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## The Constitutionality of the Use of Two-Way Closed Circuit Television to Take Testimony of Child Victim of Sex Crimes

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# THE CONSTITUTIONALITY OF THE USE OF TWO-WAY CLOSED CIRCUIT TELEVISION TO TAKE TESTIMONY OF CHILD VICTIMS OF SEX CRIMES

## INTRODUCTION

There are approximately 200,000 incidents of child sexual abuse in the United States each year.<sup>1</sup> In 1982, there were 4000 reported cases of

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1. R. Geiser, *Hidden Victims: The Sexual Abuse of Children* 6 (1979); Rogers, *Child Sexual Abuse and the Courts: Preliminary Findings*, in *Social Work and Child Sexual Abuse* 145, 145 (J. Conte & D. Shore eds. 1982). The definition of child sexual abuse has been problematic for many psychologists and social workers. See R. Geiser, *supra*, at 7-8; Conte, *Sexual Abuse Of Children: Enduring Issues for Social Work*, in *Social Work and Child Sexual Abuse* 1, 2-6 (J. Conte & D. Shore eds. 1982). Most state criminal statutes, however, specifically define sexual offenses between adults and children and classify them as felonies. See Ala. Code § 13A-6-66 (1982); Alaska Stat. § 11.41.434 (1983); Ariz. Rev. Stat. Ann. § 13-1404 (Supp. 1984); Ark. Stat. Ann. § 41-1808 (1977); Cal. Penal Code § 266(j) (West Supp. 1985); Colo. Rev. Stat. § 18-3-405 (1978 & Supp. 1984); Conn. Gen. Stat. § 53a-71 (1983); Del. Code Ann. tit. 11, § 762 (1979); D.C. Code Ann. §§ 22-2801, -3501 (1981); Fla. Stat. Ann. § 794.05 (West 1976); Ga. Code Ann. § 16-6-4 (1984); Hawaii Rev. Stat. § 707-736 (1976); Idaho Code § 18-1506(1) (Supp. 1984); Ill. Ann. Stat. ch. 38, § 12-14(b)-(c) (Smith-Hurd Supp. 1984); Ind. Code Ann. § 35-42-4-3 (Burns Supp. 1984); Iowa Code Ann. § 709.3 (West 1979); Kan. Stat. Ann. § 21-3503 (Supp. 1984); Ky. Rev. Stat. § 510.110 (1985); La. Rev. Stat. Ann. § 14:81.2 (West Supp. 1985); Me. Rev. Stat. Ann. tit. 17-A, § 252 (1983); Md. Ann. Code art. 27, § 463 (1982); Mass. Gen. Laws Ann. ch. 265, § 22A (West 1980); Mich. Comp. Laws Ann. § 750.520b (West Supp. 1984-1985); Minn. Stat. Ann. § 609.342 (West Supp. 1984); Miss. Code Ann. §§ 97-3-95, -101 (Supp. 1984); Mo. Rev. Stat. § 566.100 (1979); Mont. Code Ann. § 45-5-502 (1983); Neb. Rev. Stat. § 28-320.01 (Supp. 1984); Nev. Rev. Stat. § 200.366(2)(c) (1983); N.H. Rev. Stat. Ann. § 632-A:2 (Supp. 1983); N.J. Stat. Ann. § 2C:14-2 (West Supp. 1984-1985); N.M. Stat. Ann. § 30-9-11.A(1) (1984); N.Y. Penal Law § 130.65(3) (McKinney 1975); N.C. Gen. Stat. § 14-27.2(a)(1) (1981 & Supp. 1983); N.D. Cent. Code § 12.1-20-03 (Supp. 1983); Ohio Rev. Code Ann. § 2907.02 (Page Supp. 1983); Okla. Stat. Ann. tit. 21, § 1123 (West Supp. 1984-1985); Or. Rev. Stat. § 163.425 (1985); 18 Pa. Cons. Stat. Ann. § 3122 (Purdon 1983); R.I. Gen. Laws §§ 11-37-8.1 to -8.4 (Supp. 1984); S.C. Code Ann. § 16-3-655 (Law. Co-op. 1985); S.D. Codified Laws Ann. § 22-22-7 (Supp. 1984); Tenn. Code Ann. § 39-2-605 (1982); Tex. Penal Code Ann. § 22.011 (Vernon Supp. 1985); Utah Code Ann. § 76-5-404.1 (Supp. 1983); Vt. Stat. Ann. tit. 13, § 3252 (Supp. 1984); Va. Code Ann. § 18.2-67.3 (Michie 1982); Wash. Rev. Code Ann. §§ 9A.44.070-100 (Supp. 1985); W. Va. Code §§ 61-8B-3, -5, -7, -9 (1984); Wis. Stat. Ann. § 940.225 (West 1982 & Supp. 1984-1985); Wyo. Stat. Ann. §§ 6-2-303(a)(v), -304 (Michie 1983).

In addition, sexual exploitation of children for the purposes of producing visual depictions is a federal offense. See Act of Feb. 6, 1978, Pub. L. No. 95-225, § 2(a), 92 Stat. 7, *amended by* Child Protection Act of 1984, Pub. L. No. 98-292, § 3, 98 Stat. 204 (current version at 18 U.S.C.A. § 2251 (West 1984)). Section 2251(a) states:

Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, any sexually explicit conduct for the purpose of producing any visual depiction of such conduct, shall be punished as provided under subsection (c), if such person knows or has reason to know that such visual depiction will be transported in interstate or foreign commerce or mailed, or if such visual depiction has actually been transported in interstate or foreign commerce or mailed.

*Id.* Subsection (b) makes parents who knowingly allow a child to participate in such a

child molestation in New York State alone.<sup>2</sup> Moreover, experts agree that incidents of child molestation are grossly underreported.<sup>3</sup> Despite

production also subject to the sanctions in subsection (c). *See id.* (current version at 18 U.S.C.A. § 2251(b) (West 1984)). Violators may be fined up to \$100,000 or imprisoned up to ten years, or both. *Id.* (current version at 18 U.S.C.A. § 2251(c) (West 1984)). Recidivists and organizational violaters may receive even higher penalties. *Id.* "Sexually explicit conduct" is defined as "actual or simulated—

(A) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;

(B) bestiality;

(C) masturbation;

(D) sadistic or masochistic; [sic] abuse; or

(E) lascivious exhibition of the genitals or pubic area of any person."

Act of Feb. 6, 1978, Pub. L. No. 95-225, § 2(a), 92 Stat. 8, *redesignated by* Child Protection Act of 1984, Pub. L. No. 98-292, § 5(b), 98 Stat. 205, *amended by* Child Protection Act of 1984, Pub. L. No. 98-292, § 5(a), 98 Stat. 205 (current version at 18 U.S.C.A. § 2255(2) (West 1984)).

Thus, sexual abuse of children may be considered to fall into three basic categories: sexual contact between adults and children, sexual exploitation of children and exhibitionism. *See Conte, supra*, at 2.

2. K. Mayer, *Child Sexual Abuse and New York Law 9 (1984)* (unpublished manuscript) (available in files of *Fordham Law Review*). In 1980, the following number of children were treated at the Sexual Assault Center at Seattle's Harborview Hospital:

0-4 years old—127

5-8 years old—172

9-12 years old—155

13-16 years old—275

Comment, *Confronting Child Victims of Sex Abuse: The Unconstitutionality of the Sexual Abuse Hearsay Exception*, 7 U. Puget Sound L. Rev. 387, 387 n.1 (1984) (citing Sexual Assault Center, Harborview Hospital, Seattle, Wash., Client Characteristics 5 (1980)) [hereinafter cited as *Confronting Child Victims*].

3. F. Rush, *The Best Kept Secret: Sexual Abuse of Children 4 (1980)* (quoting one expert who estimates that 50-80% of child molestation cases are not reported and another who states that child sexual abuse is greatly underreported); *see R. Geiser, supra* note 1, at 9-10 (author estimates that there are two or three unreported cases for every reported one); Berliner, *Counseling and Follow-Up Interaction for the Sexually Abused Child*, in *Management of the Physically and Emotionally Abused* 281, 282 (C. Warner & G. Braen eds. 1982) (author believes that reported cases of child sexual abuse are only a fraction of actual incidents); De Francis, *Protecting the Child Victim of Sex Crimes Committed by Adults*, Fed. Probation, Sept. 1971, at 15, 17 (same); Sgroi, *Sexual Molestation of Children: The Last Frontier in Child Abuse*, in *The Sexual Victimology of Youth* 25, 27 (L. Schultz ed. 1980) (same); Summit & Kryso, *Sexual Abuse of Children: A Clinical Spectrum*, 48 Am. J. Orthopsychiatry 237, 238 (1978) (authors cite a survey that found that only six percent of child sexual abuse cases were reported).

Many factors contribute to this reporting problem. First, very young children do not understand that they have been sexually abused. Prager, *"Sexual Psychopathy" and Child Molesters: The Experiment Fails*, 6 J. Juv. L. 49, 62 n.56 (1982). Second, infants cannot communicate the fact that they have been sexually molested. *Id.* Third, children are afraid that adults may not believe them. *See M. Fortune, Sexual Violence: The Unmentionable Sin* 168-69 (1983); Stevens & Berliner, *Special Techniques for Child Witnesses*, in *The Sexual Victimology of Youth* 246, 251 (L. Schultz ed. 1980). Finally, children fear that the molester may carry out the threats he made to them to ensure nondisclosure. Berliner, *supra*, at 282.

One author believes that many adults cannot conceive of such a heinous crime and, that they therefore ignore the problem. *See M. Fortune, supra*, at 164. She cites Freud as a prime example. *Id.* Freud, during a lecture, stated that "almost all my women patients

the increasing number of assaults,<sup>4</sup> it remains very difficult to prosecute these cases.<sup>5</sup> One reason is that parents are reluctant to put their children through the further trauma of litigation.<sup>6</sup> Another is that reliable, competent testimony of the child victims is difficult to obtain.<sup>7</sup> A large

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told me that they had been seduced by their father. I was driven to recognize in the end that these reports were untrue and so came to understand that the hysterical symptoms are derived from phantasies and not from real occurrences." S. Freud, *The Complete Introductory Lectures on Psychoanalysis* 584 (1964).

4. See Stevens & Berliner, *supra* note 3, at 246 (there has been a steady increase in the number of child sexual abuse victims referred to the Sexual Assault Center since 1973); cf. J. Kroth, *Child Sexual Abuse* 3-4 (1979) (suggests that what we are experiencing is an increase in reported cases of child sexual abuse due either to increased occurrences or to society's heightened awareness or openness).

5. See Comment, *Evidentiary Problems in Criminal Child Abuse Prosecutions*, 63 Geo. L.J. 257, 258 (1974) (because of evidentiary problems, few child abuse cases are prosecuted) [hereinafter cited as *Evidentiary Problems*]; *Confronting Child Victims*, *supra* note 2, at 387 (difficulty in obtaining convictions results from testimony poorly given or not given at all because children are considered to be incompetent witnesses); K. Mayer, *supra* note 2, at 1, 9 (inability to prosecute many child sexual abuse cases in New York was caused by § 130.16 of the New York Penal Law, which required the child's testimony to be corroborated by independent evidence).

6. Parker, *The Rights of Child Witnesses: Is the Court a Protector or Perpetrator?*, 17 New Eng. L. Rev. 643, 651 (1982); see also J. Kroth, *supra* note 4, at 26 (parents fear the litigation process). This fear is not unfounded. See B. Karpman, *The Sexual Offender and His Offenses* 70 (1954) (recounting the events and details of the crime may be as damaging to the child victim of a sex offense as the crime itself); J. Kroth, *supra* note 4, at 26 (initial interview may be traumatic); National Legal Resource Center for Child Advocacy and Protection, Am. Bar Ass'n, *Recommendations for Improving Legal Intervention in Intrafamily Child Sexual Abuse Cases* 12 (1982) (testifying is traumatic for child victims); J. Palmer, *The Psychological Assessment of Children* 522-23 (1983) (testifying in open court may impede sexual development of a child molestation victim); Chaneles, *Child Victims of Sexual Offenses*, Fed. Probation, June 1967, at 52, 54 (judicial proceedings "may be as damaging to the child victim as the initial sex crime"); De Francis, *supra* note 3, at 16 (describing the various emotional traumas to which a child may be subjected during investigative and court proceedings); Haas, *The Use of Videotape in Child Abuse Cases*, 8 Nova L.J. 373, 373 (1984) (reiterating the event risks further trauma to the child victim of sexual abuse); Libai, *The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System*, 15 Wayne L. Rev. 977, 983-86, 1015 (1969) (child victims of sex crimes may be traumatized by the legal proceedings); Parker, *supra*, at 644-53 (same); Rogers, *supra* note 1, at 145-46 (subsequent judicial process may result in "secondary victimization"); Schultz, *The Victim and the Justice System—An Introduction*, in *The Sexual Victimization of Youth* 171, 171 (L. Schultz ed. 1980) (reiterating the details of the sex crime assumed to cause psychic trauma for the child victim); Stevens & Berliner, *supra* note 3, at 248 (the legal proceedings may be more damaging than the crime itself). But see Rogers, *supra* note 1, at 146-47 (participation in the judicial process may not be as damaging as some think).

Parents who object during the trial to the further victimization of their child by the judicial process will find it difficult to rescind a complaint against the defendant. Libai, *supra*, at 978. The state considers its interest in prosecution to be greater than the parents' interest in avoiding further trauma to the child. *Id.* This policy may be an additional deterrent to parents' bringing complaints of child sexual abuse.

7. See Meyers, *Little Witnesses*, Student Law., Sept. 1982, at 14, 16 (there is a danger that a child will combine fact and imagination when relating an event); Stafford, *The Child as a Witness*, 37 Wash. L. Rev. 303, 309 (1962) (same); *Evidentiary Problems*, *supra* note 5, at 259-60 & n.16 (children's testimony is susceptible to influence by parents and alleged abuser). But see Goleman, *Studies of Children as Witnesses Find Surprising Accu-*

portion of the potential trauma stems from the child victim's fear of being in the same room with the alleged molester.<sup>8</sup> Although this fear can be avoided by allowing the child to testify in the absence of the accused,<sup>9</sup> the criminal defendant has a right under the sixth amendment to con-

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racy, N.Y. Times, Nov. 6, 1984, at C1, C4 (recent psychological studies have found that children's memories are as reliable as adults').

A child's competency to testify is not determined by his or her age. *Wheeler v. United States*, 159 U.S. 523, 524 (1895); *United States v. Schoefield*, 465 F.2d 560, 561-62 (D.C. Cir.) (per curiam), cert. denied, 409 U.S. 881 (1972); *Doran v. United States*, 205 F.2d 717, 718-19 (D.C. Cir.), cert. denied, 346 U.S. 828 (1953); *Beausoliel v. United States*, 107 F.2d 292, 293 (D.C. Cir. 1939) (quoting *Wheeler v. United States*, 159 U.S. 523, 524-25 (1895)); *McCormick on Evidence* § 62, at 156 (E. Cleary 3d ed. 1984) [hereinafter cited as *McCormick on Evidence*]; *Melton, Children's Competency to Testify*, 5 Law & Hum. Behav. 73, 73 (1981); see *United States v. Perez*, 526 F.2d 859, 865 (5th Cir.) (child's age was not a factor in the court's determination of competency), cert. denied, 429 U.S. 846 (1976); *United States v. Hardin*, 443 F.2d 735, 737 (D.C. Cir. 1970) (same); *Pocatello v. United States*, 394 F.2d 115, 117 n.4 (9th Cir. 1968) (same). Instead, it is determined by the "capacity and intelligence of the child, his appreciation of the difference between truth and falsehood, as well as of his duty to tell the former." *Wheeler*, 159 U.S. at 524. This rule is still good law. See *United States v. Spoonhunter*, 476 F.2d 1050, 1054 (10th Cir. 1973); *Schoefield*, 465 F.2d at 562; *Pocatello*, 394 F.2d at 117 n.4.

The determination of competency is made by the trial judge and is a matter left to the discretion of the trial court. *Wheeler*, 159 U.S. at 524-25; *Hardin*, 443 F.2d at 737; *Beausoliel*, 107 F.2d at 293. Thus, appellate courts will not disturb trial courts' competency decisions unless clearly erroneous. The rationale is that these decisions are based on factors at trial which cannot be transcribed into the record. *Hardin*, 443 F.2d at 737. A judge is better able to weigh such factors as attitude, demeanor, intelligence and capacity for moral responsibility. *Doran*, 205 F.2d at 718-19.

"The ultimate test of competence of a young child is whether he has the requisite intelligence and mental capacity to understand, recall and narrate his impressions of an occurrence." *Schoefield*, 465 F.2d at 562; see also *Perez*, 526 F.2d at 865 (court using the *Schoefield* test found that the child witnesses understood the questions and answered intelligently); *McCormick on Evidence*, *supra*, § 62, at 156 (stating that the traditional test is one of requisite intelligence and the child's acknowledgment of his or her duty to be truthful).

Wigmore disagrees. He suggests that it is unnecessary to declare children competent before they testify. The child's testimony should be considered as is every other witness' testimony. See 2 J. Wigmore, *Evidence* § 509, at 719-20 (J. Chadbourn rev. ed. 1979). Three states—Minnesota, Missouri and Utah—have followed Wigmore's suggestion, but only for child victims of molestation. Utah's law states:

Notwithstanding any other provision of law or rule of evidence, a child victim of sexual abuse, under the age of ten, shall be considered a competent witness and shall be allowed to testify without prior qualification in any judicial proceeding. The trier of fact shall be permitted to determine the weight and credibility to be given to the testimony.

Utah Code Ann. § 76-5-410 (Supp. 1983). Minnesota's and Missouri's statutes are similar. See *Minn. Stat. Ann.* § 595.02(6) (West Supp. 1984); *Mo. Ann. Stat.* §491.060(2) (Vernon Supp. 1984).

The procedure proposed in this Note does not affect the determination of competency. It provides a method of bringing in competent testimony.

8. Libai, *supra* note 6, at 984, 1018; Parker, *supra* note 6, at 652-53; cf. L. Holmstrom & A. Burgess, *The Victim of Rape* 226 (1978) ("Some victims reacted visibly to seeing the defendant. One became visibly nervous as the defendant, his family, and friends came in and sat down behind her in the courtroom.").

9. Libai, *supra* note 6, at 1016-18.

front his accuser.<sup>10</sup> This constitutional right, while important, is not absolute.<sup>11</sup>

Courts have attempted in various ways to balance the defendant's right of confrontation and the state's interest in prosecuting child molestation cases.<sup>12</sup> Both interests are not always equally protected. In a recent California case,<sup>13</sup> for example, the prosecution proposed the use of two-way closed circuit television to take the testimony of child victims of sex crimes.<sup>14</sup> The court, however, ruled that this procedure could not be used.<sup>15</sup> Consequently, the children had to testify in the same room as the accused. The court based its decision on the fact that California had no statutory provision allowing this procedure.<sup>16</sup> It also suggested that the procedure might be constitutionally infirm,<sup>17</sup> but declined to rule on this issue.<sup>18</sup> Thus, the court protected the criminal defendant's right of confrontation, yet failed to secure the state's interest.

This Note argues that allowing child victims of sexual abuse to testify via two-way closed circuit television in a separate room from the defendant is the best way to effectuate the state's interest in prosecuting these cases without diminishing the defendant's confrontation rights. Part I discusses the difficulties of obtaining the testimony of victims in child molestation cases and explores possible alternatives that might ease the child victims' trauma of testifying. Part II examines the meaning of the right of confrontation. Part III discusses the constitutional considerations in balancing the defendant's right of confrontation and the state's interest in prosecuting child molestation cases. It demonstrates that the use of two-way closed circuit television to take the testimony of child victims of sex crimes strikes the most acceptable balance. This Note concludes that a victim of child molestation should be allowed to testify in a

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10. The sixth amendment states, in pertinent part, that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. Const. amend. VI.

11. *See* *Ohio v. Roberts*, 448 U.S. 56, 64 (1980) (confrontation right is an extremely important trial right, but it may have to yield to "competing interests, if 'closely examined'") (quoting *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973)); *Davis v. Alaska*, 415 U.S. 308, 320 (1974) (state's interest in protecting a juvenile's criminal record does not outweigh right to confrontation); *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973) (right to confrontation is not absolute and may be outweighed by a state interest, but the state interest must be scrutinized).

12. *See, e.g., Parisi v. Superior Court*, 144 Cal. App. 3d 211, 192 Cal. Rptr. 486, 491 (1983) (magistrate allowed eight year old child, too embarrassed to talk, to whisper her answer to him as to where the defendant had touched her); *Herbert v. Superior Court*, 117 Cal. App. 3d 661, 664-65, 671, 172 Cal. Rptr. 850, 851, 855 (1981) (finding unconstitutional the trial court's seating of the defendant, who was charged with sexual offenses against a five year old, so that he and the child victim were not in each other's view).

13. *Hochheiser v. Superior Court*, 161 Cal. App. 3d 777, 208 Cal. Rptr. 273 (1984).

14. *See id.*, 208 Cal. Rptr. at 275.

15. *See id.*, 208 Cal. Rptr. at 284.

16. *See id.*, 208 Cal. Rptr. at 276.

17. *See id.*, 208 Cal. Rptr. at 278.

18. *See id.*, 208 Cal. Rptr. at 279.

room separate from the alleged molester via two-way closed circuit television if the prosecution shows by a preponderance of evidence that the victim will suffer additional trauma if forced to testify in the same room as the defendant.

### I. BRINGING CHILD MOLESTATION CASES TO PROSECUTION

In child molestation cases, the key witness is the child.<sup>19</sup> Because of the nature of the crime, there are usually no other witnesses to child sexual abuse.<sup>20</sup> The child is the only one who really knows what happened,<sup>21</sup> yet his or her testimony often is lost. The major reason<sup>22</sup> is that parents are unwilling to subject their already traumatized child<sup>23</sup> to further trauma in the courtroom.<sup>24</sup> In a typical case, the child victim will be

19. See Meyers, *supra* note 7, at 15; Schultz, *supra* note 6, at 177-79.

20. See Meyers, *supra* note 7, at 15; Schultz, *supra* note 6, at 177; K. Mayer, *supra* note 2, at 4; cf. Bahlmann & Johnson, *Trial Issues in Child Abuse*, in *Child Abuse and Neglect* 223, 225 (1977) (child abuse usually has no witnesses besides family members); *Evidentiary Problems*, *supra* note 5, at 258 (same).

21. See Meyers, *supra* note 7, at 15; K. Mayer, *supra* note 2, at 4.

22. Another reason for the unavailability of a child victim's testimony is that the child may be considered incompetent to testify. See *supra* note 7 and accompanying text. The procedure proposed in this Note does not affect the competency determination. It does, however, provide a method for obtaining testimony from child victims who have been deemed competent.

23. See M. de Young, *The Sexual Victimization of Children* 46-64, 77-78 (1982) (discussing the effects of paternal incest on the child victim both during and after the abuse: isolation in the family, feelings of worthlessness, guilt, "acting out," "sexual acting out," psychological disturbance, physical problems, lesbianism, prostitution, thoughts of suicide); *id.* at 71-73 (stating the effects of maternal incest on sons: withdrawal, sexual problems); *id.* at 132-38 (discussing the "rape trauma syndrome" and the "accessory to sex syndrome" that occur as results of heterosexual pedophilia); *id.* at 157-60 (some of the psychological and physical effects of homosexual pedophilia on the victims are dependency, nightmares and headaches); R. Geiser, *supra* note 1, at 27-29 (discussing the "time-bomb effect" of child rape); B. Karpman, *supra* note 6, at 67-70 (citing studies that have shown that effects on child victims may include sexual delinquency, mental disturbance, an extension of the infantile stage or anxiety); J. Palmer, *supra* note 6, at 522 (child sexual abuse in itself causes damage to the child); F. Rush, *supra* note 3, at 6 (child victims may suffer from rectal fissures, torn anal and vaginal walls, venereal disease, and may become pregnant or die); *id.* at 7-10 (the emotional effects on the child victim may include severe depression or inability to function normally); Berliner, *supra* note 3, at 283 (child may withdraw or regress as a result of sexual abuse); Berliner & Stevens, *Clinical Issues in Child Sexual Abuse*, in *Social Work and Child Sexual Abuse*, 93, 103-05 (J. Conte & D. Shore eds. 1982) (effects of child molestation may include venereal disease, hysterical seizures, sexual dysfunction, fear, nightmares, regression, withdrawal, prostitution); Chandler, *Knowns and Unknowns in Sexual Abuse of Children*, in *Social Work and Child Sexual Abuse*, 51, 61-63 (J. Conte & D. Shore eds. 1982) (child molestation can cause the child to suffer fear, confusion, nightmares, mood swings, withdrawal, depression, low self-esteem); Conte, *supra* note 1, at 11-12 (citing studies that show that effects on child victims of sexual abuse include hysterical seizures, stomach aches, negative dysfunction). *But see* B. Karpman, *supra* note 6, at 67-68 (citing one study that found little harmful effect on victims of child molestation); Conte, *supra* note 1, at 11 (citing four studies that did not find detrimental results in child victims of sexual abuse).

24. See *supra* note 6 and accompanying text.

questioned by the police,<sup>25</sup> will testify at the preliminary hearing<sup>26</sup> and, if the crime is a felony, will testify at the grand jury hearing.<sup>27</sup> All this precedes the child's testimony at trial. Even when the defense counsel is gentle in cross-examination,<sup>28</sup> these experiences can be harrowing for the child.<sup>29</sup> In addition, the child victim is afraid to be in the same room with the defendant<sup>30</sup> and is intimidated by an open court with a jury and spectators.<sup>31</sup>

As a result of this loss of the key witness' testimony, the prosecution in a child molestation case must generally rely on expert testimony of physicians,<sup>32</sup> demonstrative evidence—for example, x-rays and photo-

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25. Chaneles, *supra* note 6, at 54; De Francis, *supra* note 3, at 16; Libai, *supra* note 6, at 986.

26. De Francis, *supra* note 3, at 16; Libai, *supra* note 6, at 1005; Parker, *supra* note 6, at 651.

27. De Francis, *supra* note 3, at 16; Libai, *supra* note 6, at 1005-06.

28. De Francis, *supra* note 3, at 16. A defense counsel might fare better if he or she does not appear to be badgering the child witness. See Meyers, *supra* note 7, at 51.

29. See *supra* notes 24-27 and accompanying text.

30. See L. Holmstrom & A. Burgess, *supra* note 8, at 226; Libai, *supra* note 6, at 984, 1018; Parker, *supra* note 6, at 651.

31. See Libai, *supra* note 6, at 1014; Parker, *supra* note 6, at 651-53; *Confronting Child Victims*, *supra* note 2, at 387.

32. Bahlmann & Johnson, *supra* note 20, at 225; cf. *Evidentiary Problems*, *supra* note 5, at 260-62 (discussing the importance of medical testimony in child abuse cases). Medical evidence can take various forms. A physician may testify that in his opinion a particular injury occurred in a certain way. See Bahlmann & Johnson, *supra* note 20, at 226. An examining physician may testify as to statements made by the patient for purposes of medical diagnosis and treatment. See Fed. R. Evid. 803(4). "Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment" are admissible as exceptions to the hearsay rule. *Id.* These may include statements of a then existing physical state or statements of medical history or of causation if "reasonably pertinent" to treatment or diagnosis, but would not include statements as to fault. Fed. R. Evid. 803(4) advisory committee note; McCormick on Evidence, *supra* note 7, § 292, at 839-40; see *United States v. Iron Shell*, 633 F.2d 77, 83-85 (8th Cir. 1980) (child victim's description of sexual abuse to doctor admissible because cause of injury was reasonably pertinent to treatment), *cert. denied*, 450 U.S. 1001 (1981); *United States v. Nick*, 604 F.2d 1199, 1201-02 (9th Cir. 1979) (*per curiam*) (physician allowed to testify as to child victim's statements of causation but not as to statements concerning identity of the molester). This evidence can also be admitted in most state courts because more than half of the states have adopted evidence codes based on the Federal Rules of Evidence. See McCormick on Evidence, *supra* note 7, at xv.

The statement need not be made to a medical doctor. Statements to hospital personnel, family members or ambulance drivers may be included under this exception. Fed. R. Evid. 803(4) advisory committee note; McCormick on Evidence, *supra* note 7, § 292, at 840. Statements made to a physician who has been engaged for litigation are also admissible if made for diagnosis or treatment purposes. Fed. R. Evid. 803(4) advisory committee note. Moreover, the defendant may not use the physician-patient privilege as a bar to the physician's testimony because the patient holds the privilege and therefore may waive it. McCormick on Evidence, *supra* note 7, § 102, at 252-53; see 8 J. Wigmore, *supra* note 7, § 2386, at 851 (rev. ed. 1961 & Supp. 1983); see, e.g., *State v. Fackrell*, 44 Wash. 2d 874, 878, 271 P.2d 679, 681 (1954); *State v. Thomas*, 1 Wash. 2d 298, 304-05, 95 P.2d 1036, 1039 (1939); Bahlmann & Johnson, *supra* note 20, at 232. Medical evidence may



graphs<sup>33</sup>—and testimony based on hearsay exceptions.<sup>34</sup> The medical testimony and demonstrative evidence may prove that the child was molested<sup>35</sup> but cannot, in most instances, specifically link the crime to the accused.<sup>36</sup> If the court finds the child incompetent or unwilling to testify, it may still admit the child's prior statements as present sense impressions or excited utterances. These statements must have been made to a competent witness and must meet all the requirements for Federal Rules of Evidence 803(1) and 803(2) respectively.<sup>37</sup> Courts could also expand the *res gestae* rule to allow the testimony of a person with whom a child under ten discussed the event.<sup>38</sup> It should be noted, however, that both

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also be admitted as hospital records under Fed. R. Evid. 803(6). Bahlmann & Johnson, *supra* note 20, at 235-40; see *Evidentiary Problems, supra* note 5, at 270.

33. Bahlmann & Johnson, *supra* note 20, at 240-42; *Evidentiary Problems, supra* note 5, at 273.

34. Bahlmann & Johnson, *supra* note 20, at 242-48. The hearsay exception most applicable to the admission of a child's statement is Fed. R. Evid. 803(2) (excited utterance) which states that "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" is admissible.

There is a trend toward allowing more time to elapse between the event and the statement made in child sexual abuse cases. McCormick on Evidence, *supra* note 7, § 297, at 859 n.49; see *Moore v. State*, 26 Md. App. 556, 560, 338 A.2d 344, 346 (1975) (testimony of emergency room doctor as to statement made by three year old victim of child abuse within hours of receiving the injury admissible as an excited utterance); *State v. Duncan*, 53 Ohio St. 2d 215, 217-18, 222, 373 N.E.2d 1234, 1235-36, 1238 (1978) (testimony of mother as to statement made by a six year old victim of sexual abuse within hours of the incident allowed as part of the *res gestae*); *State v. Bouchard*, 31 Wash. App. 381, 383-84, 639 P.2d 761, 762-63 (1982) (testimony of mother as to statement made by a three year old victim of sexual abuse within hours of the incident admissible as an excited utterance hearsay exception); *State ex rel. Harris v. Schmidt*, 69 Wis. 2d 668, 683-84, 230 N.W.2d 890, 898-99 (1975) (statements by five year old sexual abuse victim made within a day of the incident to his mother admissible under excited utterance hearsay exception); *Love v. State*, 64 Wis. 2d 432, 442, 219 N.W.2d 294, 299 (1974) (testimony of mother of a three year old victim of sexual abuse as to statements the child made to her the morning after the incident admitted as part of the *res gestae* or as an excited utterance). There are, however, limits on this expansion. See *State v. Lovely*, 110 Ariz. 219, 220, 517 P.2d 81, 82 (1973) (en banc) (statement made to an officer by a seven year old victim of sexual abuse not admissible as part of the *res gestae* because it was not made until two weeks after the crime took place).

35. See McCormick on Evidence, *supra* note 7, §292, at 839-40; *Evidentiary Problems, supra* note 5, at 272-73.

36. See *United States v. Nick*, 604 F.2d 1199, 1201-02 (9th Cir. 1979) (per curiam) (admitting physician's testimony as to the child victim's statements of causation but not those relating to the identity of the molester); see also Fed. R. Evid. 803(4) advisory committee note (statements of fault not admissible); McCormick on Evidence, *supra* note 7, § 292, at 841 (same).

37. The present sense impression exception to the hearsay rule states that "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter" is admissible. Fed. R. Evid. 803(1). See *supra* note 34 for the definition of the the excited utterance exception, Fed. R. Evid. 803(2). As stated above, these exceptions are also applicable in most state courts because more than half of the states have adopted evidence codes based on the Federal Rules of Evidence. See McCormick on Evidence, *supra* note 7, at xv.

38. One commentator has suggested that the *res gestae* exception be expanded. See Parker, *supra* note 6, at 670-71. *Res gestae* is a somewhat indefinite term but has gener-

on the federal level and in many states, there is no *res gestae* exception to the hearsay rule.<sup>39</sup> Although these alternative forms of testimony might prove helpful to the case,<sup>40</sup> the most persuasive testimony—that of the child victim himself or herself—is absent.<sup>41</sup> Any substitute for the child's direct testimony is unlikely to be as convincing, and thus the prosecution is unlikely to be as successful.

Rather than forego the use of the most crucial testimony in child molestation cases, courts and commentators have attempted to devise alternative methods of taking a child victim's testimony.<sup>42</sup> These methods are

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ally been used to introduce into evidence any words that accompany a litigated or relevant fact. McCormick on Evidence, *supra* note 7, § 288, at 835-36; see *State v. Boodry*, 96 Ariz. 259, 263, 394 P.2d 196, 199 (en banc) (five year old victim's spontaneous expressions to the first person she saw after her father raped her held to be part of the *res gestae* and therefore admissible), *cert. denied*, 379 U.S. 949 (1964).

Courts and commentators have criticized the phrase "*res gestae*" because of its imprecision. McCormick on Evidence, *supra* note 7, § 288, at 836; see, e.g., *Wheeler v. United States*, 211 F.2d 19, 23 n.11 (D.C. Cir. 1953), *cert. denied*, 347 U.S. 1019 (1954); *Coryell v. Clifford F. Reid, Inc.*, 117 Cal. App. 534, 538, 4 P.2d 295, 296 (1931) (Houser, J., concurring); *Williams v. State*, 188 So. 2d 320, 323-24 (Fla. Dist. Ct. App. 1966), *rev'd*, 198 So. 2d 21 (Fla. 1967); *Honick v. Walden*, 10 Md. App. 714, 717, 272 A.2d 406, 408 (1971); 6 J. Wigmore, *supra* note 7, § 1767, at 255 (J. Chadbourn rev. ed. 1976). As one commentator stated, "[t]he marvelous capacity of a Latin phrase to serve as a substitute for reasoning, and the confusion of thought inevitably accompanying the use of inaccurate terminology, are nowhere better illustrated than in the decisions dealing with the admissibility of evidence as '*res gestae*.'" Morgan, *A Suggested Classification of Utterances Admissible as Res Gestae*, 31 Yale L.J. 229, 229 (1922) (emphasis in original).

Both McCormick and Wigmore believe the phrase "*res gestae*" should be discarded. See McCormick on Evidence, *supra* note 7, § 288, at 836; 6 J. Wigmore, *supra* note 7, § 1767, at 255 (J. Chadbourn rev. ed. 1976). The Model Code of Evidence does not mention the phrase. 6 J. Wigmore, *supra* note 7, § 1767, at 256 n.2 (J. Chadbourn rev. ed. 1976). Others, however, still use the phrase. See *State v. Galvan*, 297 N.W.2d 344, 347 (Iowa 1980) (court considered admissibility of testimony under the *res gestae* exception).

39. See 6 J. Wigmore, *supra* note 7, § 1767, at 256 n.2 (J. Chadbourn rev. ed. 1976) (phrase "*res gestae*" is not mentioned in Model Code of Evidence). For a discussion of the relationship between the Model Code of Evidence and the Federal Rules of Evidence, see McCormick on Evidence, *supra* note 7, § 326, at 915-16. The pertinent Federal Rule of Evidence is Fed. R. Evid. 803(2). As stated above, more than half of the states have adopted evidence codes based on the Federal Rules of Evidence. See McCormick on Evidence, *supra* note 7, at xv.

40. See *supra* notes 32-37 and accompanying text.

41. See *supra* note 19 and accompanying text.

42. See, e.g., *Parisi v. Superior Court*, 144 Cal. App. 3d 211, 192 Cal. Rptr. 486, 490 (1983) (child victim/witness in sexual abuse case allowed to whisper her response to the magistrate as to where the defendant had touched her); *Herbert v. Superior Court*, 117 Cal. App. 3d 661, 664-65, 671, 172 Cal. Rptr. 850, 851, 855 (1981) (unsuccessful attempt to allow child victim of sexual abuse to be seated so that defendant was not within child's view); *Libai, supra* note 6, at 1014-32 (Libai proposes a trial in a "child courtroom" with only the judge, prosecutor, defense counsel and a child examiner present. The defendant, jury and spectators could view the trial through a one-way glass. Alternatively, Libai suggests that the child victim testify only once, in a special hearing held prior to trial.); *Meyers, supra* note 7, at 16 (prosecution lawyer may simply stand between the child and the defendant, thereby blocking their views of each other when the child victim must testify in the same room as the defendant); *Parker, supra* note 6, at 669-70 (defendant should remain out of child victim's sight at trial unless his appearance is

all geared toward alleviating some of the testifying child's trauma.<sup>43</sup> In addition, some techniques used by the courts for traumatized adult victims may also be considered for use in child molestation cases.<sup>44</sup> The major intention behind these suggestions is to limit or obscure the victim/witness' view of the defendant.<sup>45</sup> For example, the testimony of traumatized victims can be videotaped before trial with the defendant and the witness kept from each other's view<sup>46</sup> or the child testifying in person can be seated in such a way that he or she cannot see the defend-

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required for identification; child's deposition should be videotaped with the defendant, spectators and other court personnel behind a one-way glass, out of the child witness' view; recordings of initial interviews with the child victim/witness should be used instead of live testimony; answers previously recorded can be used instead of live cross-examination if the defense counsel's questions on cross-examination were previously asked during the initial interview); Casenote, *The Final Resting of the "Tender Years" Exception to the Hearsay Rule: People v. Kreiner*, 1984 Det. C.L. Rev. 117, 132 n.97 (prosecutor may stand between the child witness and the defendant to block their views of one another) [hereinafter cited as *Tender Years Exception*]; Comment, *Libai's Child Courtroom: Is It Constitutional?*, 7 J. Juv. L. 31, 37 (1983) (suggests the use of a two-way closed circuit television that allows the defendant to view the child victim/witness throughout the proceeding, but the child views the defendant only for a moment at the beginning of the proceeding and is told that the defendant is watching.) [hereinafter cited as *Libai's Child Courtroom*].

Many state legislatures have passed laws that make it easier to prosecute child molesters. See K. Mayer, *supra* note 2, at 12. These include, inter alia, enactment of harsher sexual abuse laws and sentences, permission to videotape testimony of the child victim, and elimination of the competency requirement for witnesses who are victims of child molestation. *Id.* At least twelve states have videotaping statutes. See Ariz. Rev. Stat. Ann. §§ 12-2311 to -2312 (1982); Ark. Stat. Ann. §§ 43-2035 to -2036 (Supp. 1983); Cal. Penal Code § 1346 (West Supp. 1985); Colo. Rev. Stat. § 18-3-413 (Supp. 1984); Fla. Stat. Ann. § 90.90 (West Supp. 1985); Ky. Rev. Stat. § 421.350 (Supp. 1984); Me. Rev. Stat. Ann. tit. 15, § 1205 (Supp. 1984-1985); Mont. Code Ann. § 46-15-401 to -402 (1983); N.M. Stat. Ann. § 30-9-17 (1984); S.D. Codified Laws Ann. §§ 23A-12-9 to -10 (Supp. 1984); Tex. Crim. Proc. Code Ann. art. 38.071 (Vernon Supp. 1985); Wis. Stat. Ann. § 967.04(7) (West 1985). New York admits videotaped testimony of child victims of sex crimes at a grand jury hearing but not at trial. See N.Y. Crim. Proc. Law § 190.30(4) (Consol. 1985).

43. See *Parisi v. Superior Court*, 144 Cal. App. 3d 211, 192 Cal. Rptr. 486, 490 (1983); *Herbert v. Superior Court*, 117 Cal. App. 3d 661, 664-65, 172 Cal. Rptr. 850, 851 (1981); *Libai, supra* note 6, at 1014; *Meyers, supra* note 7, at 16; *Parker, supra* note 6, at 647; *Tender Years Exception, supra* note 42, at 132 n.97.

44. See *United States v. Benfield*, 593 F.2d 815, 817, 821 (8th Cir. 1979) (reversing trial court's decision to allow the testimony of a traumatized adult victim to be videotaped; victim's psychiatrist testified that a less stressful method of taking the victim's testimony should be used, so defendant was able to view the proceeding and stop it at any time to consult with counsel, and victim was unaware that the defendant was watching); *People v. Williams*, 32 Cal. 2d 78, 82, 195 P.2d 393, 395 (adult woman allowed to testify facing jury but with back toward some spectators; defendant held oblique view of her), *cert. denied*, 335 U.S. 835 (1948), *overruled on other grounds*, *People v. Green*, 47 Cal. 2d 209, 232, 302 P.2d 307, 322 (1956), *overruled on other grounds*, *People v. Morse*, 60 Cal. 2d 631, 648-49, 388 P.2d 33, 44, 36 Cal. Rptr. 201, 212 (1964).

45. See *supra* notes 43-44 and accompanying text.

46. See, e.g., Ky. Rev. Stat. § 421.350(4) (Supp. 1984); Tex. Crim. Proc. Code Ann. art. 38.071(4) (Vernon Supp. 1985); see also *Libai, supra* note 6, at 1028-32; *Parker, supra* note 6, at 668-70. One commentator suggests the testimony be videotaped after the trial begins. See Note, *The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legis-*

ant.<sup>47</sup> While these suggestions reduce the stress on the child, care must be taken to avoid eviscerating the criminal defendant's fundamental<sup>48</sup> sixth amendment right of confrontation.

## II. THE MEANING OF THE RIGHT OF CONFRONTATION

Any technique designed to diminish the child victim's additional trauma in testifying must pass constitutional muster under the confrontation clause of the sixth amendment,<sup>49</sup> which provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."<sup>50</sup> Because there is no available legislative history on the confrontation clause,<sup>51</sup> one must look to judicial interpretations to understand the meaning and the scope of the sixth amendment right of confrontation.<sup>52</sup>

*lative Innovations*, 98 Harv. L. Rev. 806, 824-25, 826-27 (1985) [hereinafter cited as *Sex Abuse Prosecutions*].

47. See *People v. Williams*, 32 Cal. 2d 78, 82, 195 P.2d 393, 395, cert. denied, 335 U.S. 835 (1948), overruled on other grounds, *People v. Green*, 47 Cal. 2d 209, 232, 302 P.2d 307, 322 (1956), overruled on other grounds, *People v. Morse*, 60 Cal. 2d 631, 648-49, 388 P.2d 33, 44, 36 Cal. Rptr. 201, 212 (1964).

48. *Pointer v. Texas*, 380 U.S. 400, 403 (1965).

49. See *Libai*, supra note 6, at 1018; *Parker*, supra note 6, at 646; *Libai's Child Courtroom*, supra note 42, at 34.

50. U.S. Const. amend. VI.

51. *California v. Green*, 399 U.S. 149, 176 n.8 (1970). The confrontation clause was submitted without debate. *Id.* at 176; see also Note, *Confrontation, Cross-Examination, and the Right to Prepare a Defense*, 56 Geo. L.J. 939, 953 (1968) (stating that "standard historical literature" is not illuminating in the determination of the meaning of the confrontation clause); Note, *Preserving the Right to Confrontation—A New Approach to Hearsay Evidence in Criminal Trials*, 113 U. Pa. L. Rev. 741, 742-43 (1965) (same); Note, *Confrontation and the Hearsay Rule*, 75 Yale L.J. 1434, 1436 n.10 (1966) (stating that the sole historical insight to the confrontation clause is F. Heller's work, *The Sixth Amendment to the Constitution of the United States* (1951)). It has been stated that the confrontation clause has its roots in the common law right that emerged after the abuse in the trial of Sir Walter Raleigh. F. Heller, *The Sixth Amendment to the Constitution of the United States* 104 (1951).

The Supreme Court also stated that the bifurcated rights of confrontation and cross-examination expressed in the sixth amendment have "ancient roots." *Greene v. McElroy*, 360 U.S. 474, 496 (1959). These rights were also protected in Rome more than two thousand years ago. See *id.* at 496 n.25.

52. See 2A N. Singer, *Sutherland Statutory Construction* § 49.03, at 353 (C. Sands rev. 4th ed. 1984) ("Long-continued contemporaneous and practical interpretation of a statute by the . . . courts . . . constitutes an invaluable aid in determining the meaning of [constitutional provisions].").

A preliminary step in the interpretation of a law is to look at the plain meaning of the words. *Caminetti v. United States*, 242 U.S. 470, 485 (1917); 2A N. Singer, supra, § 45.01, at 1. In order to determine how to construe a law, however, the legislative intent in enacting the law must be considered. 2A N. Singer, supra, § 45.05, at 20-21. A literal examination of the words in the confrontation clause would result in the conclusion that only testimony by witnesses physically present in the courtroom is admissible. *Griswold, The Due Process Revolution and Confrontation*, 119 U. Pa. L. Rev. 711, 713 (1971). It is obvious that the Supreme Court chose to interpret the confrontation clause not by the plain meaning of its words but rather in conjunction with the law as it existed at the time of enactment. See *Mattox v. United States*, 156 U.S. 237, 243 (1895); *Griswold, supra*, at

Early Supreme Court decisions construing the confrontation clause describe the defendant's right to confront his accuser as twofold.<sup>53</sup> First, the defendant has a right to a face-to-face meeting with his accuser at trial.<sup>54</sup> This is so that the jury may judge whether the witness is being truthful by observing the witness' demeanor while testifying in front of the defendant.<sup>55</sup> The purpose of the face-to-face confrontation is to allow the fact-finder the opportunity to observe the demeanor of the witness when making his or her accusation in front of the one person who knows if he or she is being truthful.<sup>56</sup> Second, the defendant has the right to cross-examine the witness.<sup>57</sup> The rationale for this right is to test the truth of the testimony given.<sup>58</sup> Although later Supreme Court cases seem to emphasize that the primary purpose of the confrontation clause is the right of the defendant to cross-examine<sup>59</sup> and that the right to

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714. The law at the time of adoption recognized exceptions to the hearsay rule. *Id.*; see *Mattox*, 156 U.S. at 243-44.

53. See *Snyder v. Massachusetts*, 291 U.S. 97, 106 (1934); *Dowdell v. United States*, 221 U.S. 325, 330 (1911); *Kirby v. United States*, 174 U.S. 47, 55 (1899); *Mattox v. United States*, 156 U.S. 237, 244 (1895).

54. *Dowdell v. United States*, 221 U.S. 325, 330 (1911); *Kirby v. United States*, 174 U.S. 47, 55 (1899); *Mattox v. United States*, 156 U.S. 237, 244 (1895). The scope of this right extends to all stages of the trial. *United States v. Benfield*, 593 F.2d 815, 821 (8th Cir. 1979). A deposition is a stage of the trial. *Id.*; *State v. Turner*, 345 N.W.2d 552, 559 (Iowa Ct. App. 1983). The scope of the confrontation right does not extend to voir dire for witness competency determinations. *State v. Ritchey*, 107 Ariz. 552, 555, 490 P.2d 558, 561 (1971). Nor does it apply to prison disciplinary proceedings. *Wolff v. McDonnell*, 418 U.S. 539, 567-68 (1974).

55. *California v. Green*, 399 U.S. 149, 158 (1970); *Barber v. Page*, 390 U.S. 719, 725 (1968); 5 J. Wigmore, *supra* note 7, § 1395, at 153 (J. Chadbourn rev. ed. 1974). The Supreme Court has stated that

[t]he primary object of the [confrontation clause] was to prevent depositions or *ex parte* affidavits . . . being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

*Mattox v. United States*, 156 U.S. 237, 242-43 (1895). This does not mean, however, that the confrontation right is a right to have the accuser face the fact-finder. The Court in *Mattox* went on to explain that the confrontation right is a right to compel the witness to testify face-to-face with the defendant. See *id.* at 244.

56. See *California v. Green*, 399 U.S. 149, 158 (1970); *Barber v. Page*, 390 U.S. 719, 725 (1968); *Mattox v. United States*, 156 U.S. 237, 242-43 (1895); 5 J. Wigmore, *supra* note 7, § 1395, at 153 (J. Chadbourn rev. ed. 1974).

57. *Snyder v. Massachusetts*, 291 U.S. 97, 106 (1934); *Dowdell v. United States*, 221 U.S. 325, 330 (1911); *Kirby v. United States*, 174 U.S. 47, 55 (1899); *Mattox v. United States*, 156 U.S. 237, 244 (1895).

58. *Davis v. Alaska*, 415 U.S. 308, 316 (1974); see *Douglas v. Alabama*, 380 U.S. 415, 418-19 (1965) (quoting *Mattox v. United States*, 156 U.S. 237, 242-43 (1895)); *Dowdell v. United States*, 221 U.S. 325, 330 (1911); *Mattox v. United States*, 156 U.S. 237, 242-43 (1895).

59. See *Douglas v. Alabama*, 380 U.S. 415, 418 (1965); *Pointer v. Texas*, 380 U.S. 400, 406-07 (1965).

physical presence is a tangential sixth amendment concern,<sup>60</sup> the Court never relinquished the requirement of face-to-face confrontation. It merely did not discuss the right to face the accuser as it was not in issue in those cases.<sup>61</sup> In 1968, in *Barber v. Page*,<sup>62</sup> the Court reaffirmed that the right of confrontation includes both the right to cross-examine and the right to a face-to-face meeting<sup>63</sup> and the Court has continued to define the confrontation right as encompassing both these rights.<sup>64</sup> *Barber* and *Ohio v. Roberts*<sup>65</sup> suggest that the Supreme Court, if faced with the question today, would require physical presence if possible. In *Barber*, the Court held that a witness is not unavailable unless the state has made a good faith effort to secure his presence at the trial.<sup>66</sup> In *Roberts*, the Court required either the production of the witness or a demonstration that the witness was unavailable.<sup>67</sup> These cases imply that the right of confrontation still requires the physical presence of the accuser unless he is shown to be unavailable.

The procedures discussed above,<sup>68</sup> which are designed to prevent the child from viewing the defendant, might therefore fall if constitutionally challenged. Even though they allow cross-examination of the child victims,<sup>69</sup> the constitutional right of a criminal defendant to a face-to-face

60. See *Douglas v. Alabama*, 380 U.S. 415, 418 (1965) (primary right secured by the sixth amendment right of confrontation is the right to cross-examination); *Pointer v. Texas*, 380 U.S. 400, 406-07 (1965) (same). Wigmore agrees that the main purpose of the confrontation right is to cross-examine, not "the idle purpose of gazing upon the witness, or of being gazed upon by him." 5 J. Wigmore, *supra* note 7, § 1395, at 150 (J. Chadbourne rev. ed. 1974).

61. See, e.g., *Douglas v. Alabama*, 380 U.S. 415, 418-20 (1965) (issue was whether the defendant's inability to cross-examine his accuser denied him his sixth amendment right); *Pointer v. Texas*, 380 U.S. 400, 403 (1965) (issue was whether a statement made at a preliminary hearing without adequate opportunity to cross-examine and later introduced at trial denied defendant the right to cross-examine his accuser).

62. 390 U.S. 719 (1968).

63. *Id.* at 725. Wigmore's analysis is in line with the Court's. He states that although the main purpose of the confrontation clause is the right to cross-examine, a secondary objective is to allow the jury to judge the demeanor of the witness. See 5 J. Wigmore, *supra* note 7, § 1395, at 150-53 (J. Chadbourne rev. ed. 1974). But see *Sex Abuse Prosecutions*, *supra* note 46, at 823 & n.108, 824 (author concedes that the Supreme Court has defined the right of confrontation as the right to face one's accuser, yet argues that the right of confrontation may be satisfied without a face-to-face meeting).

64. See *Ohio v. Roberts*, 448 U.S. 56, 63 (1980); *Davis v. Alaska*, 415 U.S. 308, 315 (1974); *California v. Green*, 399 U.S. 149, 157-58 (1970) (quoting *Mattox v. United States*, 156 U.S. 237, 242-43 (1895)); *Barber v. Page*, 390 U.S. 719, 725 (1968); *Douglas v. Alabama*, 380 U.S. 415, 418-19 (1965) (quoting *Mattox v. United States*, 156 U.S. 237, 242-43 (1895)).

65. 448 U.S. 56 (1980).

66. See *Barber v. Page*, 390 U.S. 719, 722-25 (1968).

67. See *Ohio v. Roberts*, 448 U.S. 56, 65 (1980). But see *id.* at 65 n.7 (Court, citing *Dutton v. Evans*, 400 U.S. 74 (1970), indicated without explanation that a demonstration of unavailability is not necessary if trial confrontation is of remote utility).

68. See *supra* notes 42-47 and accompanying text.

69. See *United States v. Benfield*, 593 F.2d 815, 817 (8th Cir. 1979) (cross-examination of victim permitted); *People v. Williams*, 32 Cal. 2d 78, 82, 195 P.2d 393, 395 (same), *cert. denied*, 335 U.S. 835 (1948), *overruled on other grounds*, *People v. Green*, 47 Cal. 2d

meeting with his accuser is thwarted.<sup>70</sup> Recollection, truth and communication clearly are influenced by a face-to-face confrontation.<sup>71</sup> This "benign intimidation" factor is an important element of the right of confrontation.<sup>72</sup>

### III. A CONSTITUTIONAL SOLUTION

#### A. Standards

In order to capture the testimony of a child victim of a sex crime with a minimum of trauma for the child and without abridging the defendant's right to a face-to-face confrontation with his accuser, a balancing of interests is required.<sup>73</sup> From its earliest interpretations, the Supreme Court has recognized that the right of confrontation is not absolute<sup>74</sup> and

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209, 232, 302 P.2d 307, 322 (1956), *overruled on other grounds*, *People v. Morse*, 60 Cal. 2d 631, 648-49, 388 P.2d 33, 44, 36 Cal. Rptr. 201, 212 (1964); *Parisi v. Superior Court*, 144 Cal. App. 3d 211, 192 Cal. Rptr. 486, 491 (1983) (defense counsel chose not to cross-examine); *Libai*, *supra* note 6, at 1020 (proposal allows cross-examination); *Parker*, *supra* note 6, at 697 (same).

70. *See, e.g.*, *United States v. Benfield*, 593 F.2d 815, 817 (8th Cir. 1979) (defendant not present in the same room as witness); *People v. Williams*, 32 Cal. 2d 78, 82, 195 P.2d 393, 395 (defendant held an oblique view of the witness), *cert. denied*, 335 U.S. 835 (1948), *overruled on other grounds*, *People v. Green*, 47 Cal. 2d 209, 232, 302 P.2d 307, 322 (1956), *overruled on other grounds*, *People v. Morse*, 60 Cal. 2d 631, 648-49, 388 P.2d 33, 44, 36 Cal. Rptr. 201, 212 (1964); *Herbert v. Superior Court*, 117 Cal. App. 3d 661, 665, 172 Cal. Rptr. 850, 851 (1981) (defendant and witness could not see each other during testimony of witness); *Libai*, *supra* note 6, at 1017 (defendant is not in same room as witness); *Parker*, *supra* note 6, at 668 (same).

71. *Mattox v. United States*, 156 U.S. 237, 242-43 (1895); *United States v. Benfield*, 593 F.2d 815, 821 (8th Cir. 1979); *see also* *Ohio v. Roberts*, 448 U.S. 56, 63 n.6 (1980) (confrontation ensures reliability and truth); 5 J. Wigmore, *supra* note 7, §1367, at 32-33 (J. Chadbourn rev. ed. 1974) (reviewing advantages of cross-examination).

72. In its most positive aspect, this face-to-face confrontation may be considered to be benign intimidation. It is intimidation for the purpose of eliciting the truth and is not to be confused with attempting to coerce the victim not to testify.

73. *See Libai*, *supra* note 6, at 1005; *Parker*, *supra* note 6, at 643-44. The conflicting interests to be balanced are the defendant's right of confrontation and the state's interest in prosecuting child molestation cases. The Supreme Court has recognized that states have "a strong interest in effective law enforcement." *See Ohio v. Roberts*, 448 U.S. 56, 64 (1980).

A similar dilemma was encountered by the courts in rape cases. The rape victim in many cases was too fearful to bring charges. *State v. Patnaude*, 140 Vt. 361, 373, 438 A.2d 402, 407 (1981). The apprehension derived in part from the fear of being subjected to rigorous questioning about her prior sexual activities. *Id.* The victim would often then refuse to cooperate with the prosecution. A balancing of interests—the state's interest in obtaining convictions of rapists and the fundamental right of the defendant to face his accuser—was therefore also required in rape cases. In response to this problem, many states passed rape shield laws which restrict the defendant's right to ask the rape victim about her sexual history. *Brown, Historical Perspective: Rape Shield Law*, 24 N.H.B.J. 95, 95 (1983). On the federal level, Federal Rule of Evidence 412 states that "reputation or opinion evidence of the past sexual behavior of an alleged victim of . . . rape . . . is not admissible." Fed. R. Evid. 412.

74. *See Dowdell v. United States*, 221 U.S. 325, 330 (1911); *Mattox v. United States*, 156 U.S. 237, 243 (1895); *Griswold*, *supra* note 52, at 714.

"must occasionally give way to considerations of public policy and the necessities of the case."<sup>75</sup> Many exceptions to the confrontation requirement have been allowed by the Court.<sup>76</sup> The defendant may waive his right of confrontation by not appearing at trial,<sup>77</sup> by being disruptive during trial and thereby causing his removal from the courtroom,<sup>78</sup> by pleading guilty in a state criminal trial<sup>79</sup> or by threatening the witness.<sup>80</sup> Dying declarations, a major exception to the confrontation clause,<sup>81</sup> have long been admitted as evidence at trial.<sup>82</sup> In addition, if a witness is unavailable at a second trial, his prior testimony at the first trial is admissible as evidence at the second if the statement is reliable and necessary to the case.<sup>83</sup>

75. *Mattox v. United States*, 156 U.S. 237, 243 (1895).

76. *Dowdell v. United States*, 221 U.S. 325, 330 (1911); *Griswold*, *supra* note 52, at 714; *see also Snyder v. Massachusetts*, 291 U.S. 97, 106 (1934) (sixth amendment right to confrontation may be waived by consent or misconduct); *Motes v. United States*, 178 U.S. 458, 471 (1900) (sixth amendment right can be waived if witness is absent due to defendant's "suggestion, procurement or act"); *Robertson v. Baldwin*, 165 U.S. 275, 282 (1897) (admission of dying declarations and depositions of witnesses who have died since the first trial allowed under the sixth amendment). The procedure proposed in this Note comes into play only in the absence of these approved exceptions to the confrontation clause.

77. *Diaz v. United States*, 223 U.S. 442, 455 (1912); *United States v. Barracota*, 45 F. Supp. 38, 38 (S.D.N.Y. 1942); *see also Ah Fook Chang v. United States*, 91 F.2d 805, 809 (9th Cir. 1937) (defendant can waive his right to be present at his trial by voluntarily not appearing at trial).

78. *Moore v. Scurr*, 494 F. Supp. 1042, 1045 (S.D. Iowa 1980), *rev'd on other grounds*, 647 F.2d 854 (8th Cir.), *cert. denied*, 454 U.S. 1098 (1981); *see also Illinois v. Allen*, 397 U.S. 337, 343 (1970) (defendant can lose his right to be present at trial if he is disruptive in court); *Snyder v. Massachusetts*, 291 U.S. 97, 106 (1934) (right to confrontation may be waived, at times, by misconduct).

79. *Boykin v. Alabama*, 395 U.S. 238, 243 n.5 (1969) (quoting *McCarthy v. United States*, 394 U.S. 459, 466 (1969)); *McCarthy v. United States*, 394 U.S. 459, 466 (1969). For this waiver to be valid under the due process clause, it must be voluntary and knowing. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

80. *United States v. Carlson*, 547 F.2d 1346, 1359-60 (8th Cir. 1976), *cert. denied*, 431 U.S. 914 (1977).

81. *Mattox v. United States*, 156 U.S. 237, 243 (1895). Dying declarations are also exceptions to the hearsay rule. Fed. R. Evid. 804(b)(2) states "[i]n a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that his death was imminent, concerning the cause or circumstances of what he believed to be his impending death" may be admissible as an exception to the hearsay rule. Fed. R. Evid. 804(b)(2).

The confrontation clause is not a codification of the hearsay rules. *California v. Green*, 399 U.S. 149, 155 (1970). Although they guarantee similar rights, they are not equal. *Id.* The sixth amendment right to confrontation can be violated even though the statement would be admissible under a hearsay exception. *Id.* at 155-56; *see Barber v. Page*, 390 U.S. 719, 722-26 (1968); *Pointer v. Texas*, 380 U.S. 400, 406-08 (1965). Likewise, a violation of a hearsay exception does not necessarily mean the right to confrontation under the sixth amendment has been violated. *Green*, 399 U.S. at 156. For an exception to the confrontation clause to be valid, it must be based on necessity. *See infra* notes 97-99 and accompanying text.

82. *Snyder v. Massachusetts*, 291 U.S. 97, 107 (1934); *Dowdell v. United States*, 221 U.S. 325, 330 (1911); *Mattox v. United States*, 156 U.S. 237, 243 (1895).

83. *See Mancusi v. Stubbs*, 408 U.S. 204, 216 (1972). A two part test was set forth in



The constitutionality of using electronic video equipment to take the testimony of witnesses in criminal cases has not been specifically addressed by the Supreme Court. The Eighth Circuit is the only circuit to have considered the issue. The two leading cases are *United States v. Benfield*<sup>84</sup> and *United States v. Terrazas-Montano*.<sup>85</sup> In *Benfield*, an adult woman, who had been kidnapped and was afraid to testify in the same room as the defendant, gave a videotaped deposition that was then used at trial.<sup>86</sup> The witness was not able to see the defendant, nor was she aware that the defendant was watching her testimony.<sup>87</sup> The Eighth Circuit in that case adhered to the Supreme Court's analysis that the right of confrontation includes the right to a face-to-face meeting and the right to cross-examine.<sup>88</sup> It also stated that any exception must be "narrow in scope and based on necessity or waiver."<sup>89</sup>

Within these broad guidelines, the *Benfield* court did not prohibit the use of electronic video equipment in court.<sup>90</sup> It stated that face-to-face confrontation via a two-way closed circuit television might be constitutional if there is a "showing of extraordinary circumstances necessitating reliance on the procedure"<sup>91</sup> or if the parties agree to a certain procedure or if the procedure closely adheres to traditional courtroom scenes.<sup>92</sup> *Benfield* thus establishes several standards for the use of electronic video equipment to take the testimony of witnesses. First, a face-to-face meeting between the defendant and the witness ordinarily must occur.<sup>93</sup> Second, the defendant must be afforded the right to cross-examine the witness.<sup>94</sup> Third, any exception to these two rights must be narrow in scope.<sup>95</sup>

Although the *Benfield* court did not present a definitive test to determine narrowness, it is argued in this Note that this must be a two-pronged test. Both the procedure and the subject matter of the exception must be narrow. The *Benfield* court did provide a guideline to test the narrowness of the procedure: It must closely adhere to traditional court-

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Ohio v. Roberts, 448 U.S. 56 (1980): the prosecution must make a good faith effort to produce the witness; and the hearsay statement must bear adequate "indicia of reliability." *Id.* at 66. Reliability can be inferred if the evidence falls within a firmly rooted hearsay exception. *Id.* If not, the statement will be considered reliable if there is a showing of "particularized guarantees of trustworthiness." *Id.*

84. 593 F.2d 815 (8th Cir. 1979).

85. 747 F.2d 467 (8th Cir. 1984).

86. *Benfield*, 593 F.2d at 817.

87. *Id.*

88. *Id.* at 821. The right of confrontation applies to all stages of the trial. This includes a deposition. *See id.* at 821; *State v. Turner*, 345 N.W.2d 552, 559 (Iowa Ct. App. 1983).

89. *Benfield*, 593 F.2d at 821.

90. *See id.*

91. *See id.* at 822 n.11.

92. *See id.* at 821.

93. *Id.* *See supra* note 54 and accompanying text.

94. *Benfield*, 593 F.2d at 821. *See supra* note 57 and accompanying text.

95. *Benfield*, 593 F.2d at 821.

room scenes.<sup>96</sup> It would be overly broad, however, to allow the exception in all instances when the procedure closely resembles a traditional courtroom scene. To sustain the narrowness requirement, the procedure should be employed only in certain types of cases and applied only to limited categories of witnesses. The narrowness of the subject is closely entwined with and receives definition from the fourth requirement: that any exception be based on necessity or waiver.<sup>97</sup> The necessity test may be met by a showing of "extraordinary circumstances" which militate for<sup>98</sup> the use of this procedure.<sup>99</sup>

### B. *Striking an Acceptable Balance*

The most acceptable balance between the confrontation clause and the state's interest in prosecuting these cases would be to have the child<sup>100</sup> victim testify in a room separate from the defendant. The child would be accompanied by a bailiff and a parent or other trusted adult. He or she would face television monitors that would give him or her a view of the judge, defendant and attorneys. The judge, attorneys, defendant, jury and spectators would view the child from a separate monitor in the main courtroom. The television transmission would be instantaneous and the defendant would be able to interrupt the proceedings at any time to confer with his attorney.<sup>101</sup>

This technique would be employed only if the prosecution shows by a preponderance of evidence that a less stressful atmosphere for the child victim/witness is necessary. The most obvious way to meet this burden of proof would be with the expert testimony of a psychiatrist stating that the child's trauma would be substantially compounded if he or she were required to testify in a traditional courtroom setting.

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96. *See id.*

97. *See id.*

98. *See infra* Pt. III.C.4.

99. *See Benfield*, 593 F.2d at 822 n.11.

100. "Child" is defined according to state law.

101. A similar technique was employed in *Kansas City v. McCoy*, 525 S.W.2d 336 (Mo. 1975) (en banc), a case that involved a prosecution for possession of marijuana. The prosecution's witness testified from an office in a crime laboratory via closed circuit television. *Id.* at 337. Two stationary cameras and two monitors in the courtroom and a camera and a monitor in the laboratory were employed. *Id.* The judge, lawyers and witness used microphones. *Id.* All of those present in the courtroom—judge, counsel and defendant—could hear and see the witness and the witness, in turn, could see and hear the participants in the courtroom. *Id.* Transmission was instantaneous. *Id.* The court upheld the procedure on the basis that the confrontation clause did not require physical presence of the witness. *See id.* at 339. Because pre-recorded videotaped testimony is not instantaneous, it is distinguishable from two-way closed circuit television. Pre-recorded videotape testimony implicates additional issues of hearsay and fundamental fairness under the due process clause and is beyond the scope of this Note.

### C. Application of the Standards

#### 1. Face-to-Face Confrontation

The first constitutional requirement that must be satisfied in order to use two-way closed circuit television to capture the testimony of child victims of sex crimes is a face-to-face confrontation between the defendant and the witness at trial.<sup>102</sup> Physical confrontation is not fully met by the procedure proposed in this Note. The proposed procedure does, however, allow the defendant to face the witnesses at trial, even though the face-to-face confrontation does not take place in a single room. The defendant and the child victim are in each other's view throughout the proceeding. Although the confrontation is produced electronically, it is instantaneous.<sup>103</sup> Thus, this technique approximates most of the elements of physical presence.<sup>104</sup>

The use of a two-way closed circuit television to take the testimony of child victims of sex offenses is in accord with recent case law.<sup>105</sup> Although the court in *United States v. Benfield*<sup>106</sup> held that videotaping the victim's testimony in that case was unconstitutional,<sup>107</sup> the same court in *United States v. Terrazas-Montano*<sup>108</sup> found that the right of confrontation was satisfied even though the depositions of the witnesses were videotaped and subsequently used at trial.<sup>109</sup> Thus, the *Benfield* court's main objection to the videotaping technique employed there was that it allowed for only partial confrontation.<sup>110</sup> The court in *Terrazas-Montano* distinguished the facts of that case.<sup>111</sup> In *Terrazas-Montano*, the defendant, accused of transporting an illegal alien across state lines, faced the witnesses throughout the videotaped deposition.<sup>112</sup> The same is true for the procedure proposed in this Note even though the face-to-face confrontation does not take place in a single room. This proposal affects only the procedure by which evidence is presented; the substantive con-

102. See *supra* note 54 and accompanying text.

103. See *Kansas City v. McCoy*, 525 S.W.2d 336, 337 (Mo. 1975) (en banc).

104. See *id.* at 339. As the court in *Benfield* noted, "prior to the availability of television, confrontation generally involved a face-to-face meeting with one's adversaries." *United States v. Benfield*, 593 F.2d 815, 819 (8th Cir. 1979). This happenstance alone, however, cannot foreclose the use of two-way closed circuit television to take the testimony of child victims of sexual molestation. Cf. 2A N. Singer, *supra* note 52, § 49.02, at 348-49 (statutes and constitutions may be construed to adapt to changing conditions and may thus be applied to circumstances unknown at time of enactment).

105. See *United States v. Terrazas-Montano*, 747 F.2d 467, 469 (8th Cir. 1984) (holding that videotaped deposition shown at trial did not violate the confrontation clause); *United States v. Benfield*, 593 F.2d 815, 821-22, 822 n.11 (8th Cir. 1979) (stating that the use of videotape might be constitutional under the confrontation clause if there were a showing of necessity).

106. 593 F.2d 815 (8th Cir. 1979).

107. See *id.* at 821.

108. 747 F.2d 467 (8th Cir. 1984).

109. See *id.* at 469-70.

110. See *Benfield*, 593 F.2d at 822.

111. See 747 F.2d at 469-70.

112. See *id.*

cerns of the confrontation clause remain fully protected.<sup>113</sup> Although physical confrontation is forfeited, the jury is still able to capture the demeanor of the child witness. The accuser can see the accused and must testify while the defendant looks on. The "intimidation factor" therefore still weighs heavily in the defendant's favor.<sup>114</sup>

## 2. Opportunity To Cross-Examine

The second standard to be met is that the defendant must be given the opportunity to cross-examine the witness.<sup>115</sup> The defendant's right to face and cross-examine his accuser is of extreme importance.<sup>116</sup> The defendant stands accused of a very serious crime.<sup>117</sup> The only way to elicit the truth and to test the veracity of the child victim's testimony is by intense cross-examination<sup>118</sup> and by viewing the demeanor of the child when he or she is forced to testify in front of the accused.<sup>119</sup> The procedure proposed in this Note gives the defendant's counsel full opportunity to cross-examine the child witness.

Because the first prong of the constitutional test—face-to-face confrontation—is not fully met,<sup>120</sup> the proposed technique must pass the stringent third and fourth requirements discussed above to qualify as an exception.<sup>121</sup> Any exception must be narrow in scope as to both the technique employed and the subject to which it is applied. To be considered narrow, the procedure must closely adhere to the traditional courtroom scene and the types of cases in which and the witnesses for whom this procedure is used must also be limited.<sup>122</sup>

## 3. Procedural Narrowness: Traditional Courtroom Setting

The procedure herein proposed reflects a traditional courtroom scene.<sup>123</sup> There is face-to-face confrontation, albeit via two-way closed

113. See *supra* Pt. III.B., C.

114. See *supra* note 72 and accompanying text.

115. See *Snyder v. Massachusetts*, 291 U.S. 97, 106 (1934); *Dowdell v. United States*, 221 U.S. 325, 330 (1911); *Kirby v. United States*, 174 U.S. 47, 55 (1899); *Mattox v. United States*, 156 U.S. 237, 244 (1895).

116. See *supra* note 11 and accompanying text.

117. The crime of child sexual abuse is defined in various ways throughout the states but is in all cases classified as a felony. See *supra* note 1.

118. See *Davis v. Alaska*, 415 U.S. 308, 316 (1974); *Douglas v. Alabama*, 380 U.S. 415, 418-19 (1965) (quoting *Mattox v. United States*, 156 U.S. 237, 242-43 (1895)); *Mattox v. United States*, 156 U.S. 237, 242-43 (1895).

119. See *California v. Green*, 399 U.S. 149, 158 (1970); *Barber v. Page*, 390 U.S. 719, 725 (1968); *Mattox v. United States*, 156 U.S. 237, 242-43 (1895); *United States v. Benfield*, 593 F.2d 815, 821 (8th Cir. 1979); 5 J. Wigmore, *supra* note 7, § 1365, at 28, §1367, at 32-33 (J. Chadbourne rev. ed. 1974).

120. See *supra* Pt. III.C.1.

121. See *supra* notes 95-99 and accompanying text.

122. See *United States v. Benfield*, 593 F.2d 815, 821, 822 n.11 (8th Cir. 1979).

123. Cf. *United States v. Benfield*, 593 F.2d 815, 821 (8th Cir. 1979) ("[a] videotaped deposition supplies an environment substantially comparable to a trial"). The *Benfield* court found the procedure used in that case unconstitutional, however, because the de-

circuit television.<sup>124</sup> Defense counsel has full opportunity to cross-examine the witness.<sup>125</sup> All parties normally present in a traditional courtroom setting are present: defendant, witnesses, counsel for the parties, judge, jury and spectators. They are in separate rooms yet in each other's view. The proposed scheme allows a parent or a trusted adult to accompany and comfort a frightened child witness. This presence reassures the child that no harm will come to him or her as a result of testifying. Nothing prohibits this technique as long as the adult refrains from prompting the child.<sup>126</sup>

The court must also ensure that the prosecution observe some precautions with regard to the televising technique itself.<sup>127</sup> Distortion of the witness and his or her testimony must be avoided.<sup>128</sup> What the jury sees may be distorted by the camera.<sup>129</sup> Lens or angle variations should be adjusted to capture the subtle changes in the witness' demeanor—such as nervous twitches, paling or blushing—that might easily be lost.<sup>130</sup> Use of color tape, as opposed to black and white, is therefore important to en-

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fendant was not actively involved in the taking of the deposition. *See id.* The scheme proposed herein, on the other hand, does allow the defendant ordinary courtroom participation.

124. *See supra* Pt. III.C.1.

125. *See supra* Pt. III.C.2.

126. In some courts, young children are allowed to sit in the adult's lap while testifying. Meyers, *supra* note 7, at 16; *Tender Years Exception*, *supra* note 42, at 132 n.97.

127. *See* Joseph, *Videotape Evidence in the Courts—1983*, in *Video Techniques in Trial and Pretrial* 35, 40 (1983). Some courts and commentators feel that videotaping accurately transmits the scene. *See* Hendricks v. Swenson, 456 F.2d 503, 506 (8th Cir. 1972); *Paramore v. State*, 229 So. 2d 855, 859 (Fla. 1969), *vacated on other grounds*, 408 U.S. 935 (1972); *Kansas City v. McCoy*, 525 S.W.2d 336, 339 (Mo. 1975) (en banc); Morrill, *Enter—The Video Tape Trial*, 3 J. Mar. J. Prac. & Proc. 237, 256 (1970). In one case, in order to admit a movie—not a videotape—as evidence, the court required proof that the cameraman was properly trained, the camera was in working order and the films accurately represented the events. *See* Barham v. Nowell, 243 Miss. 441, 448-49, 138 So. 2d 493, 495 (1962). Motion pictures are more likely to distort than videotape because of lens variations, film speed and development. Joseph, *supra*, at 50. *But cf.* *Kansas City v. McCoy*, 525 S.W.2d at 340-41 (Bardgett, J. dissenting) (demeanor of the witness is not conveyed accurately via television).

128. *See* Hendricks v. Swenson, 456 F.2d 503, 506 (8th Cir. 1972) (make-up and other techniques to yield a more visually appealing package should be avoided); Joseph, *supra* note 127, at 40 (admissibility of videotape evidence is allowed if it is proved that it is an accurate transmission).

129. *Stores v. State*, 625 P.2d 820, 828 n.25 (Alaska 1980); *see* H. Bettinger, *Television Techniques* 67 (1947); Bermant & Jacobovitch, *Fish Out of Water: A Brief Overview of Social and Psychological Concerns About Videotaped Trials*, 26 *Hast. L.J.* 999, 1001 (1975); Joseph, *supra* note 127, at 45; Comment, *The Criminal Videotape Trial: Serious Constitutional Questions*, 55 *Or. L. Rev.* 567, 574-75 (1976) [hereinafter cited as *The Criminal Videotape Trial*]; *see also* German, Merin & Rolfe, *Videotape Evidence at Trial*, 6 *Am. J. Trial Advoc.* 209, 210 (1982). Camera angles can make a witness appear smaller or larger than he or she is. *See* H. Bettinger, *supra*, at 64-65. Lighting can also change the witness' appearance. *See* H. Zetl, *Television Production Handbook* 371 (2d ed. 1968).

130. *See* *Stores v. State*, 625 P.2d 820, 828 n.25 (Alaska 1980) (quoting *The Criminal Videotape Trial*, *supra* note 130, at 574-76); *The Criminal Videotape Trial*, *supra* note 129, at 576.

sure accurate transmission of the witness' demeanor.<sup>131</sup> Focus on the testifying witness should be as close-up and as full-length as possible.<sup>132</sup> Effort should also be made to capture valuable first impressions, such as the witness' entrance into the courtroom and the witness' approach to the witness stand.<sup>133</sup>

Defense counsel might argue that a child may think that testifying via television is a game.<sup>134</sup> This, however, is part of ensuring that a child is competent to testify and that he or she understands the seriousness of the proceeding.<sup>135</sup> It is not part of the confrontation issue. The final determination as to the child's competency rests with the trial court judge,<sup>136</sup> who has a duty to examine a young child to ensure that the child has the necessary ability to comprehend, remember and relate the alleged events.<sup>137</sup>

#### 4. Substantive Narrowness: Necessity

The exception carved out in this Note is also narrow in scope as to subject. It applies only in the prosecution of child molestation cases and only to capture the testimony of the young victim. It may be used only if the prosecution meets its burden of proving by a preponderance of evidence<sup>138</sup> that a less stressful atmosphere for the child victim is necessary.

131. See *The Criminal Videotape Trial*, *supra* note 129, at 576. On the other hand, color tape, if not adjusted properly, may add color where there is none. *Id.* at 576 n.66.

132. See E. Stasheff, R. Bretz, J. Gartley & L. Gartley, *The Television Program 28* (5th ed. 1976) (close-ups are necessary to depict the scene accurately).

133. See *The Criminal Videotape Trial*, *supra* note 129, at 576.

134. See Timnick, *Legal Tangle*, Nat'l L.J., Sept. 10, 1984, at 9, col. 1.

135. See *supra* note 7 and accompanying text.

136. See *Wheeler v. United States*, 159 U.S. 523, 524-25 (1895); *United States v. Hardin*, 443 F.2d 735, 737 (D.C. Cir. 1970); *Doran v. United States*, 205 F.2d 717, 718 (D.C. Cir.), *cert. denied*, 346 U.S. 828 (1953).

137. See *supra* note 7 and accompanying text.

138. Cf. *Ohio v. Roberts*, 448 U.S. 56, 66 (1980) (Court required that an unavailable witness' hearsay statement bear adequate "indicia of reliability"). The party claiming unavailability of the witness must show that it made a good faith effort to produce the witness. *Id.* at 74-75. Reliability requires a showing that the statement falls within a firmly rooted hearsay exception or has "particularized guarantees of trustworthiness." *Id.* at 66. These standards are lower than clear and convincing or beyond a reasonable doubt. Because the Court accepts such a low standard when the witness is unavailable, it is unlikely to impose a higher standard when the witness is available. In addition, the Court has used the preponderance standard for questions of admissibility. See *Nix v. Williams*, 104 S. Ct. 2501, 2509 n.5 (1984) (using preponderance standard for "placing evidence of unquestioned truth before juries"); *United States v. Matlock*, 415 U.S. 164, 177 n.14 (1974) (controlling burden of proof at suppression hearing should not be more than the preponderance standard). The circuits are divided on the burden of proof necessary when the defendant has waived his right of confrontation. Compare *United States v. Mastrangelo*, 693 F.2d 269, 273 (2d Cir. 1982) (court adopted a "preponderance" standard seeing no reason to impose higher burden of proof—clear and convincing—where there has been a waiver of the confrontation right by misconduct), *cert. denied*, 104 S. Ct. 2385 (1984) with *United States v. Thevis*, 665 F.2d 616, 631 (5th Cir.) (court rejected "preponderance" standard of proof when the defendant has waived his right of confrontation because the standard is insufficient to protect such an important right), *cert. denied*, 456 U.S. 1008 (1982).

The issue is too important to the defendant<sup>139</sup> to justify no burden on the prosecution. Conversely, to charge the prosecution with a higher burden of proof<sup>140</sup>—for example, beyond a reasonable doubt—would be to impose a standard that would, in essence, obliterate the exception in most cases.<sup>141</sup> The importance of the defendant's constitutional right and the state's interest dictate the application of a preponderance of proof standard prior to invoking this procedure.

The procedure proposed in this Note is based on the necessity of gaining the accurate testimony of the only witness who knows what really happened.<sup>142</sup> There is a strong public interest in bringing child molestation cases to prosecution.<sup>143</sup> Without the child victim's testimony, the state has little chance of convicting these defendants.<sup>144</sup> If the child is too afraid to testify or testifies while in terror of the defendant, however, either the testimony will not be obtained or it will be poorly given.<sup>145</sup> The child's fear of testifying in the same room as the defendant<sup>146</sup> or in a traditional open courtroom<sup>147</sup> is minimized by the procedure proposed in this Note.<sup>148</sup> If this interest is not strongly considered in the balancing approach, very few child molesters will be convicted.<sup>149</sup> Extraordinary circumstances are present in child molestation cases if the prosecution shows by a preponderance of evidence its inability to prosecute these cases successfully unless a less stressful atmosphere is provided for the child victim/witness.

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139. See *supra* note 11 and accompanying text.

140. See *Lego v. Twomey*, 404 U.S. 477, 486 (1972) (The Supreme Court stated that the "beyond a reasonable doubt" standard must be applied to prove every element of a crime, but not to determine the admissibility of evidence at trial.)

141. *Cf. United States v. Balano*, 618 F.2d 624, 629 (10th Cir. 1979) (rejecting "reasonable doubt" standard because it might eliminate possibility of finding a waiver to sixth amendment), *cert. denied*, 449 U.S. 840 (1980). One court rejected a "reasonable doubt" standard where there was a waiver of the sixth amendment because it considered the decision regarding the applicable standard of proof in this situation "purely an evidentiary ruling, not a decision on . . . substantive guilt." *United States v. Thevis*, 665 F.2d 616, 631 (5th Cir.), *cert. denied*, 456 U.S. 1008 (1982).

142. See *supra* note 21 and accompanying text.

143. See *Libai, supra* note 6, at 978 (state interest in prosecuting child molesters outweighs parent's interest in protecting the child); *cf. Ohio v. Roberts*, 448 U.S. 56, 64 (1980) ("every jurisdiction has a strong interest in effective law enforcement"). As previously stated, it is the state interest in prosecuting child molestation cases that must be balanced against the defendant's right to confrontation. Although a victim/witness in a child molestation case—as any other victim or witness in a criminal case—has no real legal standing in the case, he or she certainly needs the court's protection from further abuse. Victims of crimes should be treated with dignity, respect and sensitivity by the court system. Thus, if the proposed scheme does not violate a defendant's constitutional rights, there is a strong argument for its application.

144. See *Meyers, supra* note 7, at 15. See *supra* note 5 and accompanying text.

145. See *Confronting Child Victims, supra* note 2, at 387.

146. See *Libai, supra* note 6, at 1018; *Parker, supra* note 6, at 652-53.

147. See *supra* note 31 and accompanying text.

148. See *supra* Pt. III.B.

149. See *supra* notes 5, 19-31 and accompanying text.

D. *Danger of Enlargement*

It can be argued that this exception is susceptible to enlargement to encompass anyone who is too fearful to testify in the same room as the defendant.<sup>150</sup> The constitutional rights of the defendant, however, cannot be infringed to such an extent.<sup>151</sup> In child molestation cases, there are extenuating circumstances, not present in other cases, that require the use of the two-way closed circuit television.<sup>152</sup> The major factor is the threat of additional psychological damage to a young child if he or she is forced to testify in open court with the defendant in the same room.<sup>153</sup> Some psychologists believe that psychological damage is caused not only by the sexual abuse<sup>154</sup> but also by the related subsequent events—for example, family reaction to the crime<sup>155</sup> and the number of times the child is forced to relate the events and testify in open court in the same room as the defendant.<sup>156</sup> This aftermath trauma may impede the child's sexual development and maturation.<sup>157</sup> This interference with psychological development is not present in the case of adult victims. Furthermore, children do not understand that because they are in a court of law the proximity of the accused poses no threat.<sup>158</sup> Adults, on the other hand, know that they are protected in court even though the accused may be in the same room with them.<sup>159</sup> Children also have very limited experience with courtrooms and are frightened by the open court,<sup>160</sup> whereas adults are more familiar with the function of a court and the logistics involved, if only from television or the movies.

The potential for abuse created by a broad application of this procedure must be carefully controlled by the courts. The use of two-way closed circuit television to take testimony of witnesses, therefore, should only be allowed for children who have suffered a trauma at least as great as that stemming from sexual abuse. To impinge on a defendant's fundamental constitutional right, the scale must tip to the other side quite heavily.<sup>161</sup> In addition, the prosecution must show by a preponderance of

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150. See Timnick, *supra* note 134, at 9, cols. 1-2; *cf.* United States v. Benfield, 593 F.2d 815, 817, 822 (8th Cir. 1979) (use of videotaped testimony of adult woman who had been kidnapped and was too fearful to testify held violative of defendant's confrontation right).

151. See *supra* note 11 and accompanying text.

152. See *infra* notes 153-60 and accompanying text.

153. See Libai, *supra* note 6, at 984; Parker, *supra* note 6, at 644 n.10 (quoting Libai, *supra* note 6).

154. See J. Palmer, *supra* note 6, at 522-23; Berliner, *supra* note 3, at 282; Rogers, *supra* note 1, at 145.

155. See Berliner, *supra* note 3, at 283.

156. Libai, *supra* note 6, at 984; *see* R. Geiser, *supra* note 1, at 30; J. Palmer, *supra* note 6, at 522-23; Chaneles, *supra* note 6, at 54; Parker, *supra* note 6, at 644-45; Rogers, *supra* note 1, at 145-46.

157. J. Palmer, *supra* note 6, at 522-23; Parker, *supra* note 6, at 649-50.

158. Meyers, *supra* note 7, at 50.

159. *Id.*

160. See *supra* note 31 and accompanying text.

161. See *supra* note 11 and accompanying text.



proof that greater psychological damage will occur if the child is forced to testify in the same room as the defendant.<sup>162</sup> It would be possible, therefore, to use this procedure for children who have witnessed a crime but who have not themselves been victimized. However, the level of trauma associated with the crime and the witness' subsequent fear of the defendant should be as high as that connected with being a victim of sexual abuse. An example of this might be a child witnessing the murder of his or her parent.<sup>163</sup>

### CONCLUSION

The state has an interest in prosecuting child molestation cases. Often this interest is impeded because parents are reluctant to subject their children to further trauma during litigation. In addition, reliable, competent testimony of the child victims is difficult to obtain. Although a portion of this potential trauma stems from the child's fear of being in the same room as the alleged offender, the criminal defendant has a right under the sixth amendment to confront his accuser.

Courts and commentators have tried and suggested various ways to balance the defendant's right of confrontation and the state's interest in bringing child molestation cases to prosecution. The use of two-way closed circuit television to take the testimony of child victims of sex crimes strikes the best balance between these two interests. This narrow exception comports with the Supreme Court's analysis of the right of confrontation and also provides a much needed, humane method of taking the testimony of the victims of child molestation. As reports of child sexual abuse continue to rise, this procedure will allow for an equitable treatment of both the traumatized child victims and the alleged offenders.

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162. See *supra* Pt. III.B.

163. See Parker, *supra* note 6, at 654.