BATTERED CHILD 120, 122 (Mary Edna Helfer et al. eds., 1997).

³ Carole Jenny, *Medical Issues in Child Sexual Abuse*, in THE APSAC HANDBOOK ON CHILD MALTREATMENT 235, 239 (John E.B. Myers et al. eds, 2002) (“The physical examination for sexual abuse is often entirely normal, even in cases of proven abuse. The absence of physical signs of trauma does not mean that abuse did not occur. Many types of abuse, such as fondling or oral-genital contact, will not cause anal, genital, or oral trauma. Other types of trauma may heal completely.”) (internal citations omitted); Vincent J. Paluci et al., *Medical Assessment and Legal Outcome in Child Sexual Abuse*, 153 ARCHIVES PEDIATRIC AND ADOLESCENT MED. 388, 388 (1999) (“[M]ost children referred for medical evaluation [for sexual abuse] have normal or nonspecific findings.”).

⁴ See generally *Ritchie*, 480 U.S. at 60. This phenomenon has led to the establishment of numerous protections for child witnesses, from special hearsay exceptions to the use of screens, electronic aids, and support persons to assist in capturing children’s testimony. While a detailed discussion of these means of enhancing the legal system’s capacity to procure children’s testimonial evidence is beyond the scope of this Article, the author recognizes that they are inextricably linked to the larger point of this Article. See generally J. Tom Morgan, *The Need for a Special Exception to the Hearsay Rule in Child Sexual Abuse Cases*, 21 GA. ST. B.J. 50, 51 (1984) (“In child sexual abuse cases, the memory of the child . . . is critical because in most cases the only evidence for the State is the testimony of the child.”).

⁵ See generally STEPHEN J. CECI & MAGGIE BRUCK, JEOPARDY IN THE COURTROOM: A SCIENTIFIC ANALYSIS OF CHILDREN’S COURTROOM TESTIMONY (1995); BILLIE WRIGHT DZIECH & JUDGE CHARLES B. SCHUDSON, ON TRIAL: AMERICA’S COURTS AND THEIR TREATMENT OF SEXUALLY ABUSED CHILDREN (1991); Thomas D. Lyon & Karen J. Saywitz, *Young Maltreated Children’s Competence to Take the Oath*, 3 APPLIED DEV. SCI. 16 (1999); John E.B. Myers et al., *Psychological Research on Children as Witnesses: Practical Implications for Forensic Interviews and Courtroom Testimony*, 28 PAC. L.J. 3 (1996); *American Bar Association Guidelines for the Fair Treatment of Child Witnesses in Cases Where Child Abuse Is Alleged*, 1 CRIM. JUST. 34 (1986).

⁶ See CAL. ATT’Y GEN.’S OFFICE, CHILD VICTIM WITNESS INVESTIGATIVE PILOT PROJECT: RESEARCH AND EVALUATION FINAL REPORT (1994); CECI & BRUCK, *supra* note 5, at 242-51

1980s, one focus of this debate has been whether investigative interviews with children should be videotaped.⁷

As might be expected given the adversarial nature of our legal system, the debate about videotaping has proceeded primarily from two diametrically-opposed positions.⁸ The primary opposition to videotaping has come from prosecutors.⁹ Conversely, defense advocates have argued for mandatory videotaping of investigative interviews with children.¹⁰ Indeed, some commentators who are skeptical of children's ability to recall and relate their experiences have argued that virtually every interview of a child by a professional which takes place for any reason should be videotaped.¹¹ Child advocates have staked out somewhat more nuanced positions on the issue which cautiously endorse the practice of videotaping investigative interviews, but with a number of qualifiers.¹²

Largely absent from this debate, however, has been the broader community's perspective.¹³ While prosecutors are said to represent "the people," "the commonwealth," or "the state," in reality their interests may

(recommending various steps to preserve the statements of children made to adults in the context of child sexual abuse investigations).

⁷ DZIECH & SCHUDSON, *supra* note 5, at 148-50.

⁸ LUCY BERLINER & ROXANNE LIEB, WASH. STATE INST. FOR PUB. POLICY, CHILD SEXUAL ABUSE INVESTIGATIONS: TESTING DOCUMENTATION METHODS 2 (2001) ("Defense lawyers have long advocated videotaping as the only means by which interview credibility can be evaluated. Prosecutors have countered that videotaping inappropriately shifts the focus from children's reports onto a dissection of the interviewer's questioning methods.").

⁹ See, e.g., *id.* at 2; Paul Stern, *Videotaping Child Interviews: A Detriment to an Accurate Determination of Guilt*, 7 J. INTERPERSONAL VIOLENCE 278, 278-82 (1992) (outlining, from the prosecutorial perspective, numerous objections to videotaping investigative interviews with children). *But see* Morgan, *supra* note 4, at 51; Victor I. Vieth, *When Cameras Roll: The Danger of Videotaping Child Abuse Victims Before the Legal System Is Competent to Assess Children's Statements*, 7 J. CHILD SEXUAL ABUSE 113, 114 (1999) (recognizing the value of videotape when the professionals involved in conducting the interview and in evaluating it are properly trained).

¹⁰ Lucy S. McGough, *Good Enough for Government Work: The Constitutional Duty to Preserve Forensic Interviews of Child Victims*, 65 LAW & CONTEMP. PROBS. 179, 197-205 (2002); Allen Cowling, *Importance of Video Taping in False Allegation Cases*, available at www.allencowling.com/false07.htm.

¹¹ See CECI & BRUCK, *supra* note 5, at 242.

¹² See CAL. ATT'Y GEN.'S OFFICE, *supra* note 6, at 7 (endorsing videotaping of interviews conducted at multidisciplinary centers staffed by "trained child interview specialists"); Nancy Walker Perry & Bradley D. McAuliff, *The Use of Videotaped Child Testimony: Public Policy Implications*, 7 NOTRE DAME J.L. ETHICS & PUB. POL'Y 387, 420-22 (1993) (supporting videotaping of child investigative interviews with a number of additional recommendations about how to implement such a program).

¹³ See, e.g., Perry & McAuliff, *supra* note 12, at 410 (asserting that courts addressing the use of videotaped evidence must balance the interests of the defendant with the interests in the child not being retraumatized).

be different from those of the broader community they are charged with protecting.¹⁴ For example, while the sexual abuse of children is a crime in every jurisdiction in the country¹⁵ and a social problem that renders many children's homes unsafe,¹⁶ some prosecutors have expressed the belief that the family court rather than criminal prosecution is the most appropriate means of responding to the phenomenon of intrafamilial child sexual abuse.¹⁷ This attitude may, in part, account for the relatively small percentage of child sexual abuse cases that result in criminal charges.¹⁸

This article is based upon research conducted by the St. Mary County research group at the University of Michigan School of Social Work, of which the author is a member. It begins by reviewing the arguments on each side of the controversy surrounding the videotaping of investigative interviews of children in child sexual abuse cases. It will then assert that the arguments on either side of this controversy have proceeded from the dichotomous perspectives of the direct participants in the legal system and have created a vacuum that has not adequately considered the interests of

¹⁴ The author has argued elsewhere that political leaders, including prosecutors, may establish policies that do not actually serve the interests of their communities. See Frank E. Vandervort & William E. Ladd, *The Worst of All Possible Worlds: Michigan's Juvenile Justice System and International Standards for the Treatment of Children*, 78 U. DET. L. REV. 201, 246-47 (2001); see also Anthony C. Thompson, *It Takes a Community to Prosecute*, 77 NOTRE DAME L. REV. 321, 325-38 (2002) (discussing some prosecutors' invocation of the power of "the people" for self-serving electoral purposes rather than to serve the broader community's interests).

¹⁵ See, e.g., CAL. PENAL CODE § 261.5 (2006); 720 ILL. COMP. STAT. 5/12-15 (2006); MASS. GEN. LAWS ch. 265, § 23 (2006); MICH. COMP. LAWS § 750.520a-e (2006); N.Y. PENAL LAW § 130.5 (McKinney 2006).

¹⁶ See Leonore M.J. Simon, *Matching Legal Policies with Known Offenders*, in PROTECTING SOCIETY FROM SEXUALLY DANGEROUS OFFENDERS: LAW, JUSTICE, AND THERAPY 149, 150 (Bruce J. Winick & John Q. LaFond eds., 2003) [hereinafter PROTECTING SOCIETY] (noting that only approximately 10% of child sexual abuse is perpetrated by strangers while "[t]he majority of sex crimes against children are committed by fathers (20%), stepfathers (29%) other relatives (11%), and acquaintances (30%)") (internal citation omitted).

¹⁷ See, e.g., Richard Ginkowski, *The Abused Child: The Prosecutor's Terrifying Nightmare*, 1 CRIM. JUST. 31, 31 (1986) ("[W]hile community sentiment may militate for criminal prosecution, the case may be more appropriately resolved in a child welfare proceeding. In making the charging decision, the prosecutor also must consider whether the intervention of the criminal justice system is necessary and appropriate."). But see Simon, *supra* note 16, at 157-58 (arguing that officials should treat intrafamilial child sexual abuse as seriously or more seriously than child sexual abuse committed by strangers and that it should be prosecuted).

¹⁸ See BERLINER & LIEB, *supra* note 8, at 9 (reporting on a research study in which only 8% of 92 confirmed cases of child sexual abuse resulted in criminal charges being brought); THEODORE J. STEIN, *CHILD WELFARE AND THE LAW* 283 (1998) (summarizing a number of research studies from the mid-1980s to the mid-1990s finding that between 5% and 64% of child sexual abuse cases were criminally prosecuted).

the community as a whole in the operation of its legal system. In doing so, it will suggest a number of community interests that are at stake in the operation of the criminal justice system and the videotaping controversy. The Article will explore how the broader community's interests are served by removing the videotaping debate from the vacuum in which it has taken place and reframing the question to ask whether or not to videotape investigative interviews helps advance the community's interests when it is used as part of a broader investigative protocol. In doing so, this Article will focus on research that has been conducted on the protocol utilized in St. Mary County, which has been the subject of several published quantitative studies and is currently the subject of in-depth qualitative study.¹⁹ The Article will conclude by arguing that the community's interests will best be met by using videotaping as one element of a broader protocol for investigating cases of suspected child sexual abuse rather than as the primary investigative tool. Additionally, the Article will assert that careful study of the evidence from St. Mary County suggests that both prosecution and defense advocates should rethink their positions regarding the use of videotaping.

II. VIDEOTAPING INVESTIGATIVE INTERVIEWS OF CHILDREN: THE DEBATE AND ITS LIMITS

Debate about the credibility of child witnesses is long-standing.²⁰ As early as the late 1800s, the competency of children to testify has been an issue with which American courts have struggled.²¹ As early as 1895, in *Wheeler v. United States*,²² the Supreme Court addressed the issue of a child's competency to serve as a witness in a criminal proceeding. From

¹⁹ See Kathleen Coulborn Faller & James Henry, *Child Sexual Abuse: A Case Study in Community Collaboration*, 24 CHILD ABUSE & NEGLECT 1215 (2000); Kathleen Coulborn Faller et al., *Can the Punishment Fit the Crime when Suspects Confess Child Sexual Abuse?*, 30 J. CHILD ABUSE & NEGLECT 815 (2006) [hereinafter Faller et al., *Can the Punishment Fit the Crime*]; Kathleen Coulborn Faller et al., *What Makes Sex Offenders Confess? An Exploratory Study*, 10 J. CHILD SEXUAL ABUSE 31 (2001) [hereinafter Faller et al., *What Makes Sex Offenders Confess?*]; James Henry, *System Intervention Trauma to Child Sexual Abuse Victims Following Disclosure*, 12 J. INTERPERSONAL VIOLENCE 499 (1997) [hereinafter Henry, *System Intervention Trauma*]; James Henry, *Videotaping Child Disclosure Interviews: Exploratory Study of Children's Experiences and Perceptions*, 8 J. CHILD SEXUAL ABUSE 35 (1999) [hereinafter Henry, *Videotaping Child Disclosure Interviews*].

²⁰ See generally John E.B. Myers, *New Era of Skepticism Regarding Children's Credibility*, 1 PSYCHOL. PUB. POL'Y & L. 387 (1995) (describing the history of ambivalence regarding child witnesses).

²¹ See DZIECH & SCHUDSON, *supra* note 5, at 133-36.

²² 159 U.S. 523 (1895).

that case emerged the classic competency colloquy regarding whether the child knows the difference between the truth and a lie, and the broad discretion on the part of trial judges to qualify or disqualify a particular child as a witness.²³

This historical skepticism regarding the competency of child witnesses has formed part of the foundation for the more recent controversy about whether children's disclosures of sexual abuse are credible.²⁴ Thus, while many states have eliminated the requirement that a child witness's competency be established, remnants of that rule remain. For example, in 1998, Michigan enacted a statute requiring that Children's Protective Services (CPS) workers and law enforcement officers investigating allegations of child abuse utilize a forensic interviewing protocol.²⁵ Despite the fact that Michigan has repealed its statute requiring that the competency of children under ten be established before they are allowed to testify, the forensic interviewing protocol continues to encourage forensic interviewers to engage in this "truth-lie" exercise.²⁶

Because of concerns about the reliability of children's statements describing sexual abuse, advocates for those accused of such abuse have asserted that the constitutional right to due process of law mandates that investigative interviews with children be videotaped or otherwise electronically recorded.²⁷ The United States Supreme Court has declined to read into the Due Process Clause a requirement that investigative interviews of suspected child sexual abuse victims be videotaped.²⁸ In doing so, however, the Court has noted that videotaping "may well enhance the

²³ DZIECH & SCHUDSON, *supra* note 5, at 133-34. More recently, many jurisdictions have abandoned the rule that required the proponent of a child witness to demonstrate that the child was competent, resulting in procedural rules that presume children, like adults, are competent witnesses. *See, e.g.*, FED. R. EVID. 601 (establishing the general rule that "[c]very person is competent to be a witness"); MICH. R. EVID. 601 ("Unless the court finds after questioning a person that the person does not have sufficient physical or mental capacity or sense of obligation to testify truthfully and understandably, every person is competent to be a witness . . ."); *People v. Coddington*, 470 N.W. 2d 478, 486 (Mich. App. 1991) (noting that every person is presumed competent to testify and applying this to a five-year-old witness); *State v. Michaels*, 642 A.2d 1372, 1383 (N.J. 1994) (noting "the presumption that child victims are to be presumed no more or less reliable than any other class of witnesses" (citing *Watkins v. Sowders*, 449 U.S. 341(1981))).

²⁴ Myers, *supra* note 20.

²⁵ MICH. COMP. LAWS § 722.628(6) (2006); *see* GOVERNOR'S TASK FORCE ON CHILDREN'S JUSTICE & MICH. DEP'T OF HUMAN SERVS., FORENSIC INTERVIEWING PROTOCOL 3 (1998) [hereinafter GOVERNOR'S TASK FORCE]. This protocol was revised in April 2005.

²⁶ GOVERNOR'S TASK FORCE, *supra* note 25, at 10-11.

²⁷ *See* McGough, *supra* note 10.

²⁸ *Idaho v. Wright*, 497 U.S. 805, 818-19 (1990).

reliability of out-of-court statements of children regarding sexual abuse."²⁹ Thus, the decision whether to require or merely encourage videotaping of investigative interviews is discretionary, to be made by local law enforcement personnel.

A. ARGUMENTS AGAINST VIDEOTAPING

Arguments against videotaping investigative interviews with children have primarily been advanced by prosecutors.³⁰ While some commentators have emphatically rejected the routine practice of videotaping investigative interviews,³¹ others have suggested that while videotaping is not inherently problematic, the legal system is not yet ready for the routine use of such videotapes because members of the bench and bar are too unsophisticated in their understanding of child development and the process by which children disclose sexual abuse to be able to properly analyze these recordings.³²

Professor John Myers has summarized a number of the arguments against videotaping:³³ recording interviews will place undue emphasis on inconsistencies in children's statements about abuse;³⁴ the videotapes become the central focus of trials of sexual abuse charges while other equally or more important evidence is disregarded;³⁵ defense attorneys will overemphasize errors made by interviewers;³⁶ it is impossible to videotape every statement a child makes about abuse;³⁷ children will be frightened and

²⁹ *Id.* Indeed, not long ago there were some who apparently believed that videotaping investigative interviews of children was "the technological panacea by which all problems concerning child witnesses could be cured." Perry & McAuliff, *supra* note 12, at 399 (citing JOHN R. SPENCER & RHONA H. FLIN, *THE EVIDENCE OF CHILDREN: THE LAW AND THE PSYCHOLOGY* 142 (1990)).

³⁰ See BERLINER & LIEB, *supra* note 8, at 2; Gail S. Goodman & Vicki S. Helgeson, *Child Sexual Assault: Children's Memory and the Law*, 40 U. MIAMI L. REV. 181, 200 (1985) (noting that "[p]rosecutors are sometimes reluctant to use videotaped testimony because they fear that it will not be as effective as live testimony"); see, e.g., Stern, *supra* note 9 (Snohomish County, Washington, Deputy Prosecuting Attorney arguing against the use of videotape); Vieth, *supra* note 9 (Vieth wrote this article while on the staff of the National Center for Prosecution of Child Abuse). *But see* Robert Cares, *Videotaped Testimony of Child Victims*, MICH. B. J., Jan. 1986, at 46; Morgan, *supra* note 4, at 51-52.

³¹ See Stern, *supra* note 9.

³² Vieth, *supra* note 9, at 116-17.

³³ John E.B. Myers, *Investigative Interviews of Children: Should They Be Videotaped*, 7 NOTRE DAME J.L. ETHICS & PUB. POL'Y 371, 378-85 (1993).

³⁴ See BERLINER & LIEB, *supra* note 8, at 2; Myers, *supra* note 33, at 378-81; Stern, *supra* note 9, at 279.

³⁵ See BERLINER & LIEB, *supra* note 8, at 2; Myers, *supra* note 33, at 381-84; Stern, *supra* note 9, at 280.

³⁶ See Myers, *supra* note 33, at 384-85; Stern, *supra* note 9, at 280-81.

³⁷ Myers, *supra* note 33, at 385 (citing Brief for American Professional Society on the

intimidated by the presence of recording equipment;³⁸ technical problems with recording equipment will render videotaping less effective,³⁹ and once recorded, the tape of the child's interview may be misused.⁴⁰

Other commentators have expressed concern that electronically recording investigative interviews of children does not address the more fundamental problem of poor interviewing technique utilized by forensic interviewers and the lack of knowledge on the part of lawyers and judges regarding the intricacies of interviewing children.⁴¹ One commentator observed that defendants would derive a tactical advantage if investigative interviews were electronically recorded because videotaped statements are likely to be given under conditions which are less psychologically stressful, and the child would be less apt to "break down" on tape than in the courtroom.⁴² This commentator also argues that defense counsel will have an advantage because they will know "the precise nature of the key witness's testimony well before trial, and could therefore better prepare for trial."⁴³

B. ARGUMENTS FOR VIDEOTAPING

Arguments in support of videotaping investigative interviews of children have been advanced primarily by advocates for defendants and some child advocates.⁴⁴ Advocates from the defense perspective generally do not frame their arguments in terms of what will serve the broader community.⁴⁵ Rather, they utilize a rights-based perspective to assert that

Abuse of Children et al. as Amici Curiae at 6-8, *Idaho v. Wright*, 497 U.S. 805 (1990) (No. 89-260)).

³⁸ Stern, *supra* note 9, at 281.

³⁹ Myers, *supra* note 33, at 385.

⁴⁰ *Id.* Professor Myers suggests use of a protective order to prevent this from happening. Michigan's legislature, in enacting legislation to permit (but not require) the use of "videorecorded" statements of investigative interviews, has provided statutory protections for preventing such electronic recordings from being misused. See MICH. COMP. LAWS § 600.2163a (2006) (applicable to prosecution of adults); *id.* § 712A.17b (2006) (applicable to prosecution of juveniles).

⁴¹ Stern, *supra* note 9, at 280 ("Perhaps the most significant disadvantage of videotaping is that it does not fix any of the problems of bad interviewing."); Vieth, *supra* note 9, at 116-17 (expressing concern about videotaping interviews before members of the legal system are properly trained to understand what they are seeing).

⁴² Cares, *supra* note 30, at 47.

⁴³ *Id.*

⁴⁴ BERLINER & LIEB, *supra* note 8, at 2; see, e.g., McGough, *supra* note 10, at 203-05; see also Lucy S. McGough, *For the Record: Videotaping Investigative Interviews*, 1 PSYCHOL. PUB. POL'Y & L. 370, 377 (1995).

⁴⁵ As will be seen later in this Article, some defense-oriented advocates have essentially co-opted the argument that videotaping is more child-friendly as a rationale for its wider use.

the defendant's individual right to due process and fundamental fairness requires preservation of investigative interviews with children.⁴⁶ To the extent that the broader community's interests enter into their analysis, it does so only indirectly through critical analysis of the charges leveled against the defendant and the investigative methods used in mounting those charges.

Defense advocates assert that the failure to videotape child interviews is the equivalent of failing to preserve evidence that is potentially exculpatory and, therefore, violates a criminal defendant's constitutional right to due process of law.⁴⁷ Apart from the constitutional argument, these advocates and commentators assert, there are numerous advantages to videotaping child investigative interviews. Myers has summarized a number of the arguments they advance, among them, that mandated videotaping of investigative interviews will: reduce the number of interviews that suspected child victims must endure, which, in turn, will reduce the trauma these children experience;⁴⁸ secure evidence of child abuse and the child's emotional reaction to that abuse which may be used at trial;⁴⁹ improve interviewing practices;⁵⁰ help in reducing the incidence of recantation;⁵¹ assist non-offending parents in believing their children;⁵² increase the number of confessions by perpetrators;⁵³ enable recordings to

See Cowling, *supra* note 10.

⁴⁶ McGough, *supra* note 44, at 377 (discussing the prosecutor's duty to videotape forensic interviews of children as a matter of fundamental fairness); McGough, *supra* note 10, at 191-97 (asserting that a defendant's right to due process of law compels the state to videotape investigative interviews of children). *But see* *Idaho v. Wright*, 497 U.S. 805, 818-19 (1990); discussion *supra* notes 28-29 and accompanying text.

⁴⁷ McGough, *supra* note 10, at 205.

⁴⁸ Myers, *supra* note 33, at 372-78; *see also* Morgan, *supra* note 4, at 51.

⁴⁹ Myers, *supra* note 33, at 374-75.

⁵⁰ BERLINER & LIEB, *supra* note 8, at 11 (reporting that use of electronic recording devices—either audio or videotape—significantly increased open-ended prompts and reduced abuse-suggestive questions); Myers, *supra* note 33, at 375-76.

⁵¹ Myers, *supra* note 33, at 376. *See generally* Susan Perlis Marx, *Victim Recantation in Child Sexual Abuse Cases: A Team Approach to Prevention, Investigation, and Trial*, in MALTREATMENT IN EARLY CHILDHOOD: TOOLS FOR RESEARCH-BASED PRACTICE 105, 105-31 (Kathleen Coulborn Faller ed., 1999) (discussing videotaping as one means of documenting child victim's statements).

⁵² Myers, *supra* note 33, at 377.

⁵³ *Id.*; *see also* Stern, *supra* note 9, at 284 (noting that the possibility that videotaped interviews may induce confessions by suspects is "the greatest advantage to videotaping" but arguing that videotaping has not been proven more successful than well-conducted and well-documented forensic interviews); *Videotaping: Device for Fighting Child Abuse*, A.B.A. J., Apr. 1984, at 36 (reporting on a two-year study of the use of videotaping when interviewing child abuse victims in Minneapolis which showed that videotape was used in seventy-five cases and that "about [sixty] defendants pleaded guilty as soon as they saw the interviews").

be used to refresh the child's recollection prior to trial;⁵⁴ and allow expert witnesses to use the videotapes in rendering opinions regarding the case.⁵⁵ Finally, in communities that use videotaping, professionals involved have a positive view of its role in investigating and prosecuting cases of child sexual abuse.⁵⁶

Additionally, proponents of mandated videotaping have suggested the following rationales in support of videotaping: videotaping captures the child's account of the alleged abuse while it is still fresh in the child's memory and before the child's memory of the event is influenced or eroded;⁵⁷ videotaping the child's interview may enhance the child's credibility by providing a more comfortable environment for the child to relate her story;⁵⁸ videotaping can reduce the number of times the child must tell the story, thereby reducing the child's stress and avoiding the perception that the adults performing the repetitious interviews do not believe her;⁵⁹ videotaping preserves a complete and accurate record of what transpired during the interview, allowing the interviewer to focus on the child rather than taking notes about what questions are answered and the child's response to those questions;⁶⁰ videotaping permits interested persons to assess whether there was "interviewer distortion" at work during or after the interview;⁶¹ videotaping provides a means by which interviewers can become better at the task of interviewing children;⁶² and videotaping may improve pre-trial decision-making by the parties, which will, in turn, conserve limited public resources.⁶³

See generally DZIECH & SCHUDSON, *supra* note 5, at 149 (citing Steve Chaney, *Videotaped Interviews with Child Abuse Victims*, in PAPERS FROM A NATIONAL POLICY CONFERENCE ON LEGAL REFORMS 214 (1985)).

⁵⁴ Myers, *supra* note 33, at 377.

⁵⁵ *Id.*

⁵⁶ *Id.* at 378.

⁵⁷ McGough, *supra* note 10, at 182.

⁵⁸ *Id.*

⁵⁹ *Id.* at 183.

⁶⁰ *Id.* at 182.

⁶¹ *Id.* at 184.

⁶² *Id.*; *see also* MICH. COMP. LAWS § 712A.17b(8) (2006) (this statutory provision, applicable to delinquency proceedings against a minor, provides that "a videorecorded statement may be used for purposes of training . . ."); *id.* § 600.2163a(9) (same for adult criminal investigation).

⁶³ McGough, *supra* note 10, at 184-85.

C. DEBATE IN A VACUUM

The debate regarding whether videotaping should be mandated or whether it represents the best professional practice has too often taken place without reference to other investigative techniques and procedures. As the summary of this debate suggests, this discussion has taken place in a dialectical fashion and without consideration of the broader community's interests in vindicating actual victims without falsely accusing or incarcerating innocent suspects. Children's statements about sexual abuse typically are critically important to the investigation of these alleged crimes, to charging decisions made by prosecutors,⁶⁴ to preliminary decision-making by courts, and to the factual determination of the case as presented to a jury at trial. But taking the child's statement about what has been experienced is but one element of the investigation.

The question has too often been framed as "should investigative interviews with children in cases of suspected child sexual abuse be videotaped?" Instead, the proper question ought to be: "Should videotaping of investigative interviews of children in cases of suspected child sexual abuse be one element of a broader investigative protocol that addresses the unique evidentiary demands of these cases?"

Reframing the question, and therefore the debate, is critical to placing the issue in its proper context. As Paul Stern, a leading child abuse prosecutor and critic of videotaping has accurately noted, videotaping child investigative interviews is not a panacea.⁶⁵ Berliner and Lieb have reported on the experimental use of videotaping in investigative interviews of suspected victims of child sexual abuse in Spokane, Washington, which was halted because "unsuccessful prosecutions were attributed to excessive focus on the interview method rather than the cases' total evidence and testimony."⁶⁶ Unfortunately, as the Spokane experiment illustrates, the debate regarding videotaping has taken place as though videotaping were *the* indispensable investigative tool.⁶⁷ While videotaping child investigative

⁶⁴ Ginkowski, *supra* note 17, at 31-35 (discussing the importance of child's testimony).

⁶⁵ Stern, *supra* note 9, at 280-82 (discussing a number of potential difficulties associated with videotaping interviews).

⁶⁶ BERLINER & LIEB, *supra* note 8, at 2.

⁶⁷ While some of the commentary in the literature has recognized the value of videotaping in context, there has been precious little effort dedicated to explicating what other investigative elements would be necessary to enhance the use of videotape. *See, e.g.*, Vieth, *supra* note 9, at 114, 118 (noting in passing that videotaping investigative interviews can be effective under certain circumstances. The author correctly notes the importance of ensuring that professionals who would conduct and evaluate interviews be properly trained, but he fails to suggest any other investigative techniques or processes that would buttress the investigation itself.).

interviews can be an important part of a criminal investigation, it is but one element of the investigation. The significance of videotaping investigative interviews may well lie in its relative value as one element in a broader investigative protocol.⁶⁸

When the question of videotaping children's investigative interviews is placed in its proper context as one element of a broader investigative protocol, its utility becomes clear. When used in conjunction with other investigative methods, not only does videotaping aid the prosecution of cases of child sexual abuse and protect the interests of innocent suspects, it can serve the interests of the broader community in accurately identifying cases of child sexual abuse and addressing them in a fair and balanced manner.

III. THE COMMUNITY'S INTERESTS AND THE VIDEOTAPING CONTROVERSY

This Section will identify numerous community interests at stake in the prosecution of child sexual abuse cases. It will then analyze how the decision whether or not to videotape investigative interviews may advance or fail to advance those interests. In doing so, it will first consider the evidence available in the literature regarding various communities' use of electronic recording of investigative interviews. It will then look more closely at both quantitative and qualitative research produced from St. Mary County.

A. THE COMMUNITY'S INTEREST IN THE PROSECUTION OF CHILD SEXUAL ABUSE CASES

The criminal law is the primary means by which society expresses disapproval of specific behaviors that are harmful to it, and provides a means of controlling such behavior.⁶⁹ In determining how cases of child sexual abuse should be investigated and prosecuted, it is essential that communities identify their specific interests in how the criminal justice system responds to the unique problems presented by this form of child maltreatment. The following discussion considers seven such interests.

⁶⁸ Commentators have recognized the value of multi-pronged investigative approaches to cases of suspected child sexual abuse. See, e.g., Marx, *supra* note 51, at 114 (discussing the importance of interagency cooperation in the investigation of child sexual abuse cases).

⁶⁹ See Robert F. Schopp, "Even a Dog . . .": *Culpability, Condemnation, and Respect for Persons*, in *PROTECTING SOCIETY*, *supra* note 16, at 183.

1. Define and Enforce Normative Behavior

Communities have the right to establish rules by which members of that community will conduct themselves.⁷⁰ Commentators have noted that this power, granted to political jurisdictions such as nations and states, and to smaller polities such as counties or cities, provides broad discretion to fashion rules by which the members of that particular community may be constrained to behave.⁷¹ Recently, the United States Supreme Court has had several opportunities to address statutory enactments meant to address the problem of sexual predation.⁷² In so doing, the Court has upheld the individual states' power to mandate the post-incarceration civil commitment of sexual offenders,⁷³ at least where they are assessed to pose a continuing risk to the community and are unable to control their predatory sexual behavior.⁷⁴ Similarly, the Court has broadly affirmed the right of community to utilize sex offender registries and community notification statutes.⁷⁵ Finally, the Court has held that states may require convicted sex offenders to participate in a treatment regime that requires they admit responsibility for all their sexually aggressive behavior, regardless of whether or not they were convicted for the act, or suffer certain unpleasant consequences.⁷⁶ Taken together, the Court's holdings in these cases provide a broad granting of authority to community leaders to address the

⁷⁰ *Gregg v. Georgia*, 428 U.S. 153, 181 (1976) (citing *Witherspoon v. Illinois*, 391 U.S. 510, 519 & n.15 (1968) (noting in capital punishment context that jury sentencing is considered desirable because it maintains the link between community values and penal responses to crime)); *Schopp*, *supra* note 69, at 184 ("A society's [conventional public morality] consists of the widely accepted principles of political morality that provide the foundation for the legal institutions that order the public jurisdiction. These principles are moral in that they represent societal values that generate legal rules specifying the manner in which we should or should not behave.").

⁷¹ John Kip Cornwell, *Sex Offenders and the Supreme Court: The Significance and Limits of Kansas v. Hendricks*, in *PROTECTING SOCIETY*, *supra* note 16, at 197, 201 (citing *Kansas v. Crane*, 534 U.S. 407 (2002)).

⁷² *Smith v. Doe*, 538 U.S. 84 (2003); *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1 (2003); *McKune v. Lile*, 536 U.S. 24 (2002); *Crane*, 534 U.S. 407; *Kansas v. Hendricks*, 521 U.S. 346 (1997).

⁷³ *Hendricks*, 521 U.S. at 371.

⁷⁴ *Crane*, 534 U.S. at 412-13.

⁷⁵ See *Smith*, 538 U.S. at 96; *Conn. Dep't of Pub. Safety*, 538 U.S. at 7-8.

⁷⁶ See *McKune*, 536 U.S. 24 (upholding a Kansas treatment regime that required the prisoner to admit responsibility for the crime for which he was convicted and to complete a sexual history in which he was required to provide details of all prior sexual activities without regard to whether these constituted uncharged sexual offenses. The program also utilized a polygraph test to gauge the accuracy of the information provided and provided for a loss of privileges for failure to participate.).

problem of sexually violent behavior.⁷⁷ But, the state's power to respond to sexually predatory acts is not limitless.⁷⁸

As with other prohibited conduct, legislative responses to sexually predatory behavior regarding children have four distinct philosophical underpinnings: retribution, incapacitation, general deterrence, and specific deterrence.⁷⁹ Additionally, rehabilitation is a legitimate state interest in responding to sexual violence.⁸⁰

Criminal conviction for sexually violent behavior "express[es] condemnation, including judgments of disapproval and reprobation and attitudes of resentment and indignation."⁸¹ As a means of expressing disapproval, communities have the right to punish offenders who sexually assault minors. Prescribing punishment for offensive conduct is one means by which a community expresses the gravity of the offending conduct.⁸² The more serious the conduct, the harsher the punishment may be.⁸³

The possibility of prosecution and punishment for sexually offensive behavior is thought to deter such conduct.⁸⁴ The criminal law recognizes two forms of deterrence: specific deterrence, aimed at deterring a particular individual's offensive conduct, and general deterrence, aimed at deterring a class of crimes or criminal behavior.⁸⁵ The United States Supreme Court

⁷⁷ See generally *Cornwell supra* note 71, at 201 (citing *Crane*, 534 U.S. at 413 (noting that states have "considerable leeway" in addressing sexually aggressive behavior by use of post-incarceration civil commitment)).

⁷⁸ See, e.g., *Stogner v. California*, 539 U.S. 607, 632-33 (2003) (holding that retroactive elimination of statute of limitations regarding sex offenses against children violates the ex post facto provision of United States Constitution).

⁷⁹ See generally Jodi Leibowitz, Note, *Criminal Statutes of Limitations: An Obstacle to the Prosecution of Child Sexual Abuse*, 25 *CARDOZO L. REV.* 907 (2003) (discussing the various rationales for punishment).

⁸⁰ *McKune*, 536 U.S. at 29 (noting that the sex offender rehabilitation program at issue "serves a vital penological purpose"). See generally *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (discussing the community's and society's interest in capital punishment for the most serious crimes and discussing deterrence, retribution, and incapacitation as legitimate ends of criminal sanctioning).

⁸¹ Schopp, *supra* note 69, at 188.

⁸² See generally *McKune*, 536 U.S. at 34 (noting that the possibility of punishment for sex offending behavior reinforces the gravity of such behavior).

⁸³ See *Solem v. Helm*, 463 U.S. 277, 284 (1983) ("The principal that a punishment should be proportionate to the crime is deeply rooted and frequently repeated in common law jurisprudence."). But see *Lockyer v. Andrade*, 538 U.S. 63 (2003) (upholding two consecutive sentences of twenty-five years to life under California's "three strikes" law where the defendant was convicted of stealing approximately \$150 worth of videotapes).

⁸⁴ Schopp, *supra* note 69, at 185.

⁸⁵ See Barbara Meierhoefer Vincent, *Research in Sentencing*, *FED. SENT'G REP.* 22 (1993) (discussing the role of general deterrence).

has suggested that those who commit sex offenses have recidivism rates that are among the highest of any form of criminal behavior.⁸⁶ Because of this potential for recidivist sexually aggressive behavior, communities have a particularly strong interest in the application of both specific and general deterrence theories of punishment. Research has demonstrated that sex offenders who prey on children are at a higher risk of recidivism.⁸⁷ Moreover, those who perpetrate sexual violence on children may have numerous victims.⁸⁸ Such findings, coupled with particularly heinous anecdotal evidence, have led to the establishment of sex offender registries and community notification laws.⁸⁹

Because of the relatively high rates of recidivism among sex offenders who prey on children, communities may choose to utilize incapacitation as a means of preventing subsequent sexual predation.⁹⁰ Such incapacitation may take the form of lengthy—even life-long—prison sentences or prison sentences followed by civil commitment for those offenders who are unable to control their sexually aggressive behavior.⁹¹

⁸⁶ *McKune*, 536 U.S. at 33 (“When convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault.”) (internal citation omitted). However, the suggestion that sexual offenders have extraordinarily high recidivism rates is not universally accepted. See Karl Hanson, *Who Is Dangerous and When Are They Safe? Risk Assessment with Sexual Offenders*, in PROTECTING SOCIETY, *supra* note 16, at 63, 64-65 (“Contrary to common opinion, the observed recidivism rate of sexual offenders is relatively low.”). This proposition is supported by the 1998 Hanson & Bussière study showing recidivism rates involving new sex offenses at only 13.4% within four to five years after the initial offense. *Id.* at 64.

⁸⁷ *Doe v. Poritz*, 662 A.2d 367, 375 (N.J. 1995) (summarizing presumed legislative findings regarding New Jersey’s enactment of Megan’s Law addressing sex offenders); Hanson, *supra* note 86, at 65-66 (noting that the Hanson & Bussière study indicates that sexual interest in children is “the single strongest predictor” of sex offense recidivism); Jean Peters-Baker, Comment, *Challenging Traditional Notions of Managing Sex Offenders: Prognosis Is Lifetime Management*, 66 UMKC L. REV. 629, 635 (1998) (citing longitudinal studies in which recidivism rates for child molesters were found to be as high as 60%).

⁸⁸ Peters-Baker, *supra* note 87, at 646.

⁸⁹ See, e.g., *Smith v. Doe*, 538 U.S. 84 (2003); *Conn. Dep’t of Pub. Safety v. Doe*, 538 U.S. 1 (2003). See generally Bruce J. Winick & John Q. LaFond, *Introduction*, in PROTECTING SOCIETY, *supra* note 16, at 4 (describing heinous offenses in Washington and New Jersey which led to the enactment of revised sex offender laws there).

⁹⁰ Stephen J. Morse, *Bad or Mad?: Sex Offenders and Social Control*, in PROTECTING SOCIETY, *supra* note 16, at 165, 172 (“Sexual offenses are terrible wrongs, and if sexual offenders are responsible for their conduct, retributive justice requires that they should be convicted and punished proportionately to their culpability. Harsh sentences for such offenses are constitutional, and sexual offenders may thereby be incapacitated for lengthy periods.”).

⁹¹ See MICH. COMP. LAWS § 750.520b(2) (2006) (permitting a court to sentence one convicted of criminal sexual conduct involving penetration upon a child under thirteen to life or any number of years in prison); see also Morse, *supra* note 90, at 172. It may be no

2. Identify Sex Offending Behavior

The Supreme Court has long recognized that the state has a compelling interest in the well-being of its children.⁹² When it comes to the prevention and detection of abuse inflicted upon children, the Court has recognized the community's "urgent" interest in asserting its authority to take steps to protect its children.⁹³ Thus, communities and community members have a critically important interest in detecting the sexual predation of children. Statutory enactments at the federal,⁹⁴ state,⁹⁵ and local level⁹⁶ recognize this interest. These enactments include both civil statutes, such as the Child Abuse Prevention and Treatment Act (which has provided federal financial incentives since 1974 for states to establish child abuse reporting schemes),⁹⁷ and criminal statutes.⁹⁸ Moreover, the implementation of sex offender treatment programs that require the offender to fully disclose all

coincidence that much of the Supreme Court's recent activity in the area of proper responses to sexually aggressive behavior has concerned those offenders who have committed sexual offenses against children. Indeed, the defendants in both *Hendricks*, 521 U.S. 346, 350 (1997), and *McKune*, 536 U.S. at 29-30, were convicted of sex offenses against minors, as were the respondents in *Smith*, 538 U.S. at 91. Additionally, the defendant in *Stogner* was charged in 1998 with sex offenses against children that allegedly took place between 1955 and 1973. 539 U.S. 607, 609 (2003).

⁹² See, e.g., *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (noting that the state in exercise of its *parens patriae* function has the authority to regulate family matters).

⁹³ See *Lassiter v. Dep't of Soc. Servs. of Durham County*, 452 U.S. 18, 27 (1981).

⁹⁴ See Title IV-B of the Social Security Act, 42 U.S.C. §§ 610-629 (2000) (providing federal funding for responding to child abuse); Title IV-E of the Social Security Act, 42 U.S.C. §§ 670-679 (2000) (providing federal funds to support the foster care placement of abused children who cannot be safely maintained in their homes); The Child Abuse Prevention and Treatment Act, 42 U.S.C. §§ 5101-5119(c) (2000) (providing federal funding to states to establish programs to prevent and respond to child abuse).

⁹⁵ Every state has one or more statutes that address the state's authority to protect children from child abuse and neglect. See, e.g., ARIZ. REV. STAT. ANN. § 13-3623 (2006) (imposing criminal liability for child abuse); CAL. PENAL CODE § 273a (West 2006) (imposing criminal liability for child maltreatment); MICH. COMP. LAWS § 750.136b (criminal code provision addressing child abuse and neglect); MICH. COMP. LAWS § 750.520a-e (criminal sexual conduct statutes); see *McKune*, 536 U.S. at 30 (detailing Kansas's incarcerated sex offender treatment program which requires the disclosure of previously uncharged sex offenses against minors to law enforcement authorities).

⁹⁶ E.g., MICH. COMP. LAWS § 722.628d(6) (2006) (mandating that local jurisdictions adopt joint CPS and law enforcement investigation protocols); ST. MARY COUNTY PROSECUTING ATTORNEY'S OFFICE, CHILD SEXUAL ABUSE: PROTOCOL FOR INVESTIGATION CSC (CHILD VICTIM) [hereinafter ST. MARY COUNTY].

⁹⁷ 42 U.S.C. § 5106.

⁹⁸ See, e.g., MICH. COMP. LAWS § 722.633(2) (making it a misdemeanor for certain professionals who are required by the nature of their profession to report suspected child abuse to knowingly fail to do so).

prior sex offenses⁹⁹ and sex offender registration statutes¹⁰⁰ are expressions of the community's interest in preventing future child sexual abuse.¹⁰¹

The sexual abuse of a child often has devastating consequences for the victim. In the short-term, these consequences may include sexually transmitted diseases,¹⁰² pregnancy,¹⁰³ and physical injury.¹⁰⁴ Additionally, child sexual abuse has been linked to a number of negative long-term developmental outcomes.¹⁰⁵ These may include post-traumatic stress disorder, depression, anxiety disorders, low self-esteem, increased risk of suicide, increased risk of running away from home, increased risk of illicit drug use, and increased risk of CPS involvement, cognitive difficulties and problems with school achievement.¹⁰⁶ These problems often carry over into adulthood.¹⁰⁷ Indeed, individuals who have suffered sexual abuse disproportionately utilize publicly funded resources such as mental health and substance abuse treatment services.¹⁰⁸ These individuals are also at heightened risk of both delinquency and criminal involvement.¹⁰⁹ Moreover, those who are victimized by sexual abuse as children may themselves be at increased risk of becoming sexual offenders later in their childhoods and in adulthood.¹¹⁰ Finally, women who are sexually abused as children are at greater risk of being re-victimized as adults.¹¹¹ Clearly,

⁹⁹ See, e.g., *McKune*, 536 U.S. at 30.

¹⁰⁰ See, e.g., *Smith v. Doe*, 538 U.S. 84, 102 (2003).

¹⁰¹ Despite these efforts to prevent and respond to the sexual abuse of children, researchers believe that sexual offenses against children are dramatically underreported. See, e.g., Lucy Berliner & Diana M. Elliott, *Sexual Abuse of Children*, in THE APSAC HANDBOOK, *supra* note 3, at 55, 56.

¹⁰² See David P.H. Jones, *Assessment of Suspected Child Sexual Abuse*, in THE BATTERED CHILD, *supra* note 2, at 296, 298; Susan K. Reichert, *Medical Evaluation of the Sexually Abused Child*, in THE BATTERED CHILD, *supra* note 2, at 313, 324-25.

¹⁰³ Jones, *supra* note 102, at 298.

¹⁰⁴ See ROBERT M. REECE, CHILD ABUSE: MEDICAL DIAGNOSIS AND MANAGEMENT 185-247 (1994).

¹⁰⁵ For a helpful summary of the mental health impacts of sexual abuse upon children, see Berliner & Elliot, *supra* note 101, at 59-61.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 61-64.

¹⁰⁸ *Id.* at 59-64.

¹⁰⁹ See CATHY SPATZ WIDOM, NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, RESEARCH IN BRIEF, VICTIMS OF CHILDHOOD SEXUAL ABUSE—LATER CRIMINAL CONSEQUENCES 4 (1995).

¹¹⁰ See ROBERT A. PRENTKY ET AL., NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, RESEARCH REPORT, CHILD SEXUAL MOLESTATION: RESEARCH ISSUES 3 (1997).

¹¹¹ See PATRICIA TJADEN & NANCY THOENNES, NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, RESEARCH REPORT, FULL REPORT OF THE PREVALENCE, INCIDENCE AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN 39 (2000).

sexual abuse has a serious impact upon the social fabric and economic life of communities.

For each of these reasons, then, a community has a significant interest in detecting sexually aggressive behavior aimed at children.

3. Minimize the Possibility of Wrongful Accusations, False Confessions, and Wrongful Convictions

At its most basic level, the criminal justice system is the means by which the community searches for the truth when allegations of criminal wrongdoing are leveled.¹¹² The preeminent purpose of the process of investigation and prosecution is to separate the guilty from the innocent. Throughout this process, the criminal justice system, with its various procedural protections, is designed to ensure that if an error in discerning the truth is made, that error results in finding the guilty innocent rather than in finding the innocent guilty.¹¹³ But the system does not always work as well in practice as it does in theory. Despite procedural safeguards, the innocent are sometimes convicted.¹¹⁴ Communities have a critically important interest in seeing that their criminal justice systems achieve

¹¹² See Laura Berend, *Less Reliable Preliminary Hearings and Plea Bargains in Criminal Cases in California: Discovery Before and After Proposition 115*, 48 AM. U. L. REV. 465, 468-69 (1998) ("The purpose of the criminal justice system is often described as a 'search for the truth' in order to convict the guilty and free the innocent. This process is a synthesis of a variety of elements, including evidentiary and procedural rules, litigant concerns, social values, political interests, institutional considerations, and systemic capacity. As the justice system evolves, these elements are accorded different weights in relation to each other and their fusion achieves a 'legal' truth that ultimately meets our current social expectations of 'fundamental fairness' or 'justice.' Together, these social, political and institutional elements produce a community rather than individual body of law.") (citations omitted).

¹¹³ See *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) ("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.").

¹¹⁴ The clearest evidence of this is the recent recognition by the state of Illinois that it had convicted and sentenced to death numerous innocent defendants. See generally SCOTT TUROW, *ULTIMATE PUNISHMENT: A LAWYER'S REFLECTIONS ON DEALING WITH THE DEATH PENALTY* (2003) (describing the author's appointment to and work with Illinois governor George Ryan's Commission on Capital Punishment. The Commission was convened after numerous death row inmates in the state were exonerated through the use of DNA evidence); Samuel R. Gross et al., *Exonerations in the United States 1989 through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523 (2005). For instance, defendants are sometimes convicted based upon their own false confession of guilt. In the widely publicized case of the Central Park Jogger, five teenage defendants falsely confessed to a savage assault upon a woman, only to be exonerated years later when another prisoner confessed and DNA evidence determined that he was in fact guilty of the assault and rape. See also TUROW, *supra*, at 31.

accurate results and that true cases of crime are identified and prosecuted consistent with the laws of the community, while untrue cases do not get reported, do not result in false charges, and do not result in unjust conviction. Thus, while a community has a compelling interest in seeing that actual cases of child sexual abuse are discovered and prosecuted, it has a concomitant interest in seeing that false or mistaken allegations are not leveled or are identified and dealt with appropriately.

Few current topics have been as frequently and passionately debated among those concerned with child welfare as the issue of false allegations of child sexual abuse.¹¹⁵ Community organizations and court systems have taken numerous steps to adequately investigate and properly classify alleged child sexual abuse as true or false.¹¹⁶ These efforts include the establishment of forensic interviewing protocols to reduce the possibility of interviewer bias that might lead to a false allegation,¹¹⁷ joint investigation of cases of suspected child sexual abuse by both child protective authorities and law enforcement officials,¹¹⁸ and pre-trial “taint hearings” to determine whether children’s statements regarding sexual abuse are sufficiently reliable to be admitted into evidence at trial.¹¹⁹ Some commentators have suggested that even more protections are necessary in order to ensure the accuracy of children’s statements about sexual abuse.¹²⁰ Among their suggestions is a recommendation that every therapeutic contact with a child be recorded.¹²¹ Indeed, in *Idaho v. Wright*, the state court found that the child’s hearsay statements made to a physician during a medical examination should not have been admitted because that interview lacked sufficient procedural safeguards, including the fact that the interview was

¹¹⁵ See generally Jane Mildred, *Claimsmakers in the Child Sexual Abuse “Wars”: Who Are They and What Do They Want?*, 48 SOC. WORK 492, 493 (2003) (“[W]ell-known and respected scientists with impressive credentials disagree about almost every important issue related to child sexual abuse.”).

¹¹⁶ Such steps include interviewing protocols, see GOVERNOR’S TASK FORCE, *supra* note 25, and taint hearings, see *State v. Michaels*, 642 A.2d 1372 (N.J. 1994).

¹¹⁷ See, e.g., MICH. COMP. LAWS § 722.628(6) (2006) (requiring Michigan counties to establish a forensic interviewing protocol to be used by law enforcement and CPS investigators when investigating cases of suspected child abuse); see also GOVERNOR’S TASK FORCE, *supra* note 25.

¹¹⁸ 42 U.S.C. § 5106a(b)(2)(A)(xi) (2006); MICH. COMP. LAWS § 722.628(3)(b) (mandating joint CPS and law enforcement investigations of child sexual abuse cases).

¹¹⁹ See, e.g., *State v. Michaels*, 642 A.2d 1372, 1380-85 (N.J. 1994) (discussing the need for a taint hearing to determine the admissibility of a child’s statement concerning child sexual abuse when the defendant challenges the veracity of those statements).

¹²⁰ CECI & BRUCK, *supra* note 5, at 250.

¹²¹ *Id.*

not videotaped.¹²² The United States Supreme Court subsequently rejected the argument that due process requires the videotaping of interviews with child victims of sexual assault.¹²³

A related concern regarding the investigation and prosecution of child sexual abuse cases is the possibility of false confessions by suspected perpetrators.¹²⁴ While most mental health professionals argue that sex offenders are likely to deny or to minimize their sexually aggressive behavior,¹²⁵ legal commentators have conversely expressed considerable concern about the possibility of false confessions.¹²⁶

The community has a critically important interest in ensuring the integrity of the investigative and prosecutorial processes that its official representatives employ.¹²⁷ Whatever investigative methods are used, a community has an interest in ensuring that its members are not wrongfully accused of child sexual abuse. To be so accused has a devastating impact on the individual, tears at the fabric of the community, and undermines confidence in the justice system.¹²⁸

4. Reduce Sex Offending Behavior

Because of the devastating impact that sexual victimization can have on children and its resultant social and behavioral consequences, communities have a strong interest in seeing that sexually offensive

¹²² *Idaho v. Wright*, 497 U.S. 805, 818 (1990).

¹²³ *Id.*

¹²⁴ A detailed discussion of false confession is beyond the scope of this Article. The author addresses it here in large part because, as we will see, the community that is the focus of this Article utilizes videotaping during some phases of interrogation of suspects, particularly when a polygraph is administered. See generally TUROW, *supra* note 114, at 31 (noting that “false confessions were the dominating problem in the Illinois exonerations” which led to the commutation of 167 death sentences by the state’s governor); Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 83 N.C. L. REV. 891 (2004).

¹²⁵ It must be noted that false denials seem a much more prevalent problem than false confessions, at least among those offenders who have previously been convicted of a sexual offense. Marnie E. Rice & Grant T. Harris, *What We Know and Don’t Know About Treating Adult Sex Offenders*, in PROTECTING SOCIETY, *supra* note 16, at 101, 102 (questioning the validity of sex offenders’ self-reports of their offending behavior and arguing for the need to take “special steps” to ensure their accuracy).

¹²⁶ See, e.g., Drizin & Leo, *supra* note 124.

¹²⁷ See generally Thompson, *supra* note 14 (describing various recent efforts aimed at recognizing the importance of community involvement in the criminal justice process).

¹²⁸ See, e.g., Joel Jay Finer, *Therapists’ Liability to the Falsely Accused for Inducing Illusory Memories of Childhood Sexual Abuse—Current Remedies and a Proposed Statute*, 11 J.L. & HEALTH 45, 64-66 (1997); Maggie Jones, *Who Was Abused?*, N.Y. TIMES MAG., Sept. 19, 2004, at 77.

behavior aimed at minors is reduced. Efforts to reduce sexually aggressive behavior focus on both prevention and treatment.

Prevention may take one of several forms. Primary prevention directs its message to the community as a whole, to those who may have been previously victimized as well as to those for whom there is no reason to suspect past victimization.¹²⁹ Secondary prevention focuses on specific groups of persons thought to be at risk of sexually predatory behavior. For example, some widespread prevention programs target children of certain ages.¹³⁰ Tertiary prevention seeks to prevent further victimization of those who have previously been sexually victimized.¹³¹ The rationale for this form of prevention is, in part, that victimization may render them vulnerable to sexual behavior problems.¹³²

Prevention programming—primary, secondary or tertiary—may also be targeted at potential perpetrators.¹³³ Some commentators have opined that too little effort is expended on preventing sexually predatory behavior through such programs.¹³⁴ To the extent that treatment of known offenders reduces recidivism, it is a form of tertiary prevention.¹³⁵ Sex offender treatment programs thus typically include relapse prevention as one of their constituent components.¹³⁶ Relapse prevention aims to assist the client to

¹²⁹ See Deborah A. Daro, *Prevention of Child Sexual Abuse*, 4 FUTURE CHILD. 198, 199 (1994).

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² See Berliner & Elliott, *supra* note 101, at 60.

¹³³ See William D. Pithers et al., *Investing in the Future of Children: Building Programs for Children or Prisons for Adult Offenders*, in PROTECTING SOCIETY, *supra* note 16, at 231; Gail Ryan, *The Sexual Abuser*, in THE BATTERED CHILD, *supra* note 2, at 329, 341.

¹³⁴ See Daro, *supra* note 129, at 200 (“Unlike the efforts to alter adult behavior in cases of physical abuse or neglect, the prevention of child sexual abuse has largely focused on altering the behavior of children . . .”); Ryan, *supra* note 133, at 341.

¹³⁵ *McKune v. Lile*, 536 U.S. 24, 33 (2002) (noting that recidivism rates for treated sex offenders are thought to be about 15% while recidivism rates for untreated sex offenders are estimated to reach 80%). *But see* Ryan, *supra* note 133, at 341 (arguing that prevention aimed at offenders is primary, while their prosecution and treatment are tertiary prevention).

¹³⁶ See *McKune*, 536 U.S. at 34; ASS’N FOR THE TREATMENT OF SEXUAL ABUSERS, ETHICAL STANDARDS AND PRINCIPLES FOR THE MANAGEMENT OF SEXUAL ABUSERS 24-26 (1997) (discussing relapse prevention); Rice & Harris, *supra* note 125, at 107 (noting that a number of sex offender treatment programs include relapse prevention); Bruce J. Winick, *A Therapeutic Jurisprudence Assessment of Sexually Violent Predator Laws*, in PROTECTING SOCIETY, *supra* note 16, at 317, 322 (noting that “treatment involves relapse prevention training, designed to alert the offender, the offender’s family and support network, and the offender’s therapist or case manager to the behavioral cues that might precede relapse and to take appropriate steps to avoid it”).

“anticipate and resist deviant urges.”¹³⁷ Because treatment has potential to reduce the incidence of sexually offensive behavior, even if it is only partially successful, the Supreme Court has recognized its value to communities.¹³⁸

5. Monitor Sex Offenders

It is simply not practical to believe that all sex offenders who pose risks to children can be permanently incapacitated by incarceration or civil commitment.¹³⁹ As Professor Stephen J. Morse has observed, “some undeniably dangerous agents [will] remain at large.”¹⁴⁰ When such offenders are present in a community, the law has recognized the right of the community and of its constituent members to protect themselves through sex offender registration, notification, and monitoring.¹⁴¹ In large part because of federal funding contingencies,¹⁴² every state has enacted a sex offender registration statute.¹⁴³ The state’s interest in enacting these statutes, the United States Supreme Court has observed, is to “protect its communities from sex offenders and to help apprehend repeat sex offenders.”¹⁴⁴

¹³⁷ Eric S. Janus, *Treatment and the Civil Commitment of Sex Offenders*, in PROTECTING SOCIETY, *supra* note 16, at 119, 122 (internal citation omitted).

¹³⁸ *McKune*, 536 U.S. at 33.

¹³⁹ As of this writing a minority of American jurisdictions have statutes that provide for the civil commitment of sex offenders who pose a danger to the community. Those states are Arizona, ARIZ. REV. STAT. ANN. § 36-3707 (2005); California, CAL. WELF. & INST CODE § 6600 (West 2006); Colorado, COLO. REV. STAT. § 18-1.3-904 (2005); District of Columbia, D.C. CODE § 22-3808 (2006); Florida, FLA. STAT. § 394.9135 (2006); Illinois, 725 ILL. COMP. STAT. 205/0.01 (2006); Iowa, IOWA CODE § 229A.1 (2006); Kansas, KAN. STAT. ANN. § 59-29a01 (2005); Massachusetts, MASS. GEN. LAWS ch. 123A, § 1 (2006); Minnesota, MINN. STAT. § 253B.185 (2006); Missouri, MO. REV. STAT. § 632.480 (2006); New Jersey, N.J. STAT. ANN. § 30:4-27.24 (West 2006); North Dakota, N.D. CENT. CODE § 25-03.3-01 (2006); South Carolina, S.C. CODE ANN. § 44-48-10 (2005); Washington, WASH. REV. CODE § 71.09.010 (2006); Wisconsin, WIS. STAT. § 980.01 (2006). Additionally, Texas law permits the state to commit a sex offender for outpatient treatment. TEX. HEALTH & SAFETY CODE ANN. § 841.003 (Vernon 2006).

¹⁴⁰ Morse, *supra* note 90, at 173.

¹⁴¹ *See, e.g.*, *Conn. Dep’t of Pub. Safety v. Doe*, 538 U.S. 1, 7-8 (2003) (holding that a hearing to determine if a convicted sex offender is “currently dangerous” before he or she is listed on the state’s sex offender registry is not required by the Fourteenth Amendment’s Due Process Clause).

¹⁴² *See Smith v. Doe*, 538 U.S. 84, 89 (2003) (citing the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, 42 U.S.C. § 14071 (2000)).

¹⁴³ *Id.* at 90.

¹⁴⁴ *Conn. Dep’t of Pub. Safety*, 538 U.S. at 4.

Some commentators assert that well-intentioned notification laws may have “devastating effects” on the victim of the sex offense.¹⁴⁵ This is most true when, as is often the case, the offender is a member of the victim’s family.¹⁴⁶ Presumably the stigma conferred by such notification laws, many of which use the Internet as the primary means of notification, exposes the victim as well as the offender to some modicum of public humiliation.¹⁴⁷

In addition to sex offender registries, which place the responsibility of monitoring potentially dangerous offenders on individuals within the community, criminal justice professionals have developed a community containment approach that seeks to monitor convicted sex offenders who are at large in the community by using multiple methods of monitoring, treatment, and accountability.¹⁴⁸ The dual foci of such containment programs are to protect potential victims and to keep the sex offender’s community as a whole safe.¹⁴⁹

¹⁴⁵ Kim English et al., *Community Containment of Sex Offender Risk: A Promising Approach*, in PROTECTING SOCIETY, *supra* note 16, at 265, 268.

¹⁴⁶ *Id.*

¹⁴⁷ The public humiliation of those who would violate the community’s laws has been a part of our laws since before the United States as a nation existed. In the colonial period, “there was heavy use of open punishments, like public whipping or the pillory and stocks. These were small, inbred, gossipy communities. Public opinion and shame were important instruments of punishment.” LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 69 (2d ed. 1985). See generally *Paul v. Davis*, 424 U.S. 693 (1976) (holding that injury to reputation does not deprive one of a protected liberty interest).

¹⁴⁸ For a helpful description of community containment, see English et al., *supra* note 145; see also ASS’N FOR THE TREATMENT OF SEXUAL ABUSERS, *supra* note 136; Sarah Kershaw, *Homes Where Sex Offenders Can Help Police One Another*, N.Y. TIMES, Aug. 3, 2003, at A1. Community containment programs utilize a three-pronged approach to maintaining sex offenders in the community. English et al., *supra* note 145, at 270. First, they include intensive monitoring of offenders by probation or parole staff, which is “customized to lower risk by denying the offender the access and privacy necessary to harm victims.” *Id.* at 269. Failure to comply fully with the terms and conditions of release may result in an escalation of the level of monitoring to include house arrest or additional contact with probation or parole agents. *Id.* at 270-71. Second, the community containment model mandates that the offender participate in treatment. *Id.* at 272. Finally, in conjunction with community supervision and mental health treatment, community containment utilizes polygraph examinations in an effort to verify information that the offender provides. *Id.* at 273.

¹⁴⁹ ASS’N FOR THE TREATMENT OF SEXUAL ABUSERS, *supra* note 136, at 11 (“Community safety takes precedence over any conflicting consideration . . .”); English et al., *supra* note 145, at 267.

6. Rehabilitate Sex Offenders

As noted earlier, the Supreme Court has observed that convicted sex offenders are more likely to re-offend than are other criminal offenders.¹⁵⁰ Most sex offenders, however, either will never be incarcerated or will be released back into the community after incarceration.¹⁵¹ Mental health professionals view minimization of the potential for recidivism as the primary purpose for providing treatment to sex offenders.¹⁵² The Court has recognized that recidivism rates of sex offenders who receive treatment for their behavior are substantially lower than recidivism rates for untreated offenders.¹⁵³ Mental health researchers, however, have been much less optimistic about the efficacy of sex offender treatment.¹⁵⁴ Writing in 2003, Canadian researchers concluded: “Simply put, the effectiveness of adult sex offender treatment has yet to be demonstrated.”¹⁵⁵

The available methods of offender treatment utilized and the environment in which that treatment takes place—whether the prison setting or community based programs—is the subject of considerable scholarly discussion.¹⁵⁶ Moreover, each sex offender presents different treatment needs that implicate varying treatment modalities.¹⁵⁷ Young

¹⁵⁰ *McKune v. Lile*, 536 U.S. 24, 32-33 (2002). See generally R. Karl Hanson, *Who Is Dangerous and When Are They Safe? Risk Assessment with Sexual Offenders*, in PROTECTING SOCIETY, *supra* note 16, at 63, 64 (discussing sex offender recidivism rates).

¹⁵¹ N.M. SENTENCING COMM’N, RESEARCH OVERVIEW: SEX OFFENDER TREATMENT APPROACHES AND PROGRAMS 7 (2003), available at <http://www.nmsc.state.nm.us/download/Sex%20Offender%20Research.pdf> (indicating that 90% of sex offenders who are incarcerated will be released back into the community at some point); Pithers et al., *supra* note 133, at 235 (“[E]ven with indeterminate commitments for individuals deemed sexual psychopaths, most incarcerated sex offenders will eventually be released.”).

¹⁵² Rice & Harris, *supra* note 125, at 102.

¹⁵³ *McKune*, 536 U.S. at 33 (noting that treated sex offenders’ recidivism rates are approximately 15%, while untreated sex offenders’ recidivism rates are approximately 80%).

¹⁵⁴ Rice & Harris, *supra* note 125 (discussing various treatment approaches and noting that some are less successful than others and that some may actually contribute to higher rates of re-offense).

¹⁵⁵ *Id.* at 109.

¹⁵⁶ See, e.g., ASS’N FOR THE TREATMENT OF SEXUAL ABUSERS, *supra* note 136, at 17; English et al., *supra* note 145, at 265; Robert D. Miller, *Chemical Castration of Sex Offenders: Treatment or Punishment?*, in PROTECTING SOCIETY, *supra* note 16, at 249; N.M. SENTENCING COMM’N, *supra* note 151, at 7-8, 10-13; Pithers et al., *supra* note 133, at 235-36 (arguing, in part, for wider use of community based probation and treatment of sex offenders); Rice & Harris, *supra* note 125, at 103-09 (discussing various treatment modalities and their effectiveness).

¹⁵⁷ See Pithers et al., *supra* note 133, at 231-32 (noting that “children with sexual behavior problems . . . exhibit a diverse array of developmental needs that reach far beyond problematic sexual behavior, yet simultaneously influence its occurrence”).

children's treatment needs differ from those of adolescents, which differ from adult male offenders' needs.¹⁵⁸ Indeed, within each of these chronological categories of offenders there is a need for disparate treatment modalities.¹⁵⁹ Additionally, women make up a small proportion of the adult sex offender population,¹⁶⁰ but little research has addressed the most effective means of treating them.¹⁶¹ Notwithstanding these considerations, the Supreme Court in *McKune* concluded that the individual states "have a vital interest in rehabilitating convicted sex offenders."¹⁶²

7. Minimize Trauma to Children Caused by Their Participation in the Criminal Justice System

The United States Supreme Court has recognized a compelling state interest in protecting children's well-being, physical as well as emotional.¹⁶³ This interest in the child's welfare extends to protecting sexually abused children from "further trauma and embarrassment."¹⁶⁴ Yet, it has long been recognized that the way in which cases of suspected child sexual abuse are investigated and pursued within the legal system can have traumatic impact upon children.¹⁶⁵ Repeated interviewing, making unwarranted assurances to the child, testifying in court—especially more than once—are but some of the sources of trauma children experience in the legal system.¹⁶⁶ The courtroom in particular can be a forbidding, even hostile place for child sexual abuse victims.¹⁶⁷ As Wisconsin Court of Appeals Judge Charles B.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 242-45 (discussing various types of children with sexual behavior problems and concluding that there is a need to develop treatment programs specific to the needs of each type of child).

¹⁶⁰ Rice & Harris, *supra* note 125, at 101.

¹⁶¹ *Id.*

¹⁶² *McKune v. Lile*, 536 U.S. 24, 33 (2002).

¹⁶³ *Maryland v. Craig*, 497 U.S. 836, 852-53 (1990).

¹⁶⁴ *Id.* at 852 (citing *Globe Newspaper Co. v. Superior Court of Norfolk County*, 457 U.S. 596, 607 (1982)).

¹⁶⁵ Mary Avery, *The Child Abuse Witness: Potential for Secondary Victimization*, 7 CRIM. JUST. J. 1, 3 (1983) ("Mental health professionals have found that legal proceedings can have a profoundly disturbing effect on the mental and emotional health of the child victim."); Henry, *System Intervention Trauma*, *supra* note 19, at 500-01 (citing several studies).

¹⁶⁶ See CAL. ATT'Y GEN'S OFFICE, *supra* note 6, at 3, 11; Avery, *supra* note 165, at 2 ("The young victims would benefit from keeping interrogations to a minimum . . ."); Henry, *supra* note 19, *System Intervention Trauma*, at 508-09.

¹⁶⁷ See *Craig*, 497 U.S. at 853-54 (enumerating the various protections that states have enacted to protect child witnesses); *Coy v. Iowa*, 487 U.S. 1012, 1022-23 (1988) (O'Connor, J., concurring).

Schudson has noted, children are expected to testify “like adults—with adult language in intimidating adult settings.”¹⁶⁸ Similarly, Gail S. Goodman and Vicki S. Helgeson have observed:

Once a child qualifies as a witness, he or she is treated much like an adult. The child is sworn in, seated alone in the witness stand, and questioned by the attorneys. Many children naturally express fear upon seeing the defendant, meeting the judge, speaking in front of an audience, and being cross-examined. It is also likely that physical separation from supportive others, such as the child’s mother, causes additional stress during the child’s court appearance.¹⁶⁹

The criminal justice system’s approach has historically been characterized by a lack of accommodation of child witnesses in abuse cases, which may result in the children suffering serious harm due to trauma inflicted upon them by the legal process itself.¹⁷⁰ Yet research suggests that the opportunity for children to testify when they have been the victims of sexual abuse may have positive benefits for the child’s emotional well-being.¹⁷¹ Two factors seem to have the most impact on the issue of trauma when children testify. First, being required to testify more than once is associated with negative psychological impact upon children.¹⁷² Second, the means by which children’s testimony is taken—that is, whether the unique developmental needs of the child are taken into account through the use of support persons, closed circuit television, and videotaped depositions in lieu of testimony in open court—has been recognized by both courts and legislatures as necessary to secure a child’s testimony and prevent unnecessary harm to child witnesses.¹⁷³

¹⁶⁸ DZIECH & SCHUDSON, *supra* note 5, at xiv.

¹⁶⁹ Goodman & Helgeson, *supra* note 30, at 201.

¹⁷⁰ See Avery, *supra* note 165, at 3.

¹⁷¹ Henry, *System Intervention Trauma*, *supra* note 19, at 500-01 (citing several studies).

¹⁷² *Id.*

¹⁷³ See generally 18 U.S.C. § 3509 (2000) (providing various protections for child witnesses); MICH. COMP. LAWS § 600.2163a (2006) (permitting admission of “videorecorded statements” in all stages of child sexual abuse prosecution except trial; providing for the admission of “videorecorded deposition” at trial; permitting various other child witness protective measures in sexual abuse prosecutions); *Maryland v. Craig*, 497 U.S. 836, 851-57 (1990) (holding that the state’s interest in protecting child witness from trauma was sufficient to permit the use of closed circuit television when child testifies where there are individualized findings that a face-to-face confrontation would be harmful to the child); John E.B. Myers, *A Decade of International Reform to Accommodate Child Witnesses: Steps Toward a Child Witness Code*, in *INTERNATIONAL PERSPECTIVES ON CHILD ABUSE AND CHILDREN’S TESTIMONY: PSYCHOLOGICAL RESEARCH AND LAW* 221-65 (Bette L. Bottoms & Gail S. Goodman eds., 1996) (summarizing various accommodations for child witnesses in American courts and internationally).

To protect its interest in preventing unnecessary trauma to its child members, a community has dual interests in seeing that its criminal justice system is able to procure the testimony of these children and, at the same time, minimize the possibility that child witnesses will suffer psychological trauma in the process.¹⁷⁴ Thus, the state has an interest in minimizing the number of interviews a child sexual abuse victim must endure, in limiting the number of times a child must testify, and in seeing that when children must testify their unique vulnerabilities are taken into consideration.¹⁷⁵

B. ONE COMMUNITY'S RESPONSE TO CHILD SEXUAL ABUSE

In the early 1980s, St. Mary County, Michigan, prioritized the prosecution of child sexual abuse cases. In doing so, community leaders established a protocol for investigating and responding to cases of suspected child sexual abuse.¹⁷⁶ The protocol, which has changed little over the two decades it has been utilized, consists of the following basic elements:¹⁷⁷

1. *Rapid response:* Law enforcement and CPS respond immediately to reports with a timely interview of the child and the suspect. When a report of suspected child sexual abuse is received, representatives of law enforcement and CPS go as quickly as possible to where the child is and conduct a forensic interview of the child to capture her version of events.
2. *Collaboration between CPS and law enforcement:* Under Michigan law, CPS need only be involved in an investigation if the child is suspected of having been abused or neglected by a "person responsible for the child's health or welfare," essentially a parent or legal guardian or other person whom the law assigns responsibility for care of that child.¹⁷⁸ Pursuant to the county's protocol, however, the preference is for CPS workers to conduct all interviews with children, and law enforcement officers may request that a CPS interviewer

¹⁷⁴ See *generally Craig*, 497 U.S. at 852-53 (holding that the State's interest in protecting child witnesses may outweigh the criminal defendant's right to a face-to-face confrontation).

¹⁷⁵ *Id.*; see also *Idaho v. Wright*, 497 U.S. 805, 824-25 (1990) (permitting, by implication, the admission of a child's hearsay statements when the statement has adequate guarantees of trustworthiness).

¹⁷⁶ ST. MARY COUNTY, *supra* note 96.

¹⁷⁷ The protocol contains seventeen elements; only the essential elements are discussed here. In the actual protocol, each of these elements is expanded upon, some at considerable length. For example, the protocol contains a detailed discussion about the then state of the art technique for conducting an interview with a child.

¹⁷⁸ See MICH. COMP. LAWS § 722.628(1) (2006); *id.* § 722.622(u) (defining "person responsible for a child's health or welfare").

conduct the interview even if the case does not involve a civil child protection issue (for example, where the suspected perpetrator is a neighbor and there is no reason to believe that the child's parent has been negligent in allowing the child to associate with the neighbor).¹⁷⁹

3. *Videotape of child interview*: The child interview is to be videotaped. The earliest version of the protocol provides: "There are sound policy reasons for not questioning the victim about the sexual allegations until the videotape interview."¹⁸⁰ The protocol does recognize that in some circumstances a brief pre-videotape interview may be necessary. "If such an interview is conducted," the protocol advises, "it should be kept brief."¹⁸¹ The protocol further advises that any pre-videotape interview should be audio recorded. When audio recording is not available, the pre-videotape interview is to be "reconstruct[ed] . . . not only what was said by the victim, but how the questions were phrased."¹⁸² In such a circumstance, the interviewer is to provide a full written report. The protocol advises that the interview should not be done in the child's home if it can be avoided, preferring instead the child's school, the child welfare agency's office, the law enforcement agency's office or the prosecutor's office. Interviews are to be done in a room that is comfortable for the child and which minimizes distractions.¹⁸³ Interviewers are cautioned to be precise in attempting to identify the perpetrator to prevent the child from naming

¹⁷⁹ Some of the details of the protocol have changed over the twenty years it has been in existence. The original protocol provided:

3. Responsibility for Interviewing the Victim

Usually a [CPS] worker should perform this task. Typically, [CPS] workers are adept at this function since they deal with children on a regular basis and conduct this type of interview. . . .

Whoever conducts the interview . . . must be trained in the interviewing of children.

ST. MARY COUNTY, *supra* note 96, at 1.

The County's current protocol provides:

Interviewing Responsibility

1. CPS performs this task of interviewing the victim if the alleged perpetrator is a parent, guardian, custodian or other person responsible for the care of the child. . . . The law enforcement agency may request the assistance of [CPS] in interviewing the child.

Id. at 3.

¹⁸⁰ *Id.* at 3.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ The protocol contains numerous additional technical requirements for conducting a videotaped interview that are not reproduced in detail here. See *id.* at 2-3.

the wrong individual.¹⁸⁴ The investigating law enforcement officer is to be present at the time of the videotaped interview of the child, typically watching the interview on closed circuit television or through a one way mirror. If the child discloses sexual abuse, the police officer will have probable cause to arrest the suspected perpetrator.¹⁸⁵

4. *Interview of suspect:* If the child makes a disclosure,¹⁸⁶ law enforcement immediately locates the suspect and seeks to interview him regarding the child's allegations. Officers are instructed to "[g]o out and meet with him personally."¹⁸⁷ The protocol states: "The interview of the defendant, along with the interview of the victim, is absolutely the most crucial component of a CSC [criminal sexual conduct] case."¹⁸⁸ The interview of the suspect regularly takes place within hours of the interview with the child. A critical component of this stage of the investigation is a requirement that the investigating officer show the suspect the videotape of the child's interview. The protocol states that "a person who commits sexual abuse is likely to confess, at least to make some partial admissions, after viewing the video taped statement of the victim."¹⁸⁹ Thus, suspects are to be advised of their *Miranda* rights prior to viewing the videotape.¹⁹⁰ Regardless of whether the suspect confesses or not, the protocol advises law enforcement officers to solicit as detailed a statement as possible from the suspect.¹⁹¹

5. *Use of polygraph, which is also videotaped:* After viewing the videotape of the child's interview, the suspect is questioned and given an opportunity to respond. If he denies that he committed the sexual abuse as described by the child, he is offered the opportunity to take a polygraph.¹⁹² "[I]f the suspect is willing, a polygraph examination

¹⁸⁴ *Id.* at 5.

¹⁸⁵ *Id.* at 2, 6.

¹⁸⁶ If the child does not make a disclosure of sexual abuse, the investigation is at an end. If the child discloses sexual abuse without naming a perpetrator, the investigation would continue.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* (boldfaced in original).

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*; see *Miranda v. Arizona*, 384 U.S. 436 (1966).

¹⁹¹ See ST. MARY COUNTY, *supra* note 96, at 6.

¹⁹² Under Michigan law, a defendant in a criminal sexual conduct case has the right to demand that a polygraph be administered. MICH. COMP. LAWS § 776.21(5) (2006). "The purpose for affording individuals accused of criminal sexual conduct a right to a polygraph exam is to provide a means by which accused individuals can demonstrate their innocence, thereby obviating the necessity of a trial." *People v. Phillips*, 649 N.W.2d 407, 412 (Mich. Ct. App. 2002), *aff'd on other grounds*, 666 N.W.2d 657 (Mich. 2003).

should be set up immediately.”¹⁹³ The polygraph examination and the post-polygraph interview are also videotaped.¹⁹⁴

6. *Investigating officer is present at the polygraph:* The investigating officer observes the polygraph and assists the polygrapher as needed.

7. *Gathering physical evidence:* While it is often the case that there is no physical evidence in cases of suspected child sexual abuse, the protocol charges the investigating officer with the responsibility to immediately obtain any physical evidence which may be relevant. Interviewers are instructed to attempt to ascertain from the child whether there may be physical evidence. The protocol uses the example of a washcloth being used to wipe off semen. The interviewer is instructed to elicit as much detail about potential physical evidence as possible.¹⁹⁵

8. *Medical examination:* As noted in the Introduction to this Article, medical evidence is rarely present in child sexual abuse cases. Despite this probability, the protocol requires that a medical examination be done on the child.

When an investigation conducted pursuant to this protocol results in criminal charges, there are two additional elements that impact how the county handles child sexual abuse cases. First, although an unwritten rule, it is understood by all involved that if the defendant demands a preliminary examination to determine if there is sufficient evidence to hold him on the charges and the child is required to testify, the defendant will not subsequently be offered a reduced charge as part of a plea bargain.¹⁹⁶ If the child is required to testify at the preliminary exam, the defendant must plea

¹⁹³ ST. MARY COUNTY, *supra* note 96, at 7.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 5.

¹⁹⁶ *See generally* MICH. COMP. LAWS § 766.1 (statutory provision requiring a preliminary examination. In early 2003 the Michigan legislature amended the law to permit “videorecorded statements” of investigative interviews in child sexual abuse cases to be admitted at a preliminary examination in lieu of the child’s actual corporeal testimony. At this time, it is not known how this change in the law may affect practice in the county.). *See* MICH. CT. R. 6.110 (outlining procedure for conducting preliminary examination).

as charged.¹⁹⁷ The rationale for this policy is that it typically prevents the child from having to testify more than once.¹⁹⁸

The second unwritten element of the county's handling of these cases involves a pre-sentence evaluation by a mental health professional with expertise in evaluating sex offenders.¹⁹⁹ The professional renders an opinion as to whether the defendant is a suitable candidate for the treatment program he runs.²⁰⁰ In St. Mary County, the evaluator's recommendation regarding treatability is generally given considerable weight at sentencing.²⁰¹ If the evaluator finds the defendant amenable to treatment, the defendant stands a much improved chance of receiving a relatively short jail sentence followed by a term of probation—which will include participation in the county's sex offender treatment program—rather than a longer prison sentence.

The effectiveness of St. Mary County's protocol for handling child sexual abuse cases has been the subject of considerable study.

IV. WHAT EMPIRICAL DATA TELL US ABOUT VIDEOTAPING IN ST. MARY COUNTY

In the mid-1990s, after it had been in place for nearly fifteen years, researchers began to study various aspects of St. Mary County's protocol. A study comparing St. Mary County's handling of child sexual abuse cases to two other counties was the subject of a 1994 Ph.D. dissertation by James Henry—now a Professor in the School of Social Work at Western Michigan University.²⁰² Various aspects of the protocol's operation have been the subject of articles published in peer-reviewed social science journals by Dr. Henry and a team of researchers from the University of Michigan School of Social Work headed by Dr. Kathleen Coulborn Faller.²⁰³ Although the

¹⁹⁷ During interviews with the author and other members of our research team, the county's prosecutors have insisted that this policy is inviolate. Interview with Evert Gans, Prosecuting Attorney, in St. Mary County (Feb. 6, 2003). Although defense attorneys, when interviewed, acknowledged that this was indeed the prosecutors' policy, they insisted that exceptions are made. Interview with Sam Huff, Defense Attorney, in St. Mary County (Feb. 27, 2003). See *infra* note 287 for an explanation of the citation format of the interviews.

¹⁹⁸ Interview with Evert Gans, Prosecuting Attorney, *supra* note 197.

¹⁹⁹ Interview with Nathan Quant, Mental Health Professional, in St. Mary County (June 3, 2003).

²⁰⁰ *Id.*

²⁰¹ Interview with Kevin O'Reilly, Circuit Court Judge, in St. Mary County (Mar. 10, 2003); Interview with Nathan Quant, Mental Health Professional, *supra* note 199.

²⁰² James A. Henry, Societal System Intervention Trauma to Child Sexual Abuse Victims Following Disclosure (1994) (unpublished Ph.D. dissertation, Michigan State University) (on file with author).

²⁰³ See Faller & Henry, *supra* note 19; Faller et al., *Can the Punishment Fit the Crime*,

results of these studies suggested that St. Mary County's approach to handling cases of suspected child sexual abuse increased the accountability of offenders while decreasing the trauma children experienced from their participation in the legal system, the researchers concluded that the numbers resulting from this empirical work told an incomplete story of St. Mary County's success. In an effort to better understand the protocol's history, applicability in practice, and reasons for success, this research team, under the leadership of Professor Karen Staller from the University of Michigan's School of Social Work, undertook a qualitative study of the county's protocol.²⁰⁴

This Section will summarize in detail the quantitative and qualitative evidence gathered through the study of the St. Mary County protocol. This information will be used for two purposes. First, it will form the basis of an argument that videotaping children's interviews in cases of suspected child sexual abuse when part of a broader protocol for investigating such cases meets the various needs of the St. Mary County community as delineated in the earlier discussion. Second, the information will be utilized to make a more general observation in the debate over whether investigative interviews with children in cases of suspected child sexual abuse should be videotaped. Before undertaking that examination, however, it will be helpful to review the literature that pre-dates the studies from St. Mary County.

A. DATA ON VIDEOTAPING PRE-DATING THE ST. MARY COUNTY STUDIES

As early as 1969, legal commentators began to advocate the use of videotaping as a means of taking children's testimony in sexual abuse-related litigation.²⁰⁵ The early proposals recommended that children's

supra note 19; Faller et al., *What Makes Sex Offenders Confess?*, *supra* note 19; Henry, *System Intervention Trauma*, *supra* note 19; Henry, *Videotaping Child Disclosure Interviews*, *supra* note 19.

²⁰⁴ As of this writing, our research team has viewed dozens of videotaped investigative interviews with children and videotaped polygraph examinations, gathered hundreds of pages of documents (including trial transcripts, historical documents, various versions of the county's CSA investigation protocol), conducted more than twenty-five interviews with various members of the community (including judges, prosecutors, defense attorneys, CPS workers and supervisors), observed two separate criminal sexual conduct trials, and made numerous visits to St. Mary County. St. Mary County's protocol for investigating cases of suspected child sexual abuse is therefore perhaps the most carefully studied protocol of its kind in the U.S. Lessons learned from these investigations may provide important guidance for the future development of similar investigative protocols and for determining the most effective use of videotaping.

²⁰⁵ David Libai, *The Protection of the Child Victim of a Sexual Offense in the Criminal*

testimony be videotaped and be presented in a child-friendly courtroom.²⁰⁶ In 1981, an early commentator proposed that investigative interviews be conducted by specially trained mental health professionals and be videotaped.²⁰⁷ By the early 1990s, the debate as to whether videotaping should be used—or even mandated—when interviewing children in cases of suspected child sexual abuse was robust.²⁰⁸ There was, however, limited empirical evidence that could be used to guide decision-making regarding the use of videotaping.²⁰⁹

The earliest reference the author has been able to locate in the legal literature that addresses the efficacy of videotaping in handling child sexual abuse cases is a 1984 article in the *American Bar Association Journal*.²¹⁰ This reference is a brief anecdotal report that provides no in-depth discussion on the use of videotaping interviews or its effectiveness. Three paragraphs of the five-paragraph article address the use of videotaping in handling “child abuse” cases, but it does not distinguish the various forms of maltreatment involved.²¹¹ According to the article, videotaping was used in seventy-five cases of suspected child abuse in 1983.²¹² The article cursorily states that “about sixty defendants pleaded guilty as soon as they saw the interviews.”²¹³

In 1989, the California legislature, in response to a report by the state’s Child Victim Witness Judicial Advisory Committee, established a

Justice System, 15 WAYNE L. REV. 977, 1002-03 (1969).

²⁰⁶ *Id.* at 1020 (proposing a “child-courtroom” which utilizes electronic equipment to protect child witnesses from face-to-face confrontation with alleged perpetrator).

²⁰⁷ Dustin P. Ordway, Note, *Parent-Child Incest: Proof at Trial Without Testimony in Court by the Victim*, 15 U. MICH. J.L. REFORM, 131, 139-40 (1981).

²⁰⁸ See, e.g., CAL. ATT’Y GEN.’S OFFICE, *supra* note 6, at 11 (describing various concerns that had been raised regarding children’s statements describing abuse); DZIECH & SCHUDSON, *supra* note 5, at 147-53. Compare Stern, *supra* note 9, at 278-84 (arguing against the videotaping of interviews with children), with Catherine Stephenson, *Videotaping and How It Works Well in San Diego*, 7 J. INTERPERSONAL VIOLENCE 284, 285-88 (1992) (describing San Diego’s program for videotaping interviews with children suspected of having been abused).

²⁰⁹ While professionals argued vigorously about whether to use videotape, those arguments were based upon legal rights and the individual experiences of the authors. The authors did not cite any research regarding the efficacy or impact of videotaping. See, e.g., Stephenson, *supra* note 208, at 285-88 (using an example to argue that videotaping can be useful); Stern, *supra* note 9, at 278-84 (arguing against the use of videotape but citing no empirical data to support his position).

²¹⁰ *Videotaping: Device for Fighting Child Abuse*, *supra* note 53, at 36.

²¹¹ *Id.* The remaining two paragraphs address the use of videotape in proving drunk driving cases.

²¹² *Id.*

²¹³ *Id.*

demonstration project to test the efficacy of "multidisciplinary interview centers."²¹⁴ While three pilot sites were established as part of the demonstration, the final report, which was published in June 1994, only includes results from the two sites that complied with the project's guidelines.²¹⁵ The Final Report of this demonstration project was published in June 1994. Among other issues, the pilot program evaluated the use of videotape during forensic interviews with children.²¹⁶ In doing so, it sought to answer a simple question: "Should investigative interviews of children be videotaped?"²¹⁷ To evaluate this question, the study employed a before-and-after comparison, which held constant all aspects of processing a case except the use of videotaping.²¹⁸ In Sacramento County, over 200 investigative interviews were studied: 102 interviews were conducted without the use of videotape while another 110 were videotaped.²¹⁹ In Orange County, 570 non-videotaped interviews were compared with 388 videotaped interviews.²²⁰ The project collected three sources of evaluative information: 1) a survey regarding the overall project; 2) case data forms which were completed for each case; and 3) a survey focused exclusively on the question of videotape use.²²¹ Each survey or data form employed a Likert scale²²² and was completed by professionals involved in the investigation of child sexual abuse.²²³ The videotaping-specific survey was administered to professionals at the beginning of the project and then again

²¹⁴ CAL. ATT'Y GEN.'S OFFICE, *supra* note 6, at 11.

²¹⁵ *Id.* at 11 n.1. The three original sites were Sacramento, Orange, and San Francisco Counties. *Id.* The final report includes only information from Sacramento and Orange Counties. *Id.*

²¹⁶ The final report delved into a number of topics that will not be addressed here. These include training of interviewers, the overall impact of multidisciplinary centers on the investigation cases of suspected child sexual abuse, implementation issues, and the use of a medical component within multidisciplinary centers. *Id.* at 19-22, 31-39, 81-87, 89-93.

²¹⁷ *Id.* at 57.

²¹⁸ *Id.* ("With the before and after model, all aspects of the investigation were held constant over time. The only variable to change was videotaping. The pilot project phase of the evaluation began by conducting a predetermined number of interviews (100) with videotaping. Then, when the non-videotape portion . . . was complete, an equal number of interviews were videotaped.").

²¹⁹ *Id.* at 58.

²²⁰ *Id.* at 58.

²²¹ *Id.* at 58-59.

²²² A Likert scale is "[a] measure of attitudes in which a participant responds to a series of statements on a continuum from 'strongly agree' to 'strongly disagree' (for example, strongly agree—agree—undecided—disagree—strongly disagree) that would form a five-point Likert scale." DICTIONARY OF PSYCHOLOGY 549 (Raymond J. Corsini ed., 1999); see also CAL. ATT'Y GEN.'S OFFICE, *supra* note 6, at app. F.

²²³ CAL. ATT'Y GEN.'S OFFICE, *supra* note 6, at 27.

at the end of the project.²²⁴ These instruments sought to gauge professionals' opinions on the videotaping of investigative interviews.

The findings were deemed positive by the professionals who participated in the study and by the project's Advisory Panel,²²⁵ which concluded:

The pilot projects provide clear support for videotaping interviews that occur at well run multidisciplinary interview centers. Moreover, most professionals involved in the pilots believe videotaping should be routine. In Sacramento and Orange counties, the specter of injustice that is feared by opponents of videotaping did not materialize. What emerged instead is a clear consensus that videotaping helps lower trauma for children and contributes to the search for truth.²²⁶

The study's authors, however, cited an important limitation of this study—that the survey information, while indicating support for videotaping, was based upon anecdotal evidence and “cannot prove to a certainty that the benefits of videotaping outweigh the drawbacks.”²²⁷

Therefore, while there had been a good deal of discussion of the issue by the mid-1990s, there was a paucity of quantitative or in-depth qualitative data addressing the videotaping debate.²²⁸ It was to fill this gap in knowledge that the researchers involved in the St. Mary County project undertook their work.

²²⁴ *Id.* at 59.

²²⁵ *Id.* at 69-70. Among the findings were the following: 1) when investigative interviews were supposed to be videotaped they were; 2) the use of videotaping “was well implemented in both pilot counties”; 3) professionals involved in the investigation of alleged child sexual abuse concluded that videotaping investigative interviews with suspected victims reduced the trauma those children experienced as a function of the investigative process; 4) most professionals concluded that videotaping “improves the investigative process”; 5) there was moderate support among the professionals surveyed to suggest that the use of videotaping in the investigative process saved professionals time; 6) at the conclusion of the pilot project, 83% of the professionals surveyed indicated that videotaping was helpful to their investigations, while only 30% suggested that videotaping had harmful effects; 7) 63% of the professionals surveyed endorsed the continued use of videotaping for all child sexual abuse investigations after the conclusion of the pilot, while 26% supported the selective use of videotaping during investigative interviews and only 5% opposed any further videotaping; and 8) among the professional groups involved in investigating cases of alleged child sexual abuse, deputy district attorneys were the strongest supporters of using videotape during investigative interviews. *Id.*

²²⁶ *Id.* at 79.

²²⁷ *Id.* at 70-71.

²²⁸ For instance, in her 2002 article, *Good Enough for Government Work*, Professor McGough notes: “The often-touted assumption that a videotape ‘increases guilty pleas’ has yet to be proved.” McGough, *supra* note 10, at 185 n.29.

B. DATA FROM ST. MARY COUNTY

Shortly after being awarded his Ph.D., Professor Henry began to publish articles examining the efficacy of St. Mary County's protocol in peer-reviewed social science journals.

1. *Intervention Trauma*

The first of these articles appeared in August 1997.²²⁹ That study involved ninety children and youth aged nine to nineteen.²³⁰ Thirty-one of the children studied had their case handled in St. Mary County.²³¹ Henry compared rates of trauma to children who participated in the legal system in St. Mary County with those of children in two comparison counties that did not utilize videotaping as an investigative tool after a disclosure of sexual abuse.

To assess the trauma children experienced from participating in legal proceedings that resulted from their disclosures, Henry administered three tests during semi-structured interviews.²³² The tests included the Trauma Symptom Checklist for Children, the Intervention Stressor Inventory, and Henry's self-designed "open-ended self-report."²³³

Among the study's findings were the following: 84% of those children studied indicated that disclosing the details of their sexual abuse was the hardest part of the intervention process; of the thirty-one St. Mary County children, 83% found that videotaping the initial interview was either helpful or had no effect upon them.²³⁴ Of the total ninety children studied, thirty had to testify in either criminal proceedings or civil child protective proceedings, or both.²³⁵ Analysis of the results demonstrated no statistically significant impact upon the children's experienced trauma from testifying in either criminal or civil proceedings.²³⁶ While 34% of the children who

²²⁹ Henry, *System Intervention Trauma*, *supra* note 19.

²³⁰ *Id.* at 502.

²³¹ *Id.* at 505.

²³² *Id.* at 503.

²³³ *Id.* The self-report included seventy-one questions. Approximately half of the questions provided the child research subject three possible responses: that the question's subject 1) was experienced as harmful; 2) had no effect; or 3) was perceived by the child as helpful. After selecting one of these three options, each child was asked to provide an open-ended explanation for his or her answer. The remainder of the questions captured demographic data (age, gender, race, county of residence, present placement, sex of perpetrator, and perpetrator's relationship to the child). See Henry, *Videotaping Child Disclosure Interviews*, *supra* note 19, at 48-50.

²³⁴ Henry, *System Intervention Trauma*, *supra* note 19 at 505.

²³⁵ *Id.*

²³⁶ *Id.*

testified indicated during the self-report that it was a harmful experience, nearly half (48%) defined the experience as helpful, and 59% believed the experience helped them to build trust in the professionals with whom they worked.²³⁷ Moreover, Henry reported, “[t]estifying was a stressful experience for many of the children. The majority, when asked how testifying affected them, indicated they were either scared or felt as though they were on trial.”²³⁸ For more than 60% of the children, testifying would have been easier had the defendant not been present in the courtroom.²³⁹

The number of interviews, Henry concluded, was “significantly related to elevated trauma” as evidenced by responses to the Trauma Symptom Checklist, and “was the strongest predictor of trauma score of any of the independent variables” studied.²⁴⁰ Repeated investigative interviews were clearly traumatic for these children. “Demanding that children continually repeat their abuse stories,” Henry wrote, “connects children with painful memories and may reinforce the internalization of guilt and shame experienced in sexual abuse.”²⁴¹ The use of videotape during the initial investigative interview substantially reduced the number of times a child was required to tell his or her abuse story, although it did not wholly eliminate repetitive interviewing.

2. Videotaping

In his next study, Henry focused on the videotaping component of the investigative protocol.²⁴² Extrapolating data from the broader study of ninety children discussed above, and using the same three instruments, the Trauma Symptom Checklist, the Intervention Stressor Inventory and his self-designed survey, Henry looked specifically at children’s experiences of having their initial forensic interview videotaped. He made several notable findings.

First, children whose cases were handled in St. Mary County “were more likely to experience fewer interviews”²⁴³ Specifically, while 41% (twelve of twenty-nine) of St. Mary County children experienced more

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.* In *People v. Kruger*, 643 N.W.2d 223 (Mich. 2002), the Michigan Supreme Court held that excluding a criminal defendant from the courtroom during the testimony of the minor complaining witness violated his statutory right to be present during his trial. In doing so, the court avoided addressing the question of whether such action violated the defendant’s Sixth Amendment right to confront the witnesses against him.

²⁴⁰ Henry, *System Intervention Trauma*, *supra* note 19, at 508.

²⁴¹ *Id.*

²⁴² Henry, *Videotaping Child Disclosure Interviews*, *supra* note 19.

²⁴³ *Id.* at 42.

than one investigative interview, 90% of the children in comparison counties experienced more than one interview.²⁴⁴ Thus, only six of sixty-one children in the counties that did not utilize videotaping reported a single investigative interview.²⁴⁵ In the two comparison counties, 61% of the children reported three or more investigative interviews whereas in St. Mary County, that number of interviews was reported by only 35% of the children.²⁴⁶

Notably, Henry found that videotaping suspect interrogations correlated with an increase in guilty pleas.²⁴⁷ in 79% of the cases in which the defendant's interrogation was videotaped, he plead guilty whereas when the interrogations were not videotaped, the defendant plead guilty only 44% of the time.²⁴⁸

Henry supplemented his empirical findings with interviews of St. Mary County officials.²⁴⁹ He summarized: "The findings indicate that when videotaping occurred there was a likelihood of reduced interviews for children, less likelihood that children were required to testify, an increase in perpetrators pleading, and minimization of system stress to children. In addition, most children videotaped found the experience either helpful or benign."²⁵⁰ In arriving at these conclusions, however, Henry was careful to emphasize that the influence of the videotaping component of the protocol cannot be separated from the protocol's other elements.²⁵¹

3. Community Collaboration

In 2000, Henry joined his colleague Kathleen Coulborn Faller to co-author a third article analyzing data from St. Mary County.²⁵² In that article, Faller and Henry sought to "outline one community's protocol for case management and provide findings related to their handling of sexual abuse cases."²⁵³ The authors provided a detailed description of the results of their analysis of 323 cases handled between 1988 and 1998.²⁵⁴ Their study resulted in the following findings:

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.* at 44-47.

²⁵⁰ *Id.* at 47-48.

²⁵¹ *Id.* at 48.

²⁵² Faller & Henry, *supra* note 19.

²⁵³ *Id.* at 1216.

²⁵⁴ *Id.* at 1217.

- Charging decisions:
 - In 69% of child sexual abuse cases referred to the prosecutor's office, criminal charges were filed; the primary reason for not charging was that the suspect passed the polygraph.²⁵⁵
 - In 73.1% of cases (236), the child's disclosure interview was videotaped.²⁵⁶ In cases in which CPS was involved, 84.8% of cases were captured on videotape; whereas when only law enforcement was involved, 56.8% were videotaped.²⁵⁷
 - The average age of the children whose interviews were videotaped was 11.4 years, while the average age of those children whose interviews were not videotaped was 12.4 years.²⁵⁸
 - In 4.6% of cases (15), the children who disclosed sexual abuse had previously denied that abuse, and in 6.5% of cases the children recanted the allegations at some point.²⁵⁹
 - In 60.1% of cases (194), the suspect was offered a polygraph; 62.4% of suspects (121) offered a polygraph actually received one; and 80.1% of those polygraphs (97) were videotaped.²⁶⁰
 - Of those suspects who received polygraphs, in 62.5% of the cases (75 cases), the examiner deemed the suspect deceptive; in 18.3% of cases (22), the examiner found no deception; in 6.7% of cases (8), the examiner was unable to form an opinion.²⁶¹ Eleven suspects confessed during the polygraph (9.2%).²⁶²
- Confessions:
 - 64% of the suspects (206) confessed to some act of child sexual abuse during the investigation. Of these cases, in 95.6% (197) the researchers could determine the extent to which the suspect's confession corroborated or did not corroborate the child's reported victimization: in 97 cases the suspect's

²⁵⁵ *Id.* at 1221.

²⁵⁶ *Id.* at 1219.

²⁵⁷ *Id.*

²⁵⁸ *Id.* This finding is particularly important because it suggests that the younger, more suggestible children were videotaped. This point will be discussed in more detail later in this article.

²⁵⁹ *Id.*

²⁶⁰ *Id.* at 1220.

²⁶¹ *Id.*

²⁶² *Id.*

confession corroborated the child's report completely, while in 100 cases the suspect's confession provided a partial corroboration of the child's report.²⁶³

- There were confessions in 69% of the cases (60) in which the child's interview was not videotaped.²⁶⁴
- In 37.9% of cases in which a confession was obtained (76), the suspect confessed during the initial interrogation and viewing of the child's videotaped interview.²⁶⁵
- Pleas:
 - In 69.7% of cases (225), the suspect pleaded guilty to a sexual offense; the authors note that "[a]mong cases with no plea were 20 in which the suspect pleaded to a sex crime in another case, resulting in 76% of the cases with a plea."²⁶⁶
- Videotaping:
 - In 70.4% of cases (159), the child's disclosure was videotaped, and there was a guilty plea; where there was no videotape, the defendant pleaded guilty in 77% of cases (66).²⁶⁷
 - Children testified 26 times: 11 times at the preliminary hearing, eleven times at trial, and 4 times at both.²⁶⁸
 - In fifteen cases, the defendant asserted his right to a trial, and in only six of those cases was the defendant found guilty.²⁶⁹
 - In the 233 cases in which a sentence was imposed, 2.4% of defendants (8) received only probation; 37.7% (122) received some jail time with or without probation; 29.1% (91) received a prison sentence.²⁷⁰

One important limitation in this study is that the researchers could not analyze each of the seventeen elements of the protocol.²⁷¹ They conclude, however, that their findings suggest that communities can work

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.* In such circumstances, the suspect is not offered a polygraph during the investigation, although he retains his statutory right to demand a polygraph. MICH. COMP. LAWS § 776.21 (2006).

²⁶⁶ Faller & Henry, *supra* note 19, at 1220.

²⁶⁷ *Id.* at 1220.

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *Id.* at 1221.

²⁷¹ *Id.* at 1222.

collaboratively to address the needs of children who are alleged to have been sexually abused.²⁷²

4. Confessions

The research team, which expanded after the publication of the 2000 article,²⁷³ next examined these same 323 cases to consider what factors related to suspect confession.²⁷⁴ These include characteristics of the suspect and the child-victim, the type of abuse (penetrating offense versus non-penetrating offense), and the methods and personnel used to investigate the case.²⁷⁵ Because there were only five cases in which the suspect was female, these cases were removed from the study, leaving 318.²⁷⁶ Additionally, because some of the suspects were alleged to have assaulted more than one child, the study examined only 301 individuals.²⁷⁷ The more notable findings:

- Suspect income data was incomplete, including in the fifteen cases in which the suspect was a juvenile. Income data was available in only 197 cases. Of those 197, 160 of the suspects had annual incomes at or below \$20,000.²⁷⁸
- Suspects with lower socioeconomic status or who worked in unskilled employment were the most likely to confess; professionals and those who received job-related benefits were also more likely than not to confess; suspects designated as “skilled” were the least likely to confess.²⁷⁹
- Younger suspects confessed more often than older suspects. The mean age of those who confessed was thirty-one years, while the mean age of those who did not was thirty-six years.²⁸⁰
- No child demographic factors were associated with a higher likelihood of confession. Confession was not related to the proximity of relationship between the child and the suspect; it did not matter

²⁷² *Id.* at 1223.

²⁷³ The expanded team included team methodologist William C. Birdsall, an economist and Emeritus Professor at the University of Michigan School of Social Work, and this author.

²⁷⁴ Faller et al., *What Makes Sex Offenders Confess?*, *supra* note 19.

²⁷⁵ *Id.* at 33-34.

²⁷⁶ *Id.* at 34-35.

²⁷⁷ *Id.* at 35.

²⁷⁸ *Id.*

²⁷⁹ *Id.* at 39.

²⁸⁰ *Id.*

whether the suspect was a parental figure, other relative, or unrelated.²⁸¹

- When the child victim's investigative interview was videotaped and the state police rather than a local law enforcement agency investigated the case, the suspect confessed to some act of sexual abuse 80% of the time. By comparison, the suspect confessed in 63.2% of cases where videotaping was used in an investigation conducted by the sheriff's department or a local law enforcement agency.²⁸²

- 21% of suspects (67) were able to retain counsel, while 69% of suspects (222) were represented by court-appointed counsel.²⁸³ When the defendant was represented by court-appointed counsel, he confessed 69.8% of the time, whereas only 44.8% of suspects represented by retained counsel confessed.²⁸⁴ In 76% of the cases in which the defendant had court-appointed counsel, an alleged offense involved sexual penetration, whereas penetration was alleged in only 45.3% of the cases in which an attorney was retained. Thus, court-appointed counsel were more likely than retained counsel to represent defendants alleged to have committed more serious crimes.²⁸⁵

- Research on St. Mary County's handling of child sexual abuse cases is ongoing, including both quantitative and qualitative study.

IV. DATA FROM THE QUALITATIVE STUDY OF ST. MARY COUNTY'S PROTOCOL

Through the qualitative study of St. Mary County's protocol,²⁸⁶ our research team has learned a great deal about how this particular prosecutor's office defined its priorities, how it brought other community agencies and persons into its decision-making, and how it developed an

²⁸¹ *Id.*

²⁸² *Id.* at 43.

²⁸³ *Id.* There was no data on whether counsel was appointed or retained in twenty-nine cases. *Id.*

²⁸⁴ *Id.* Because confession took place during the investigation and before arrest, having court-appointed counsel could not have caused confession.

²⁸⁵ *Id.* at 44.

²⁸⁶ The members of the team have reviewed various documents, observed trials in child sexual abuse cases, and interviewed numerous community members. These interviews have included prosecutors, defense attorneys, law enforcement officers, judges, CPS and foster care workers, prevention specialists, victim-witness assistance personnel, mental health professionals who provide assessment and treatment for both perpetrators and victims, and other interested members of the community.

approach to cases of child sexual abuse over a twenty-year period.²⁸⁷ With this information in hand, we have gathered and analyzed enough data to assess whether and how videotaping of children's investigative interviews meets the needs of the St. Mary County community when utilized as one element of the county's broader investigative protocol for child sexual abuse cases.

This Section will summarize the findings of the qualitative study in an effort to understand how it meets the community's needs. In doing so, it will consider the seven community interests set out in Section II.

A. DEFINING AND ENFORCING NORMATIVE BEHAVIOR

The enactment of criminal statutes represents a broad effort on the part of communities—as large as the United States or as circumscribed as small towns—to define for their constituent members what constitutes unacceptable behavior. Every criminal code contains a welter of statutes seeking to proscribe and punish certain offensive behavior.²⁸⁸ For example, the prosecutor's office in St. Mary County is responsible for enforcing hundreds of criminal statutes.²⁸⁹

Prosecutors have broad discretion to determine which among numerous statutes they will enforce and how aggressively they will pursue a particular case or category of cases.²⁹⁰ Those decisions will depend on

²⁸⁷ Due to the University of Michigan's Institutional Review Board requirements, when a particular interview is referenced, its subject will be identified by a pseudonym and by his or her professional role, the place where the interview was conducted, and the date on which the interview was conducted. The county under study is also referred to here by a pseudonym. A word about method is in order: consistent with the ethical principals of qualitative research, interviews with community stakeholders were audiotaped. Each audiotape was then transcribed, and a copy of the transcription was sent to the interviewee for final editing. A deadline for returning the edited version of the transcription was set which provided ample time for the interviewee to review the transcript and make any corrections she thought appropriate, including the authority to excise information if she so desired. The edited version of the transcript is considered the final version of the interview. If an edited version of the transcript was not returned, the transcript was considered final. A copy of each final transcript is on file with the author. All quotations used in this article come from the final versions of the transcripts. Quoted passages have been edited for clarity with every effort having been made to preserve the integrity of the interviewee's statements.

²⁸⁸ See Steven Breyer, *Federal Sentencing Guidelines Revisited*, 14 CRIM. JUST. 28, 29 (1999) (noting that there are some seven hundred federal criminal statutes); Kate Stith & William Stuntz, *Sense and Sentencing*, N.Y. TIMES, June 29, 2004, at A27 ("The federal criminal code covers an enormous array of crimes. All those statutes, together with the complex web of sentencing guidelines that apply to them, amount to a long and elaborate menu of charging options for prosecutors.").

²⁸⁹ See generally MICH. COMP. LAWS §§ 750.1-750.568 (2006).

²⁹⁰ See generally *Town of Newton v. Rumery*, 480 U.S. 386, 396 (1987) ("In recent

many factors, including the nature of the crime, the harm caused by the alleged wrongdoing, the quantity and quality of law enforcement resources, the available prosecution resources, the quality of a given investigation, and pre-determined prosecutorial priorities, which may reflect the concerns of individual prosecuting attorneys and communities.²⁹¹

Twenty years ago, the St. Mary County authorities saw a dramatic increase in the number of cases of child sexual abuse. A prosecutor observed: “[T]he real explosion in child sexual abuse in St. Mary County—and the country—was sometime in the early 1980s. Not that we didn’t have cases before that, but we had no idea that the problem was that prevalent. We had to react to them.”²⁹² St. Mary County’s experience was indeed consistent with the experience of much of the country as child sexual abuse emerged as a socially recognized phenomenon and prosecutors focused attention on it as a criminal violation.²⁹³ A prosecutor noted, “[Q]uite often the child sexual abuse cases were within the family unit.”²⁹⁴ At that time, many prosecutors struggled with the appropriate response to cases of intrafamilial child sexual abuse.²⁹⁵ In those early years, many exercised their discretion to handle such cases exclusively or typically as civil matters in the juvenile or family court where the aim of legal action is protection of the child’s well-being rather than identification and punishment of the alleged perpetrator.²⁹⁶ St. Mary County took a somewhat different tactic, focusing on criminal prosecution as an integral part of the community’s

years the court has considered a number of claims that prosecutors have acted improperly. Our decisions in those cases have recognized that courts normally must defer to prosecutorial decisions as to whom to prosecute. The reasons for judicial deference are well known. Prosecutorial charging decisions are rarely simple. In addition to assessing the strength and importance of a case, prosecutors must also consider other tangible and intangible factors, such as government enforcement priorities. Finally, they also must decide how best to allocate the scarce resources of a criminal justice system that simply cannot accommodate the litigation of every serious criminal charge.”) (citations omitted).

²⁹¹ See generally Thompson, *supra* note 14 and accompanying text (discussing the role of the community in setting prosecutorial priorities).

²⁹² Interview with Charles Davis, former Prosecuting Attorney, in Wayne County (Mar. 6, 2003).

²⁹³ Myers, *supra* note 173, at 221 (noting an increase in young children testifying in court in the early 1980s as prosecutors more frequently prosecuted sexual abuse as a crime); Morgan, *supra* note 4, at 50 (noting a 400% increase in reports of child sexual abuse in a single Georgia county between 1976 and 1983).

²⁹⁴ Interview with Charles Davis, former Prosecuting Attorney, *supra* note 292.

²⁹⁵ Ginkowski, *supra* note 17, at 31.

²⁹⁶ See *People v. Gates*, 452 N.W.2d 627, 632-34 (Mich. 1990) (discussing the distinction between child protective proceedings and criminal prosecution under Michigan law).

official response to disclosures of child sexual abuse.²⁹⁷ But focusing resources on child sexual abuse was not easy. A prosecutor describes his challenge in convincing law enforcement officers of the need to focus on child sexual abuse:

It would always kill me that [the police] will find a quarter ounce of pot in someone's car and they'll get all salivating and they want to get a search warrant for their house and want to do this drug investigation. Someone comes in on a CSC [criminal sexual conduct] investigation on a small child and they'll run out the back door.²⁹⁸

In 1984, responding to the increasing number of cases of alleged sexual abuse, St. Mary County's CPS agency "began to look at a community effort to educate about sexual abuse."²⁹⁹ Not long after, the office received a referral regarding a case that involved a young, mentally retarded girl alleging sexual abuse.³⁰⁰ At the behest of the prosecuting attorney, the CPS worker's interview with the girl was videotaped.³⁰¹ That videotaped interview proved a catalyst. A former CPS worker explained: "[T]he girl was so limited, the tape was so convincing, [the prosecutor] was very excited about doing more."³⁰²

The prosecutor supported CPS efforts to videotape its interviews with children, and soon discovered that these videotapes were invaluable to law enforcement in their effort to investigate these cases as alleged crimes.³⁰³ A number of interview subjects relayed that law enforcement officers immediately began to see positive results from videotaping.³⁰⁴ In the first three cases in which the child's interview with CPS was videotaped, the videotape was shown to the alleged perpetrator by the investigating police officers.³⁰⁵ Each suspect confessed.³⁰⁶

Prosecutorial leadership was vital in establishing the protocol.³⁰⁷ A former CPS worker described how the use of videotaping in several cases proved very helpful. He explained that the prosecutor "said, 'We've gotta get this going. We have to, in a sense, institutionalize this because it is

²⁹⁷ Interview with Charles Davis, former Prosecuting Attorney, *supra* note 292.

²⁹⁸ Interview with Kravis Navarre, Prosecuting Attorney, in St. Mary County (Dec. 12, 2002).

²⁹⁹ Interview with Kenneth Isley, former CPS Worker, in Washtenaw County (June 9, 2003).

³⁰⁰ *Id.*

³⁰¹ *Id.*

³⁰² *Id.*

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ *Id.*

³⁰⁶ *Id.*

³⁰⁷ *Id.*

working.' . . . And so he decided that he was going to put together this protocol formally."³⁰⁸ While others in the community supported the establishment of the protocol, the prosecutor's office lead the reform effort.³⁰⁹

For the past two decades the St. Mary County community has focused considerable public resources on the problem of child sexual abuse. A prosecuting attorney described his office's commitment to these cases:

I think if there's anything that's the hallmark of the way we do things, it is commitment to the child. It certainly isn't a commitment to a won-loss percentage. We take cases that a lot of other prosecutors' offices would never touch. And that commitment to the child means that you sometimes take cases you believe in—of course, you wouldn't ever take a case you don't believe in—but you also believe you are probably going to lose. And sometimes you take those cases as far as you can, and somewhere short of trial, give up. . . . [A]ccording to the criteria that many prosecutors' offices set for themselves in general, that's not excellence. . . .³¹⁰

Among the resources this community has dedicated to addressing child sexual abuse are educational programs aimed at prevention, law enforcement resources aimed at responding to alleged sexual misconduct involving children, social service resources such as CPS, and community mental health services to provide treatment to both the victims and the perpetrators. In doing so, this community has defined for itself a normative standard that children will be free from sexual predation at the hands of adults, and that adults who sexually abuse children will be vigorously prosecuted.

Before the protocol was implemented in St. Mary County, each agency conducted a separate interview with the child. As a former law enforcement officer explained:

[T]he child had been interviewed by social services [and they wouldn't tape it, or at least wouldn't videotape it, and then law enforcement would have to interview and than maybe the assistant prosecutor or the prosecutor so you could figure out what the child was saying or how they were going to act when they got on the stand. All of a sudden we're hurting these kids because they had to go over this three or four or five times; every time with a stranger.³¹¹

It was precisely this type of repetitive interviewing and uncoordinated investigation that the prosecutor sought to address by implementing the St. Mary County protocol.³¹²

³⁰⁸ *Id.*

³⁰⁹ *Id.*

³¹⁰ Interview with Evert Gans, Prosecuting Attorney, *supra* note 197.

³¹¹ Interview with Chance Kotter, former Police Officer, in St. Mary County (Mar. 9, 2003).

³¹² Interview with Charles Davis, former Prosecuting Attorney, *supra* note 292.

Since the leadership of St. Mary County has defined child sexual abuse cases as a priority, professionals within the community have had to work closely together to eliminate turf wars regarding which agency is responsible for what activities. For example, under Michigan's Child Protection Law, CPS is only legally responsible for handling cases of suspected child abuse perpetrated by those adults who are legally responsible for the child or who live in the child's home.³¹³ Because sexual abuse cases were deemed a priority in the county, however, CPS permitted its caseworkers to work with law enforcement on cases that were outside the statutory purview of the agency.³¹⁴

The investigative protocol, and particularly the videotaping of child interviews component, has survived several changes in prosecutorial leadership. Each prosecutor has had a very different personality and leadership style—some intense, others more easy going.³¹⁵ Regardless of the personality of the county's chief law enforcement officer, they remained focused on doing the work effectively. As one former state police officer explained when asked whether the protocol has ever failed to be helpful in his investigative work:

Never . . . [T]he guidelines worked fine for me. I like the guidelines. . . . I feel comfortable with guidelines, as I think most people do. This is what I'm permitted [to do] and this is what I can't do. And because people . . . knew what they were doing when they made these guidelines, they weren't just spurious things The guidelines . . . were for us, to make us winners, to make us succeed The guidelines were functional and would make our job easier.³¹⁶

The existence of the protocol has permitted law enforcement personnel from various agencies as well CPS workers to remain focused and consistent in their response to sexual abuse. This exemplifies the sort of leadership that addresses the broader community's interests in responding to child sexual abuse.

The prioritization of sexual abuse cases involving children is also exemplified by the prosecutor taking a leadership role in establishing community based treatment programs for non-violent sex offenders. One

³¹³ See generally MICH. COMP. LAWS §§ 722.621-722.638 (2006) (civil Child Protection Law outlining duties of CPS).

³¹⁴ Interview with Kenneth Isley, former CPS Worker, *supra* note 299.

³¹⁵ Interview with Kravis Navarre, Prosecuting Attorney, *supra* note 298. Navarre related that the prosecutor who preceded him "actually wrote the first protocol and then I tweaked it a little bit over the years" *Id.* The prosecutor who wrote the first protocol was described to us as a "take charge kind of guy," Interview with Kenneth Isley, former CPS Worker, *supra* note 299, who "ran the office like a Marine Corps . . . and he just was no nonsense." Interview with Kevin O'Reilly, Circuit Court Judge, *supra* note 201.

³¹⁶ Interview with Chance Kotter, former Police Officer, *supra* note 311.

prosecutor describes his efforts in the late 1980s to secure state department of corrections approval to use community corrections funds to pay for the county's community based sex offender treatment program:

What we wanted to do was pay for our sex offender treatment program. So that's what we did. We set up a program where we would do evaluations of all of our sex offenders—and then if they went to prison there was no treatment—but if there was some feeling we could keep them locally and put them in treatment, we would put them into the treatment program. So we started doing this and . . . being successful and [the State Community Corrections Board] said, "You can't use the money for violent offenders; these are violent offenders and this [money] is for non-violent offenders." . . . So I went to the State Board meeting and said, "We want to use this [money] for this purpose. We're not diverting violent offenders from prison, and the purpose is to weed out the violent ones from the non-violent and the ones who are appropriate for treatment we are going to put into treatment. . . ." Later on . . . [the State Community Corrections Board] decided it was diverting people from prison and [it] held us out as a model for other counties to use the money for sex offender treatment.³¹⁷

Such advocacy serves the needs of the community both by protecting it from violent and repeat sex offenders and by demonstrating responsible stewardship over public funds.

St. Mary County's leadership consistently expressed concern about the broader community, and reaffirmed that they were taking efforts to respond to its needs. As one judge of the circuit court, the court of general jurisdiction, explained,

Everybody throughout the system cares about the community. . . . It's not about us, it's about them. I exist for them, not they for me. And so when people say, "your . . . courtroom judge," I say, "No, it's not my courtroom. It's your courtroom. I just work [here]."³¹⁸

One treatment provider described efforts undertaken to keep the broader community informed of the leadership's focus on child sexual abuse:

[The prosecutor] will present at the Elks [Club] or the Moose [Club] or have me go and present to increase community awareness of what's going on. I go to Glen Oaks [Community College] and present in their psychology classes, talking about CSC offenders and treatment. I think awareness in this community has really helped.³¹⁹

Such acts of public engagement also provide the opportunity for the leaders to receive feedback from the community.

An aspect of this focus is the prosecutor's office's ability to carefully review each case and to discriminate between various scenarios within the universe of child sexual abuse cases. Due to the variability in charging

³¹⁷ Interview with Kravis Navarre, Prosecuting Attorney, *supra* note 298.

³¹⁸ Interview with Kevin O'Reilly, Circuit Court Judge, *supra* note 201.

³¹⁹ Interview with Nathan Quant, Mental Health Professional, *supra* note 199.

options under Michigan's statutory scheme,³²⁰ and the infinite factual variations, a former prosecutor explained, "The cases need particular attention."³²¹ He then illustrated this point by describing some of the difficult cases he has had to address:

I've got two boys, they graduated [from high school] in the year 2000. Both were in special ed. One is a little farther ahead than the other. One kid has a driver's license. Both boys had worked at Burger King or that sort of thing. They were able to function in society, so they are not incompetent, but they are low functioning kids. One boy was having intercourse with his nine-year-old niece. The other boy was doing cunnilingus and other stuff with a nine-year-old. The cases weren't related, they were just very similar. I said, "What the hell are we going to do with these guys?" They both confessed, one to the police and one to the polygraph operator.

So we'll take the first guy. . . . He was living with his aunt because he wasn't getting along with his parents. He was in jail, scared. So we agree to put him in a treatment program . . . for mentally retarded sex offenders. He plead guilty to assault with intent to commit penetration, which is a ten-year felony offense. And we put him in our program. We put him in jail for a year, he went to our local treatment program then he'll be on probation to follow up with that. Now, intercourse with a nine-year-old is pretty bad stuff. But was the answer to give the guy ten years in prison? . . . The other one, same thing. The boy ultimately plead to assault with intent to commit penetration. We did a psychological evaluation. He went to jail also.³²²

He described another set of difficult cases. Under Michigan's statutory scheme, if a seventeen-year-old boy³²³ has sexual intercourse with his fifteen-year-old girlfriend, he is guilty of third degree CSC, a felony punishable by up to fifteen years in prison.³²⁴ One prosecutor describes this subcategory of cases as "hard ones."³²⁵ He continues:

A lot of these are eighteen-year-old Bobby is going with fifteen-year-old Suzie, and Suzie's mom finds out they are having sex and there's a complaint. . . . [T]here's an age range, you know, if the guy is twenty-seven and the girl is fourteen, you've got

³²⁰ Michigan's criminal sexual conduct statute establishes four degrees of CSC. These range from the most serious, CSC in the first degree (penetration with an aggravating circumstance such as a victim under age thirteen or by use of force), to the least serious, fourth degree CSC (touching various portions of the victim's body for the purpose of sexual gratification in the absence of aggravating factors), which is a misdemeanor. See MICH. COMP. LAWS §§ 750.520b-3 (2006).

³²¹ Interview with Kravis Navarre, Prosecuting Attorney, *supra* note 298.

³²² *Id.*

³²³ Under Michigan law, all seventeen-year-olds are considered adults for criminal law purposes, and the family court lacks jurisdiction over these youth. See MICH. COMP. LAWS § 712a.2 (2006).

³²⁴ See MICH. COMP. LAWS § 750.520d.

³²⁵ Interview with Kravis Navarre, Prosecuting Attorney, *supra* note 298.

more of a problem than a seventeen-year old boy and a fifteen-year-old girl. The girl may be more mature than the boy.³²⁶

In such cases, the boys have been allowed to plead to misdemeanor offenses of CSC fourth degree and utilize the community-based Probation Center. The prosecutor explains his rationale: "So often the boys need to finish high school, they need to get a job, they need to start to pay child support, they need to go to our sex offender treatment program."³²⁷

This same prosecutor distinguishes between cases in which the focus is rehabilitation and those which merit a more aggressively punitive and incapacitating prosecutorial approach. By way of example, he explained: "We had a man who was having intercourse with his daughter. [T]here may be a line in the sand, and that is it. Someone who is having intercourse with his biological daughter goes to prison. I don't care what treatment he's been through."³²⁸ As these examples illustrate, the protocol aides the St. Mary County community to define normative behavior for its members and to ascribe relative punishments for the violation of those norms. It also provides an efficient means to identify sexually offensive behavior.

B. SEX OFFENDING BEHAVIOR IS IDENTIFIED

In 2002, the St. Mary County Prosecutor's Office processed 1200 requests for felony warrants, 48 of which involved criminal sexual conduct.³²⁹ Those 1200 applications resulted in 300 cases in which a defendant either plead or was found guilty of a crime. Of that 300, 34—more than 10% of that year's convictions—involved CSC charges.³³⁰ By comparison, a prosecutor discussed the possible extrapolation from St. Mary County, with a population of approximately sixty thousand inhabitants, to Wayne County, Michigan, which encompasses the City of Detroit and some of its suburbs, and has a population of approximately two million people. He indicated that several years earlier he had spoken with the prosecutor in charge of the child abuse unit in Wayne County. That year, St. Mary County handled 40 cases of child sexual abuse whereas Wayne County handled 240 such cases. Thus, according to the prosecutor, the state's most populous county, with thirty-three times the population of St. Mary County, handled only six times as many CSC cases involving child victims.³³¹

³²⁶ *Id.*

³²⁷ *Id.*

³²⁸ *Id.*

³²⁹ *Id.*

³³⁰ *Id.*

³³¹ *Id.*

These numbers reflect St. Mary County's long-standing efforts to identify cases of child sexual abuse through child sexual abuse prevention efforts. A CPS supervisor described that in general terms the protocol has two aims: "[O]ne was an educational piece . . . the other was trying to successfully prosecute without chewing up kids . . ." ³³² She continued:

The educational piece really went out first . . . [W]e searched around where we could find other people doing sexual abuse prevention education in the schools. What were they doing? And we found . . . a few different things. And so we sort of came up with our own program and then we sent a teacher to go out to kindergarten [and] third grades. Those were our target ages. . . . [A]nd within two or three years, we had all the schools. . . . [I]t was about good touches and bad touches, and so while the kids were being educated they started to talk. And we found out that there was [sic] even more problems in the community than those statistics led us to believe. ³³³

Concentrated efforts to identify cases are essential for any community that is serious about responding to the sexual abuse of children because these cases are largely hidden.

Focusing St. Mary County's limited resources on the problem of child sexual abuse reduces, but does not eliminate, the practical proof problems that these cases present, which renders successful prosecution an ongoing struggle. One former prosecutor, who had been elected to the bench at the time of our study, related, as an example of the difficulty in prosecuting child sexual abuse cases, the following story: a ten-year-old boy spent a day with a friend of his family's on the friend's farm. When the boy returned home, his mother observed her son emerge from the man's truck and sensed almost immediately that something was wrong with the boy. She spoke to him, asking what the matter was. Within a few minutes the boy disclosed to his mother that the farmer had molested him. The former prosecutor continued, "I got a good case. First of all, I don't have the problem of an untimely report. Second, there's no problem about identification because the mother saw the man, knew the man. And third, the child's demeanor reinforced his veracity." ³³⁴ Despite the perception that the case was strong, the jury acquitted the defendant. ³³⁵

A former prosecutor related a similarly difficult case that began when the victim was a minor, but continued until she was a young adult after a hiatus of several years:

There's a guy named Earl Collins. He sexually abused his little niece, Effie. Effie is retarded. I met Effie when she was twelve. Earl went to prison; he got convicted of

³³² Interview with Darla Elders, CPS Supervisor, in St. Mary County (Feb. 17, 2003).

³³³ *Id.*

³³⁴ Interview with Kevin O'Reilly, Circuit Court Judge, *supra* note 201.

³³⁵ *Id.*

CSC II. Now Effie is twenty, Earl is still doing stuff to her. He went to prison, came back, the family is all together and he is staying with her mom. So, I had Effie come in. I said, "Effie, remember me?" I hadn't seen her in eight years. "Can you tell us what happened?" She wasn't going to do it. So we let him plead to CSC IV and the judge gave him a year in jail.³³⁶

In a third example, a child disclosed sexual abuse, including cunnilingus and penile penetration, during the investigative interview which was being videotaped. The case went to trial, and the prosecutor, as is the county's typical practice, reviewed the videotape with the child to prepare her to testify. He explained:

[T]hat morning just before we went upstairs, I played the most important part of the videotape . . . I said, "That's what he did?" and she said, "Yes." So we go upstairs in the courtroom and she wouldn't say it. She got out the cunnilingus, that he licked her vagina . . . but she wouldn't say he put his penis in there . . .³³⁷

In this particular case there was medical evidence of penetration, and the examining physician was prepared to testify that the child suffered vaginal tears and abrasions that were consistent with sexual abuse.³³⁸ Since the prosecutor was unable, through the child's testimony, to prove the corpus of the penile penetration, the court barred him from introducing the medical evidence.³³⁹ This case graphically illustrates the difficulty of proving even very high probability cases of child sexual abuse when the proof rests on the shoulders of a young child.

C. MINIMIZE THE POSSIBILITY OF WRONGFUL ACCUSATION, FALSE CONFESSION, AND WRONGFUL CONVICTION

St. Mary County's legal system values a careful adherence to the law in the investigation of criminal sexual conduct cases. Each step in the protocol is designed, at least in part, to minimize the possibility of wrongful accusation, false confession and wrongful conviction. One of St. Mary County's leading defense attorneys reported: "Our prosecutors are very cognizant of a defendant's rights and will usually bend over backwards to make sure they're protected."³⁴⁰ This same attorney observes, "Quite frankly, [in] my experience with St. Mary County . . . they've been very good. They don't have any intention of prosecuting innocent people."³⁴¹

³³⁶ Interview with Kravis Navarre, Prosecuting Attorney, *supra* note 298. The names of the principals have been changed.

³³⁷ *Id.*

³³⁸ *Id.*

³³⁹ *Id.*

³⁴⁰ Interview with Sam Huff, Defense Attorney, *supra* note 197.

³⁴¹ *Id.*

As noted earlier, some prosecution-oriented commentators have expressed concern that videotaping investigative interviews will place undue emphasis on children's inconsistent statements about their abuse.³⁴² One St. Mary County prosecuting attorney addressed that issue and in the process illustrates the defense attorney's point about the solicitude the prosecutor's office has for fairness to the defendant. He explained:

[W]e started to do training for the police officers and the [CPS] workers, training them on how to interview kids because now the videotapes become more important. And everyone was afraid to use the videotaping because they were afraid the children would be impeached by what they said on the tape if it was different than what they said in the courtroom. And my attitude has always been that it is what it is. If the kid said it happened on Tuesday in mom's bed on the tape and in court she said it happened on Saturday on the couch, well it's inconsistent. Now, granted, if you don't videotape, nobody knows it's inconsistent, but shouldn't you be fair to the defendant also?³⁴³

This is not to suggest that the prosecutors are unaware of the difficulties for their case presented by the presence of defense attorneys early on in the investigative process, or that they do not wish to avoid early involvement in the case by defense counsel. As one prosecutor explained:

[O]ne of the tricks of the whole thing is doing it quickly, probably more than videotaping it, was doing it right now, not a week from Tuesday. . . . Suzy tells her teacher that Mom's boyfriend is doing something to her on Tuesday morning, we get the interview Tuesday after lunch and we get to the house before she's supposed to get off the bus and interview him. Those are the cases that work the best.³⁴⁴

He goes on to explain that the speed of the response is an important factor:

Once they find out about it, Mom's boyfriend finds out Suzy talked to the [CPS] worker, he gets to Mom, he gets to Suzy, he gets to a lawyer. . . . As soon as a lawyer comes into the picture, you know, a first year law student is going to tell him, "Don't talk to anybody."³⁴⁵

The defense attorneys in St. Mary County are well aware of this effort on the part of the law enforcement authorities to exclude them from the early stages of the investigation. A leading defense attorney in the county explained:

The prosecutor doesn't want us involved because if someone is smart enough to pick up the phone and call a lawyer, the first thing we're going to say is, "Don't you say one word. If there's nothing else you do, don't talk to anybody. . . . Let 'em prove the

³⁴² See *supra* note 34 and accompanying text.

³⁴³ Interview with Kravis Navarre, Prosecuting Attorney, *supra* note 298.

³⁴⁴ *Id.*

³⁴⁵ *Id.*

case if they have to prove the case, but don't you help them." And so, the last guy they ever want to involve in the process is the defense attorney.³⁴⁶

This attorney goes on to observe, "They never want to get us involved because if we got involved, they can't do the protocol. It ceases to exist if the people contact a lawyer."³⁴⁷

Recently a great deal of attention has been focused on the methods used by law enforcement officers to interrogate criminal suspects.³⁴⁸ When asked to comment on the role of police investigative techniques on the confession rate, one of the county's defense attorneys responded:

I don't think it's necessarily all based on just the police and police tactics . . . the real coercive questioning and that type of thing. I think they can be awfully persuasive, and I've seen in the videotapes that they are persuasive. But they can be persuasive and still not be coercive. So, I don't want to lay that on the police because I don't think that's fair. I don't think there's a lot of coercive questioning going on.³⁴⁹

In line with that attorney's description that the police can be "persuasive," another of St. Mary County's contract defense attorneys is more blunt. "[T]here's no law that says cops and prosecutors can't lie. And, of course, they do, every day."³⁵⁰ Another defense attorney is concerned that the protocol has already ensnared innocent defendants. "Somewhere in this state, there's a guy in prison who . . . is totally innocent of these charges . . ."³⁵¹ Despite his expressed concern, this attorney was unable to suggest any specific case in which he believed an individual had been falsely convicted. Moreover, members of St. Mary County's defense bar were generally confident that the child sexual abuse investigation protocol achieved just results. "I guess for the most part, I think probably the people are guilty and most of the time it does the right thing," one defense attorney opined of the protocol.³⁵² This opinion is echoed by another of St. Mary County's defense attorneys, who remarked of the

³⁴⁶ Interview with Sam Huff, Defense Attorney, *supra* note 197.

³⁴⁷ *Id.*

³⁴⁸ See generally discussion *supra* notes 112-136 and accompanying text.

³⁴⁹ Interview with Steve Epsom, Defense Attorney, in St. Mary County (Feb. 27, 2003).

³⁵⁰ *Id.* See generally Sherman J. Clark, *An Accuser-Obligation Approach to the Confrontation Clause*, 81 NEB. L. REV. 1258, 1271 (2003) ("[I]t would have to be admitted that the criminal justice system requires us to do many things of which we can not be proud We encourage co-conspirators to betray one another, we literally pit brother against brother. We employ undercover officers to lie and gain people's trust so that they can betray them. This is unpleasant stuff, however necessary and justified, and the names we give to those we employ in this dirty business—'rat' and 'narc'—evince our desire to distance ourselves from what we do.").

³⁵¹ Interview with Sam Huff, Defense Attorney, *supra* note 197.

³⁵² Interview with Steve Epsom, Defense Attorney, *supra* note 349.

protocol: "That procedure doesn't bother me that much as far as fairness is concerned. . . . I think they generally do a fairly good job of focusing in on the person that is the likely offender without any prejudice to [the suspect]." ³⁵³

To the extent that there is concern about the investigative methodology used in a particular case, videotaping the child's forensic interview and polygraphs provide a documentary record that maximizes the defendant's ability to mount a defense. One defense attorney explained that although he has shown the jury the videotape of the child's interview in an effort to demonstrate that improper interviewing had been used or that the child has told an inconsistent story, "I've never been successful at getting an acquittal." ³⁵⁴ Another defense attorney, when asked about his use of videotapes as part of his defense strategy observed, "Let's face it, how important is impeachment when you're impeaching a six-year-old or a seven-year-old? It's not important. The jury's going to give the kid the benefit of the doubt 99% of the time." ³⁵⁵ He explained further that the variance between what the child says during the interview and what the child says on the witness stand is typically so minor that showing the videotape is of no moment. ³⁵⁶ Indeed, the defense attorneys explained that declining to show the videotaped interview may have two advantages for the defendant. First, one defense attorney explained, the child complainant is often less certain of what happened when the case comes to trial six to nine months after the initial disclosure, especially if there was a time-delay in disclosing the abuse. ³⁵⁷ Another defense attorney pointed out that showing the videotape to the jury can have the unintended effect of reinforcing the child's story to the jury. ³⁵⁸

Moreover, the prosecution's preferred polygraph examiner explained two efforts he undertakes to ensure that innocent persons do not confess. First, he detailed his efforts to divorce from his mind any preconception that the defendant is guilty. "I try to start with a clean slate . . . and systematically go through the interview process. The reason is, if I give them any idea, or if they get any idea, that I'm being subjective and I've already made up my mind, they are *not* going to talk to me." ³⁵⁹ He distinguished his perception of the value of the polygraph from the

³⁵³ *Id.*

³⁵⁴ *Id.*

³⁵⁵ Interview with Sam Huff, Defense Attorney, *supra* note 197.

³⁵⁶ *Id.*

³⁵⁷ *Id.*

³⁵⁸ Interview with Steve Epsom, Defense Attorney, *supra* note 349.

³⁵⁹ Interview with Roger Quincy, polygrapher, in St. Mary County (Apr. 16, 2003).

prosecuting attorneys. Prosecutors, in his view, think of the polygraph as a tool for interrogating the guilty, while he deems it a means of protecting the innocent.³⁶⁰ He administers the polygraph in three steps: a pre-testing interview, the test itself, and a post-test interrogation. The polygrapher asserted cogently that he would never subject a suspect that, after administration of the test, he believed was innocent to the interrogation phase of the process.³⁶¹

As with forensic interviews of child victims, the administration of the polygraph to the suspect is videotaped to preserve any evidence of wrongdoing in conducting the polygraph. Review of these tapes demonstrates that the suspects are routinely informed that his participation in the polygraph is voluntary and that his *Miranda* warnings are administered. That tape is available to defense counsel through the discovery process.

Training St. Mary County's law enforcement officers and CPS workers has been an important element in reducing the possibility of wrongful allegations being leveled due to the use of leading or coercive questioning techniques. As the prosecutor's earlier comments make clear, when investigative interviews with children are videotaped, the questioning techniques used become a more potent issue: evidence is preserved that has the potential of aiding the defendant's case that the child was influenced to make a false allegation.³⁶² From early on in the county's use of videotaping, the tapes were critiqued as a form of training. A former CPS worker explained, "there wasn't a lot of training at that point, in [19]86. . . . [through] the videotapes we learned [about] suggestibility, some of those unconscious things you do."³⁶³ He continued:

[The prosecutor] was the ultimate critiquer. . . . And he would watch those and he would say to you, "What the hell are you doing?" . . . I mean, he . . . was saying, "You know, I got to get a criminal case here." And so he would say to me, "That was a good interview," and saying, "You shouldn't have done this. You shouldn't have done that." . . . having [the prosecutor's] feedback as somebody who certainly communicated a man of integrity, to say, "I want a clean case." . . . [H]e was very aware of suggestibility.³⁶⁴

When asked about the use of videotaping in training CPS interviewers, a supervisor spoke of its value:

Well, it exposes your mistakes, that's for darn sure . . . it keeps you kind of humble.

³⁶⁰ *Id.*

³⁶¹ *Id.*

³⁶² See Interview with Kravis Navarre, Prosecuting Attorney, *supra* note 298.

³⁶³ Interview with Kenneth Isley, former CPS Worker, *supra* note 299.

³⁶⁴ *Id.*

[A] lot of people don't like that kind of exposure. We just told the [CPS] workers, "You're going to have to be personally strong enough to withstand that exposure and the critique that comes from it."³⁶⁵

This supervisor expressed that view that videotaping interviews frees interviewers from taking notes and allows them to relax, which permits "a much more genuine interview."³⁶⁶ The caseworkers, however,

may be on pins and needles because they know that people are watching [the interview] and ten people are gonna see it later. But that's part of their training. That should be part of their training, to know that they are going to get critiqued. . . . We're here to learn that. You know, I hope my interview that I do tomorrow is better than today's. But it won't be unless I'm able to look at today's. . . . I have that philosophy and I can convey it to the workers and get them to get the critique. . . . And on the videotapes, that's just the epitome of exposure and learning opportunity."³⁶⁷

The use of the videotapes for training provides St. Mary County a built-in, on-going self-assessment process that minimizes the possibility that suggestive or coercive interviewing will result in false allegations of sexual abuse.

D. SEX OFFENDING BEHAVIOR IS REDUCED

It is not clear that the operation of this protocol has had any appreciable general deterrent impact upon child sexual abuse in St. Mary County, although there may be a specific deterrent phenomenon at work. A prosecuting attorney spoke of his naïveté in believing that eventually St. Mary County would solve its sex offender problem:

We were doing such a good job, after a while we will have caught everybody, we will have caught all the sex offenders and there just won't be any more. Well, that was a pretty naïve view of things because there is always someone to come in the in-door when you send someone out the out-door. So it would never work that way.³⁶⁸

Later in his interview, the prosecutor and an interviewer had this colloquy:

Interviewer: [Y]ou said at one point that you thought you [would] run out of cases because you [will have] gotten all of them off the street. Do you think you're preventing these situations . . . ?

Prosecutor: No, I don't. In the sense when I lock up a serial offender, I'm saving those victims When I say it doesn't prevent it, maybe if I take a longer view of it, if I take one of these guys and put him in a treatment program and get him in a position

³⁶⁵ Interview with Darla Elders, CPS Supervisor, *supra* note 332.

³⁶⁶ *Id.*

³⁶⁷ *Id.*

³⁶⁸ Interview with Kravis Navarre, Prosecuting Attorney, *supra* note 298.

where he isn't going to re-offend, then I've saved other victims. If I've saved other victims, maybe I haven't created other offenders.³⁶⁹

There is, of course, no way of being certain that any specific offender has been deterred from perpetrating an act of child sexual abuse. Moreover, one element that seems to be missing in St. Mary County's approach is a lack of primary prevention directed at potential offenders. For example, there does not appear to be any effort to encourage adults who may have a propensity to perpetrate sexual abuse upon minors to seek treatment *before* they offend and are caught.

E. SEX OFFENDERS ARE MONITORED

In most CSC cases with a child victim handled in the county, the defendant is given a jail sentence followed by a term of probation coupled with mandatory participation in the county's sex offender treatment program.³⁷⁰ A judge explains the rationale for the incarceration element of this approach: "You know, there has to be a punishment because there has to be a consequence."³⁷¹ In making sentencing determinations, judges must rely upon the work of others. The judges we interviewed expressed a great deal of confidence in the probation officers employed by the county: "The five probation officers who supervise and also write the [pre-sentencing investigation reports] have outstanding judgment."³⁷² Many offenders are housed in the county's probation center, a facility that combines jail-like structure with a complement of treatment resources. A judge described the program:

It's an alternative to jail. They deal with whatever [the prisoner's] issues are. For example, if they don't have a high school diploma, if they have a substance abuse problem—and most of them do—[then] that's their issue. . . the probation agent has the defendant screened for a substance abuse issue and the substance abuse screener will make treatment recommendations . . . like intensive out patient [or] out patient. And, of course, you've got your NA meetings and your AA meetings. [F]or some of these people—especially the young, young men—they don't have an employment history and they don't have training, so we work on getting them employed. Many have a parenting skills problem, so we work on that; many have anger management problems and we deal with that. Whatever the individual's problem is, there seems to be something and someone to address it. And they're locked up. They can go out for school, for work, for their treatment, but then they have to come back to the center.

³⁶⁹ *Id.*

³⁷⁰ See discussion *supra* note 196 and accompanying text.

³⁷¹ Interview with Kevin O'Reilly, Circuit Court Judge, *supra* note 201.

³⁷² *Id.*

[T]he people are very, very closely monitored³⁷³

Close supervision “makes them form good habits” in the judge’s view,³⁷⁴ and provides a means of meeting another important community interest, the rehabilitation of sex offenders.

F. REHABILITATION OF SEX OFFENDERS

As noted earlier, there is considerable disagreement among academics and researchers about whether sex offenders can be successfully treated.³⁷⁵ St. Mary County’s leaders have come down squarely on the side of those who believe treatment can be successful, although not with every offender. One prosecuting attorney describes the overarching goal of the criminal justice system in relation to handling child sexual abuse cases: “All it really is about is the kids want someone to believe them and the guy that is doing it needs to be assigned responsibility for what he’s doing.”³⁷⁶ For the leaders of the St. Mary County system, that assignment of responsibility begins at the start of the case. As one prosecuting attorney related:

[It] also impresses the judge when you come in right from the get go and accept responsibility, say, “Okay, I did it. I’m sorry. I’m not going to make the child testify. I’ll do whatever you want me to do in terms of treatment. I’ll take my punishment. I’m sorry for what I *did*.” You know, if you can’t be sincere about it, then at least fake it. We try to tell which guys are sincere. But the guy that bellies up right from the get go is probably more likely to be sincere than the guy that’s sincere on the day of sentencing and says, “Okay, I’m sorry.”³⁷⁷

St. Mary County’s commitment to assigning responsibility is the first step in its efforts to rehabilitate offenders. The degree to which this is true was described by the then-sitting circuit court judge in whose courtroom felony sex offenses are handled: “[M]y sense of it is that 80% of the people that are convicted [of CSC] are rehabilitatable.”³⁷⁸ Conversely, the judge recognized that some of those who perpetrate sexual crimes upon children cannot benefit from rehabilitative efforts. “[S]ome people cannot change; they’re constitutionally dishonest and cannot change, but the good news is, the vast majority of people can. And, so, my focus, at least from my part in the system, is that we’re here to facilitate change.”³⁷⁹ He reiterated the need for rehabilitative measures and their limitations:

³⁷³ *Id.*

³⁷⁴ *Id.*

³⁷⁵ See discussion *supra* notes 150-162 and accompanying text.

³⁷⁶ Interview with Kravis Navarre, Prosecuting Attorney, *supra* note 298.

³⁷⁷ *Id.*

³⁷⁸ Interview with Kevin O’Reilly, Circuit Court Judge, *supra* note 201.

³⁷⁹ *Id.*

[M]y experience with almost every defendant who comes before me is that they're there because they're emotionally unhealthy. Occasionally you'll see somebody who you feel is truly evil, but that's rare. . . . But I've come to the conclusion that you can't deter unhealthy people from doing unhealthy things. Because their defense mechanisms are so strong or because they think they won't get caught or because they're just not responsible.³⁸⁰

The assignment and acceptance of responsibility is, in the view of St. Mary County's leadership, the first step in the rehabilitative process. "It is very, very important to the defendant's recovery . . . that they [sic] take responsibility, and, so, my perception of the prosecutor's system is to encourage that by being reasonable to deal with in terms of settling cases"³⁸¹ A prosecuting attorney likens the treatment of perpetrators of sex offenses against children to other self-help treatment modalities:

[T]hey can only start rehabilitation once the case has been resolved; and it's so much better if that starts with someone taking responsibility for his crime. . . . [I]t's just like AA where they have to admit they're alcoholic before AA works. I think a lot of that concept is true in the rehabilitation of sexual offenders of children.³⁸²

Similarly, as a circuit court judge points out in regard to the assignment of responsibility, "you have to address punishment because that's very important for the victim's recovery that the system recognizes that they've been a victim and the system is not soft-peddling it."³⁸³ Still, the judge's commitment to the ideal of rehabilitation through treatment is reflected in both his personal approach to his work and in his sentencing decisions. "I don't want to see these people come back and so I invest myself in trying to make the process as effective and efficient as I can."³⁸⁴

Many jurisdictions now use criminal sentencing guidelines.³⁸⁵ One judge explained his use of the applicable guidelines:

I don't know if I've ever departed from the sentencing guidelines because of punishment. I hesitate to do that because that is so subjective. But I routinely depart from the guidelines—at least go above the guidelines—where public protection is the issue. In one or two cases, I've departed under the guidelines because rehabilitation was not an issue, where the defendant had addressed whatever the problem was.³⁸⁶

³⁸⁰ *Id.*

³⁸¹ *Id.*

³⁸² Interview with Evert Gans, Prosecuting Attorney, *supra* note 197.

³⁸³ Interview with Kevin O'Reilly, Circuit Court Judge, *supra* note 201.

³⁸⁴ *Id.*

³⁸⁵ See, e.g., MICH. SENTENCING GUIDELINES MANUAL (2005).

³⁸⁶ Interview with Kevin O'Reilly, Circuit Court Judge, *supra* note 201.

G. MINIMIZE TRAUMA TO CHILDREN CAUSED BY THEIR PARTICIPATION IN THE CRIMINAL JUSTICE SYSTEM

The prosecutors in the community place considerable value on handling cases without children having to testify. As noted earlier, one unwritten element of the protocol in place for many years has been a practice that if the defendant makes the child testify at the preliminary examination, the prosecutor will typically not offer a reduced charge to which the defendant may plead.³⁸⁷ When asked how he would define the successful handling of a child sexual abuse case, a prosecutor stated that his ideal resolution of such a case is for the defendant to plead guilty to an appropriately serious charge to the extent that it results in “an acceptable sentence, but yet not have the child to have to testify.”³⁸⁸ Another prosecutor elaborates on this point, “We have very rarely absolutely insisted on a conviction as charged because we really prefer not to run the risk of loss of a case or traumatize the victim . . . these cases are better for everybody if they’re resolved.”³⁸⁹

The vulnerability of the child-victim was not always recognized. As a former prosecutor, who worked in the office before the investigative protocol was established, and who later became a judge in St. Mary County, explained:

I remember my approach was: get to the victim quickly and to interview that victim as many times as necessary so that the victim can give us all the information. And, ironically, I think that did more harm than good because the telling of the story was almost as bad as the abuse. . . . [T]here just wasn’t the sensitivity in the system to the victim that there is today.³⁹⁰

With the protocol in place, the prosecutors have used the trauma that the child victim may experience by participating in the legal proceedings as a guidepost in resolving cases that might otherwise be tried. A prosecutor explains his thinking in this regard:

[W]e find in those last few weeks and days just before the trial, when we are really afraid because we know that there’s a good chance that the child will be traumatized by telling a jury what happened to him or her and the jury saying “No,” it’s amazing how many times at about that same time, the defendant gets really worried about the fact that he could be convicted; maybe some compromise is the best result. Given those circumstances, we’re not shy about . . . giving a good offer and accepting a compromised result.³⁹¹

³⁸⁷ See discussion *supra* note 196 and accompanying text.

³⁸⁸ Interview with Kravis Navarre, Prosecuting Attorney, *supra* note 298.

³⁸⁹ Interview with Evert Gans, Prosecuting Attorney, *supra* note 197.

³⁹⁰ Interview with Kevin O’Reilly, Circuit Court Judge, *supra* note 201.

³⁹¹ Interview with Evert Gans, Prosecuting Attorney, *supra* note 197.

As was noted earlier, in an empirical study of 323 child sexual abuse cases handled in St. Mary County from 1988 to 1998, 22 children actually testified only 26 times in these cases.³⁹² When children do not testify they cannot suffer the trauma that may result from confronting the perpetrator in open court or from being subjected to cross-examination.

V. CONCLUSIONS

Careful study of St. Mary County's protocol for handling child sexual abuse cases leads this author to conclude that it serves the community's interests by obtaining just results for victims while ensuring that defendants' due process rights are respected. The protocol responds efficaciously to the difficulties inherent in prosecuting sex offenses against children. It accomplishes this outcome largely through use of investigative methods that are explicitly aimed at neutralizing any potential defense, by responding very promptly to cases of alleged child sexual abuse and by focusing investigative energy on obtaining confessions through the use of a well-developed, methodical investigative scheme.

By focusing on rehabilitation of confessed or convicted sex offenders rather than on exacting the most severe punishment, St. Mary County encourages the guilty to take responsibility for their actions, to avail themselves of necessary treatment programs, and to establish or reestablish themselves as contributing members of the community. In essence, the authorities counterbalance an aggressive investigative practice before most suspects can marshal a defense with moderate sentencing and a focus on rehabilitation. Of course, defendants' right to trial remains intact for those who maintain their innocence or wish to test the state's evidence of their wrongdoing. When defendants have chosen this course, they have fared well, winning acquittal more times than not. When, however, a particular offender is assessed to be beyond rehabilitation, the authorities are not unwilling to incapacitate the offender through the use of lengthy periods of incarceration.³⁹³ In appropriate circumstances, this may include life in prison without the opportunity for parole.³⁹⁴

³⁹² See discussion *supra* note 268 and accompanying text.

³⁹³ In one of the trials which our research team observed, a thrice-convicted felon was convicted of criminal sexual conduct in the first degree for committing an act of sexual penetration upon a twelve-year-old girl, a friend of the defendant's niece. This offense, criminal sexual conduct in the first degree, carries a penalty of life or any number of years. MICH. COMP. LAWS § 750.520b (2006). He was sentenced to forty-to-sixty years in prison.

³⁹⁴ On February 6, 2003, our research team interviewed one of St. Mary County's prosecuting attorneys. He related a recent case in which a nineteen-year-old defendant had been sentenced to life without chance of parole. He had been convicted of multiple counts of criminal sexual conduct in the first degree. All six victims were toddlers. The pre-

Perhaps the most interesting finding from this research is the ironic inversion of the arguments for and against the use of videotape to preserve evidence of how forensic interviews of children are conducted. As noted, there has long been a debate among professionals about whether forensic interviews of children should be videotaped. While a number of jurisdictions currently videotape forensic interviews with children in cases of suspected child sexual abuse, other jurisdictions still do not. There has been no definitive practical resolution to the debate.³⁹⁵ Videotaping has often been opposed by prosecutors and urged by defense advocates. This has largely been a quixotic debate that has taken place in a vacuum with advocates for either side advancing their perceived interests and without consideration of how other investigative methods and tools might complement the use of videotaping. Moreover, the broader community's interests have been largely absent from this debate. Our findings suggest that, at least when used as part of a carefully thought-out investigative protocol, videotaping has a deleterious impact upon defendants' interests and a very positive impact on prosecutors' efforts to successfully prosecute child sexual abuse cases. Furthermore, such an approach serves the interests of the community, as it achieves a fair and just result for victims, suspects, and defendants. Such findings suggest that reconsideration of and possible realignment in prosecution and defense positions regarding this issue may be in order.

One of the more vexing questions arising from the study of St. Mary County's experience is whether its protocol, and, more importantly, its success, can be replicated, particularly in large urban settings. In interviews with St. Mary County's professionals this question was posed, but no clear consensus emerged. The basic question regarding the protocol's success is this: "Is it the protocol or is it the people that generate the successful outcomes?" It seems clear that the professionals in this small, rural community have an extraordinary level of commitment to responding to child sexual abuse. It is also clear that this commitment has been sustained over a long period of time. Thus, the protocol's success may be due to personnel. On the other hand, there seems to be nothing inherent in this protocol that would render it inapplicable to other communities. Obviously, the scale of the community aids the implementation of such a protocol. The

sentence sex offender evaluation determined that he was a true pedophile, sexually attracted to very young children. See Interview with Evert Gans, Prosecuting Attorney, *supra* note 197.

³⁹⁵ The Michigan Court of Appeals has addressed the question of whether forensic interviews with children regarding sexual abuse must be videotaped as recently as May 2005. See *People v. Ward*, No. 254101, 2005 WL 1123881, at *1 (Mich. App. Mar. 12, 2005).

intensity of scrutiny that each case receives from the various professionals in St. Mary County suggests the need to commit tremendous resources to these cases. It would certainly take leadership to replicate St. Mary County's success, especially in large urban jurisdictions. But it does not appear to this author that replication is inherently beyond the pale.