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See No Evil? Can Insulation of Child Sexual Abuse Victims Be Accomplished Without Endangering the Defendant's Constitutional Rights?

WALLACE J. MLYNIEC* AND MICHELLE M. DALLY**

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I. INTRODUCTION

For the past three years, one of the more discussed issues in criminal law has been the protection of child witnesses in sexual abuse cases. Child sexual abuse cases, some of which have received nationwide attention,[1] have awakened both the public and state legislators to the need to protect child victims not only from attack but also from the emotional trauma of testifying about the experience in later legal proceedings. Many adults feel uncomfortable when brought to a courtroom and asked to testify before the very person they fear the most; presumably, this is even more difficult

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1. *See, e.g.*, State v. Bentz, N.Y. Times, Sept. 23, 1984, § 4, at 8, col. 1 (Scott County Dist. Ct. Sept. 19, 1984) (two adults from Jordan, Minnesota aquitted after extensive cross-examination of the children). The acquittal caused the dismissal of charges in cases involving twenty-two other adults and several children; *see also* Galante, *Calif. Court Clears Televised Testimony*, Nat'l L.J., July 29, 1985, at 1, col. 1 (discussing People v. Buckey, a recent case in which the court upheld California's closed circuit television law in a child sexual abuse case. No. A-750900, A-753005 (Los Angeles Mun. Ct. July 12, 1985)).

for children.

Responding to a plea for protection, legislators in several states studied the issue, and as a result, enacted laws that allow a child to testify via videotape or closed circuit television in an effort to bring the child's testimony before the jury without subjecting the child to the presence of the defendant.[2] In addition, some states have enacted laws that create a hearsay exception for statements made by child sexual abuse victims.[3] Although these procedures may protect the child victim, they retreat from two centuries of trial practice.

Since the demise of wager by battle, wager of laws, and inqui-

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2. Commentators have suggested various procedures to alter the courtroom environment. Technological developments such as closed circuit television, videotape, and sophisticated mirrors have made it possible for the victim to avoid face to face contact with the defendant without completely altering the traditional courtroom experience. Numerous states have enacted statutes that provide for the admission of videotaped testimony of minor victims at sexual abuse trials. *See, e.g.*, **Arkansas:** ARK. ANN. §§ 43-2035 to -2036 (Supp. 1985) (allowing videotaped depositions of the victim to be admitted into evidence at trial); **Colorado:** COLO. REV. STAT. § 18-3-413 (Supp. 1984) (same); **New Mexico:** N.M. STAT. ANN. § 30-9-17 (Supp. 1984) (same); **Wisconsin:** WIS. STAT. ANN. § 967.04(7) (1985) (same); **California:** CAL. PENAL CODE § 1346 (West Supp. 1985) (permitting the alleged victim's testimony at the preliminary hearing to be videotaped and presented at trial); **South Dakota:** S.D. CODIFIED LAWS ANN. § 23A-12-9 to -12-10 (Supp. 1985) (same); **Arizona:** ARIZ. REV. STAT. ANN. §§ 12-2311 to -2312 (1982) (providing for the alleged victim's testimony to be videotaped for presentation at trial and allowing the defendant to be present during the videotaping); **Florida:** FLA. STAT. § 90.90 (Supp. 1984) (same) (The legislature recently amended this statute and added § 92.54 to make the use of videotape and closed circuit television more readily accessible. 1985 Fla. Laws ch. 85-53.); **Montana:** MONT. CODE ANN. § 46-15-401 (1983) (allowing videotaped testimony of the victim to be admitted at trial); **Kentucky:** KY. REV. STAT. § 421.350 (Supp. 1984) (allowing the videotaped testimony of the victim to be admitted at trial or permitting the victim's testimony to be taken in a room other than the courtroom and viewed by the court on closed circuit television); **Texas:** TEX. CRIM. PROC. CODE ANN. § 38.071 (Vernon Supp. 1985) (same); *see also* Paper presented by Debra Whitcomb, *Assisting Child Victims in the Courts: The Practical Side of Legislative Reform* 17-18, 24-25 American Bar Association National Policy Conference on Legal Reforms in Child Sexual Abuse Cases, Wash., D.C. (1985) (discussing videotaping statutes); Note, *The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations*, 98 HARV. L. REV. 806, 813 (1985) (same).

3. Several states have created new hearsay exceptions so that out-of-court statements made by child sexual abuse victims can be admitted into evidence. *See, e.g.*, **Colorado:** COLO. REV. STAT. § 13-25-129 (Supp. 1984); **Florida:** 1985 Fla. Laws ch. 85-53, § 4 (to be codified at FLA. STAT. § 90.803(23) (1985)); **Indiana:** IND. CODE ANN. § 35-37-4-6 (Burns Supp. 1985); **Kansas:** KAN. STAT. ANN. § 60-460(dd) (1983); **Maine:** ME. REV. STAT. ANN. tit. 15, § 1205 (Supp. 1984); **Minnesota:** MINN. STAT. § 595.02(3) (Supp. 1985); **South Dakota:** S.D. CODIFIED LAWS ANN. § 19-16-38 (Supp. 1984); **Utah:** UTAH CODE ANN. § 76-5-411 (Supp. 1983); **Washington:** WASH. REV. CODE ANN. § 9A.44.120 (Supp. 1985); *see also* McNeil, *The Admissibility of Child Victim Hearsay in Kansas: A Defense Perspective*, 23 WASHBURN L.J. 265 (1984) (discussing Kansas hearsay statute); Note, *supra* note 2, at 811 (discussing hearsay statutes); Note, *Sexual Abuse of Children—Washington's New Hearsay Exception*, 58 WASH. L. REV. 813 (1983) (discussing Washington hearsay statute).

sition, trials have been the primary method of dispute resolution in Anglo-American jurisprudence. By the seventeenth century, the English trial had evolved to consist of three principal elements: an accused, an accuser and an arbiter.[4] Each element of the trial had a clear purpose. The accuser accused; the accused defended; and the arbiter, either judge or jury in a public forum, heard the case and determined who was telling the truth.

During the intervening years, courts engrafted a myriad of evidentiary rules, each designed to effect specific goals, upon this simple trial system.[5] The courts also carved out exceptions, including various hearsay exceptions, to these rules. Nonetheless, face to face confrontation before an arbiter in a public forum remains the hallmark of Anglo-American dispute resolution.[6] Accordingly, a court's use of videotape, closed circuit television, or other evidentiary innovations that deny face to face confrontation may endanger a criminal defendant's constitutional rights notwithstanding their laudable purposes[7] and approval by state legislatures.

Courts have begun to explore the right to confrontation and other constitutional problems that the use of evidentiary innovations may produce.[8] These innovations clearly implicate a defendant's constitutional right to be present during all phases of his trial and his right to compel the production and testimony of witnesses on his behalf. The right to be present could limit the use of all technological innovations and some of the newly formulated hearsay exceptions because these innovations, by design, prevent a defendant from confronting his minor accuser face to face. A defendant's right to compel the production and testimony of witnesses on his behalf also could prevent a court's use of some of the

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4. Sir William Blackstone referred to the constituent parts of the trial as the actor (the party who complains of an injury), the reus (the party whom the actor calls upon to make satisfaction), and the judex (the party who ascertains the truth, applies the law, and secures the remedy). 3 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 25 (9th ed. 1783). While Blackstone used these terms to discuss private wrongs, the terms also applied to criminal law, although in the criminal context the king became the accuser. *See* 4 W. BLACKSTONE, *supra* at 1425; 2 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 47-50 (3d ed. 1923).

5. For an overview of the evidentiary issues associated with child sexual abuse cases and some proposed exceptions, see Graham, *supra* p. 19 (*Indicia of Reliability and Face to Face Confrontation: Emerging Issues in Child Sexual Abuse Prosecution*, 40 U. MIAMI L. REV. 19 (1985)).

6. These rules and exceptions developed gradually throughout the eighteenth century and solidified in the nineteenth with the abolition of laws declaring parties themselves incompetent to testify. 6 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 387-89 (2d ed. 1937).

7. *See* MacFarlane, *infra* p. 135 (*Diagnostic Evaluations and the Use of Videotapes in Child Sexual Abuse Cases*, 40 U. MIAMI L. REV. 135 (1985)).

8. *E.g.*, Ohio v. Roberts, 448 U.S. 56, 64 (1980).

innovations.

Additionally, a court must consider the impact of the defendant's sixth amendment right to represent himself without the assistance of counsel before permitting the prosecutor to use a technological substitute for the courtroom encounter. A defendant who makes a timely decision to represent himself generally must be allowed to question the victim in person.

Altering a system that society has accepted as an adequate method for obtaining the truth and protecting the innocent must be done with care. To ignore the presumption of innocence and the importance of procedural guarantees in order to protect an accuser may hinder the search for truth and lessen the accuracy of fact-finding. While measures can and should be taken to ease the emotional burden placed on a child witness, the courts must adopt such measures only to the extent that they truly protect the witness and do not infringe upon the defendant's right to defend himself.

II. THE DEFENDANT'S RIGHT TO BE PRESENT AT HIS TRIAL

A. *Historically*

Courts have long held that the right to be present at one's own criminal trial is an indispensable feature of the criminal justice process.[9] The right existed at common law, and is included in many state constitutions,[10] criminal codes, and rule books. The right has gradually gained federal constitutional stature as well.

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9. *See, e.g.*, Lewis v. United States, 146 U.S. 370 (1892); Note, *Constitutional Law—Criminal Defendant Has Absolute Right to Be Present at Trial*, 23 VAND. L. REV. 431 (1970).

10. This article addresses issues involving only the United States Constitution. Eighteen state constitutions use the words "face to face" when describing a defendant's right to be present at his criminal trial. **Delaware:** DEL. CONST. art. I, § 7; **Illinois:** ILL. CONST. art. 1, § 8; **Indiana:** IND. CONST. art. 1, § 13; **Kansas:** KAN. CONST. § 10; **Kentucky:** KY. CONST. § 11; **Ohio:** OHIO CONST. art. I, § 10; **Oregon:** OR. CONST. art. I, § 11; **Pennsylvania:** PA. CONST. art. 1, § 9; **Tennessee:** TENN. CONST. art. 1, § 9; **Wisconsin:** WIS. CONST. art. 1, § 7. The remaining eight state constitutions limit the right of the defendant to confront witnesses face to face to those witnesses against him. **Arizona:** ARIZ. CONST. art. 2, § 24; **Massachusetts:** MASS. CONST. Part 1, art. XII; **Missouri:** MO. CONST. art. I, § 18(a); **Montana:** MONT. CONST. art. II, § 24; **Nebraska:** NEB. CONST. art. I, § 11; **New Hampshire:** N.H. CONST. Part 1, art. 15; **South Dakota:** S.D. CONST. art. VI, § 7; **Washington:** WASH. CONST. art. 1, § 22.

The Mississippi Constitution contains language which indicates that an accused may not have the right to a public trial in rape cases. MISS. CONST. art. 3, § 26.

State constitutions may create an even greater right than that found in the United States Constitution. *E.g.*, Commonwealth v. Willis, No. 84CR346 (Fayette Cir. Ct., Ky. Feb. 20, 1985), *appeal docketed*, No. 85-SC-218-TG (Ky. May 23, 1985).

The right to be present first gained constitutional significance as a part of the due process clause of the fourteenth amendment. In 1884, the Supreme Court considered a challenge to a conviction based on the absence of the defendant during portions of the jury selection process.[11] Although the Court's decision in *Hopt v. Utah*[12] was based solely on a territorial statute guaranteeing the defendant's right to be present at his trial, the Court stated that the absence of the defendant during the jury selection process, in contravention of the territorial statute, would violate the United States Constitution's due process guarantee.[13] In dicta, the Court stated that the due process clause required the defendant's presence in the courtroom at all times between the empaneling of the jury and the reception of the verdict.[14]

After *Hopt*, the Supreme Court heard several other cases that concerned defendants' presence in the courtroom.[15] Most of these cases, however, concerned the due process ramifications of failing to comply with a state statute,[16] as in *Hopt*, or involved the right to be present at stages of the trial that are not generally associated with ascertaining guilt.[17] Notwithstanding the Court's narrow holding in *Hopt*, the Court began to cite the case for the more expansive proposition that due process of law requires the accused to be present at every stage of his trial.[18] In 1933, Justice Roberts recognized the right's significance: "Our traditions, the Bill of Rights of our federal and state constitutions, state legislation and the decisions of the courts of the nation and the states, unite in testimony that the privilege of the accused to be present throughout his trial is of the very essence of due process."[19]

In *Snyder*, the four dissenting Justices stated that after the grand jury returns an indictment, the fourteenth amendment requires that the defendant be present during all proceedings.[20] The majority also assumed that the fourteenth amendment required the presence of the defendant, but limited this requirement to

11. Hopt v. Utah, 110 U.S. 574, 577 (1884).
12. 110 U.S. 574 (1884).
13. *Id.* at 579.
14. *See id.*; Diaz v. United States, 223 U.S. 442, 455 (1912).
15. *See, e.g.*, Ponzi v. Fessenden, 258 U.S. 254 (1922); Frank v. Mangum, 237 U.S. 309 (1915).
16. *E.g.*, Thompson v. Utah, 170 U.S. 343, 354 (1898).
17. *E.g.*, Schwab v. Berggren, 143 U.S. 442, 448 (1892).
18. *E.g.*, Dowdell v. United States, 221 U.S. 325, 331 (1911).
19. Snyder v. Massachussetts, 291 U.S. 97, 128-29 (1933) (Roberts, J., dissenting).
20. *Snyder*, 291 U.S. at 129.

those stages of the trial where the defendant's presence bore a substantial relationship to his opportunity to defend against the charges.[21] Thus, the majority found no need for Snyder to be present during the jury's view of the scene of the crime, because his absence did not render the trial unfair or unjust.[22]

The majority in *Snyder* also suggested that the defendant's right to be present had its roots in the sixth amendment's confrontation clause.[23] The Supreme Court expressed this view as early as 1892, in *Lewis v. United States*,[24] where the Court spoke of the right to be present as entwined with the right to confront witnesses and accusers.[25] Similarly, in *Diaz v. United States*, the Court construed a Phillipine statute that required the defendant's presence at trial to be the equivalent of the sixth amendment right of a defendant to confront his accusers.[26] The Court echoed this view after *Snyder* as well.[27]

Recent cases have not clarified the source of the right.[28] In *Illinois v. Allen*,[29] the majority discussed the confrontation clause in relation to the right to be present.[30] Justice Brennan's concurring opinion, however, also contained references to the due process clause.[31] In *Rushen v. Spain*,[32] the plurality accepted the right to be present as fundamental without stating its source,[33] while the

21. *Id.* at 105.

22. *Id.* at 108.

23. *Id.* at 106.

24. 146 U.S. 370 (1892).

25. *Id.* at 373.

26. *Diaz*, 223 U.S. at 454-55; *see also* Valdez v. United States, 244 U.S. 432, 453-55 (1916) (Clarke, J., dissenting).

27. *See, e.g.*, United States v. Hayman, 342 U.S. 205, 222 (1952).

28. In United States v. Gagnon, the Court most clearly stated the dual sources of the right; however, the Court reported its decision in a per curiam opinion and did not give the parties the opportunity to brief and argue the merits of the case. 105 S. Ct. 1482, 1487 (1985) (Brennan, J., dissenting).

29. 397 U.S. 337 (1970). In *Allen*, the trial judge removed the defendant from the courtroom due to the defendant's repeated disruptive behavior. *Id.* at 339-41. The Supreme Court held that the defendant's behavior warranted such action and that the court had not violated the defendant's sixth amendment right to attend his own trial. *Id.* at 342.

30. *Id.* at 338.

31. *Id.* at 350 (Brennan, J., concurring).

32. 464 U.S. 114 (1983). In *Rushen*, a juror twice spoke to the trial court judge about a possible personal prejudice. Neither the defendant nor counsel for either side was present during the discussion. After defendant's conviction, his counsel learned of the ex parte communication and appealed the conviction on this ground. *Id.* at 116-17. The Supreme Court remanded, holding that the trial court's blanket rejection of "harmless error" was error. *Id.* at 119, 122.

33. *Id.* at 117.

concurring Justice related it to the sixth amendment.[34]

A distillation of the language in these cases suggests that the defendant's right to be present at his trial is very important but is subject to expansion and contraction depending on the source of the right. During the stages of the trial in which the defendant confronts his accuser and other witnesses, the Court extracts the right from the sixth amendment. During the other stages of the trial, where the defendant's presence is substantially related to his opportunity to defend or where his absence would render the trial unfair or the outcome unjust, the Court extracts the right from the fourteenth amendment. While a court may deem the defendant's absence at some stages to be de minimus and therefore harmless, core confrontation clause violation might not be harmless error at any stage.[35] Finally, like most rights, the defendant's right to be present can be waived or forfeited in certain circumstances.[36]

B. *The Lower Courts*

Lower courts have been equally inconsistent in their constitutional analysis of the defendant's right to be present at his trial. Because the courts generally enforce the right, few cases have arisen where a court prohibited the defendant from attending part of his trial. The issue of presence most often arises when the defendant has been excluded from a discussion concerning a matter of law. In *United States v. Gore*,[37] the defendant was absent during an evidentiary hearing on the admissibility of a co-defendant's confession. The court rejected the defendant's challenge by suggesting that his presence did not bear a substantial relationship to his opportunity to defend.[38]

While most courts adhere to this test where the proceedings concern matters of law, they state that even at these hearings, the defendant's presence will be required when it may be useful.[39] Thus, appellate courts have found a due process violation where the trial court excluded the defendant from an in camera examination of the prosecution witnesses' testimony[40] because the wit-

34. *Id.* at 129-30 (Stevens, J., concurring).

35. *Id.* at 129-30 n.8 (Stevens, J., concurring) (citing Snyder v. Massachussetts, 291 U.S. 97, 114-18 (1934)).

36. *Allen*, 397 U.S. at 342-43; *Diaz*, 223 U.S. at 455.

37. 130 F. Supp. 117 (W.D. Ky. 1955).

38. *Id.* at 119.

39. *See, e.g.*, United States v. Sinclair, 438 F.2d 50, 52 (5th Cir. 1971).

40. State v. Howard, 57 Ohio App. 2d 1, 5, 385 N.E.2d 308, 312 (1978).

nesses' statements could have contained inconsistencies of which only the defendant would be aware.[41] In *Brown v. State*,[42] the Supreme Court of Alaska found that the defendant's presence during arguments regarding the admissibility of his wife's testimony might have caused her to waive her spousal privilege and testify on his behalf.[43] Thus, the supreme court found that his absence violated his constitutional right to be present. Challenges based on the defendant's presence at hearings regarding the competency of witnesses have produced differing results depending on whether the court believed the defendant could have assisted in his defense at that stage of the proceeding.[44] Consequently, courts permit the defendant to be present during pretrial determinations of the competency of a child witness if the defendant's presence is necessary to insure his meaningful defense.

Whenever a court chooses or a legislature directs a trial court to use evidentiary innovations in order to protect an alleged victim of sexual abuse, it implicates the preference for face to face contact. A court may employ any of several technological innovations. A judge may order that testimony be produced on closed circuit television during the trial, or that prerecorded testimony be preserved on videotape for later use. Two-way mirrors and a public address system can be used to separate the witness from the defendant. Each of these techniques has several variants. The examinations may take place with the witness, lawyers, defendant, and judge present, and the jury absent but viewing the proceedings electronically, or with the defendant viewing the proceedings electronically, either with or without the jury. The court can also isolate the victim, while providing him with electronic visual and aural access to the proceedings. Actually, the court can physically separate any of the participants from the trial and provide electronic visual and/or aural contact with the proceedings. To avoid violating the right to be present, the electronic alteration must not substantially interfere with the defendant's right to confront his

41. *Id.* at 5, 385 N.E.2d at 313.

42. 372 P.2d 785 (Alaska 1962).

43. *Id.* at 789.

44. *Compare* State v. Ritchey, 107 Ariz. 552, 555, 490 P.2d 558, 561 (1971) (defendant did not have a right to be present at a competency determination of a child witness where defendant's counsel was present) *and* Moll v. State, 351 N.W.2d 639, 643-44 (Minn. App. 1984) (preliminary competency determination of a child witness is not a stage of the trial at which the defendant has a right to be present) *with* United States v. Ashe, 478 F.2d 661, 666 (D.C. Cir. 1973) (defendant has sixth amendment right to be present for competency determination of a child witness).

accusers, destroy the defendant's opportunity to defend himself fully, or result in an unfair trial or unjust outcome.[45] Finally, the court must tailor the technological innovation carefully in order to prevent overbroad application.[46]

State courts have ruled on some of these issues. In *Herbert v. Superior Court*,[47] a California court disapproved of testimony taken in a manner that permitted the defendant to hear but not see the child witness.[48] The court based its decision on prior cases in which the Supreme Court indicated a preference for physical face to face contact with a witness.[49] The court also noted that in some real but undefined way, a face to face challenge influences recollection, veracity, and communication.[50] Similarly, in *United States v. Benfield*,[51] the Eighth Circuit refused to uphold the admission into evidence of a prerecorded, videotaped deposition of an adult.[52] The defendant was not present during the taping of the deposition, but he was in the same building, although the victim was unaware of his presence.[53] The defendant observed the proceeding on a monitor and contacted his lawyer periodically with a buzzer. When contacted, the lawyer left the room and consulted with his client.[54] The appellate court, believing that the absence of face to face contact could have affected recollection, veracity, and communication, disapproved of this process.[55]

In *Hochheiser v. Superior Court*,[56] the California court of appeal refused to allow a technological innovation in a molestation trial in the absence of specific legislative authority.[57] The court

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45. *See* United States v. Benfield, 593 F.2d 815, 821 (8th Cir. 1878).

46. *Cf.* Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982) (The circumstances under which the press and public can be barred access to criminal trials are limited and the denial must be narrowly tailored to serve a compelling governmental interest.).

47. 117 Cal. App. 3d 661, 172 Cal. Rptr. 850 (1981).

48. *Id.* at 665, 671, 172 Cal. Rptr. at 851, 855.

49. *Id.* at 667, 172 Cal. Rptr. at 853 (citing Dowdell v. United States, 221 U.S. 325, 330 (1911) ("only such witnesses as meet him face to face at the trial"); Kirby v. United States, 174 U.S. 47, 55 (1899) ("witnesses . . . upon whom he can look while being tried"); Mattox v. United States, 156 U.S. 237, 244 (1895) ("the advantage he has once had of seeing the witness face to face")).

50. *Accord Herbert*, 117 Cal. App. 3d at 666-67, 172 Cal. Rptr. at 852.

51. 593 F.2d 815 (8th Cir. 1979).

52. *Id.* at 821.

53. *Id.* at 817.

54. *Id.*

55. *Id.* at 821.

56. 161 Cal. App. 3d 777, 208 Cal. Rptr. 273, *modified*, 162 Cal. App. 3d 517a, 208 Cal. Rptr. 273 (1984).

57. *Id.* at 789, 208 Cal. Rptr. at 280.

stated that even if closed circuit television could be used in some cases, a generalized belief in psychological trauma was insufficient to show the need for it in a specific case.[58] Citing *Globe Newspaper Co. v. Superior Court*,[59] the court indicated that before a trial judge authorizes the use of an evidentiary innovation to safeguard a minor witness, the prosecution must present a factual basis supporting the nature of the potential injury to the witness, its degree, and its potential duration.[60]

The New Jersey superior court has upheld the use of closed circuit television where the prosecution clearly showed that the child victim would suffer probable injury if she testified.[61] The court permitted a ten-year-old sexual assault victim to testify in a room near the courtroom while the judge, jury, and defendant remained in the courtroom and viewed and heard the child's testimony via monitors.[62] The defendant, and his lawyer who was in the room with the child, were in continuous audio contact.[63] The court distinguished *Benfield* because of the contemporaneousness of the testimony.[64] In holding that no violation of the right to be present had occurred, the court focused on the right to cross-examine and found that the procedure did not eliminate a meaningful opportunity to exercise this right.[65]

C. *Technical Innovations: Some General Guidelines*

Although the various court decisions appear to be in conflict, they present a basis for assessing when the use of technological innovations violates the right to be present. If the following requirements are met, the technological innovation will not violate the Constitution. First, there must be a particularized showing of need to protect the child witness. The need can be based on actual trauma, or possibly, on intimidation. Second, the chosen procedure must not deny the defendant a meaningful opportunity to confront his accusers, assist in cross-examination, or otherwise assist in his defense. Thus, in-trial contemporaneous closed circuit television testimony appears to be preferable to pretrial prerecorded video-

58. *Id.* at 792-93, 208 Cal. Rptr. at 283.
59. 457 U.S. 596 (1982).
60. 161 Cal. App. 3d at 793, 208 Cal. Rptr. at 283.
61. State v. Sheppard, 197 N.J. Super. 411, 433, 484 A.2d 1330, 1343 (Law Div. 1984).
62. *Id.* at 432, 484 A.2d at 1343.
63. *Id.* at 442-43, 484 A.2d at 1349.
64. *Id.* at 424, 484 A.2d at 1337.
65. *Id.* at 435, 484 A.2d at 1344.

taped testimony. Additionally, the defendant's lawyer is in the same room as the witness, and the defendant must be in communication with his lawyer during the witness's examination. Finally, the jury should be able to view both the defendant and the witness, and the defendant must be able to see and hear the witness. If all of these conditions are met, the only difference between the innovative examination and a traditional one is the inability of the witness to see the defendant and the existence of the innovation itself.

Both *Herbert* and *Benfield* support the proposition that face to face confrontation between the witness and the defendant, and the appearance of the witness before the jury, are necessary to preserve the psychological impact of the witness on the jury.[66] For years, courts have regarded this impact as a guarantee of veracity. Physical separation of the witness from the defendant accompanied by the use of dual closed circuit television approximates the traditional encounter, and arguably does not violate the defendant's right to confront his accuser. Proponents of separation, however, generally seek to insulate the child from the defendant completely. Although courts differ as to the effect of this factor on the right to face to face confrontation, an analysis of this constitutional guarantee suggests that in specific cases, where the prosecutor shows a clear need for separation, a violation of the defendant's rights will not occur if the court adheres to the above-referenced procedures. The Supreme Court has approved the admission of a transcript of previously cross-examined testimony of an unavailable witness.[67] If this procedure is permissible, a defendant's rights should not be violated when an available witness is cross-examined in a slightly altered courtroom.[68]

Although physical face to face contact is important and may have a psychological effect on the reliability of a witness's testimony, it is not essential to a meaningful opportunity of a defendant to confront his accuser. Thus, separation does not violate the right to be present during cross-examination. The absence of any of the above conditions, however, lessens the ability of the defendant to protect himself from unfounded accusations, and increases the likelihood of a constitutional violation.

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66. *See Benfield*, 593 F.2d at 821; *Herbert*, 117 Cal. App. 3d at 671, 172 Cal. Rptr. at 855.

67. *See* Ohio v. Roberts, 448 U.S. 56, 66, 73, 77 (1980).

68. A similar argument could be made for placing the lawyers in a separate room as well.

Nonetheless, courts should be reluctant to use these innovations. Both children and adults may experience an unconscious alteration of reality when placed under certain pressures. Peer reinforcement and improper motives or procedures on the part of the investigating personnel can affect the subsequent testimony of any witness.[69] Further, even supporters of technological innovations have acknowledged that the medium of television can alter the impact of a trial on a witness, and the jury's perception of the reliability of the testimony.[70]

For over three hundred years, our current trial procedure has attempted to insure that courts do not convict the innocent. This is a laudable goal for a workable system. Face to face confrontation was designed to preserve an efficient balance between the prosecution and the defense. Although occasionally the process fails, it should not be replaced hastily with a system that consciously alters the balance in favor of conviction.

III. Defendant's Right to Compulsory Process

A. *Historically*

One of the rights the sixth amendment to the United States Constitution confers upon an accused is the right to call witnesses on his own behalf. The right is essential if the defendant plans to present a defense to the charges against him. The Supreme Court has discussed few of defendants' constitutional rights as infrequently as the sixth amendment right to compulsory process for obtaining witnesses. Prior to 1967, the Supreme Court had addressed the right only five times; twice in dicta and three times tangentially.[71] The Court recognized its importance, nonetheless, much earlier in American history. During the trials of Aaron Burr, Chief Justice Marshall upheld the issuance of subpoenas upon President Jefferson stating that the laws and the power of the

69. *See* Goodman & Helgeson, *infra* p. 201-02 (*Child Sexual Assault: Children's Memory and the Law*, 40 U. Miami L. Rev. 201-02 (1985)).

70. *See* Brakel, *Videotape in Trial Proceedings: A Technological Obsession?*, 61 A.B.A. J. 956, 957 (1975).

71. Westen, *The Compulsory Process Clause*, 73 Mich. L. Rev. 73, 108 (1974) (citing Pate v. Robinson, 383 U.S. 375, 378 n.1 (1966); Blackmer v. United States, 284 U.S. 421, 442 (1932); United States v. Van Duzee, 140 U.S. 169, 172-73 (1891) (dictum that compulsory process does not require defense subpoenas to issue at government expense); *Ex Parte* Harding, 120 U.S. 782 (1887); United States v. Reid, 53 U.S. (12 How.) 361, 364-65 (1851) (dictum), *overruled in* Rosen v. United States, 245 U.S. 467 (1918)).

courts governed even the President.[72] President Jefferson complied with the subpoena and the Court said little else about the clause for 170 years.

In 1966, the Supreme Court discussed the clause and expanded its literal meaning. In *Washington v. Texas*,[73] the Court struck down a statute that prohibited coparticipants in a crime from testifying on each other's behalf.[74] In doing so, the Court expanded the scope of the right. The Court held that it not only guarantees compulsory process to obtain witnesses, but also the testimony of those witnesses whose presence it secures, as long as their testimony is relevant, material, and vital to the accused's defense.[75] For the next sixteen years, the Court discussed the clause only tangentially. In 1982, however, the Court further defined the scope of the right. In *United States v. Valenzuela-Bernal*,[76] the Court held that a witness's testimony could be withheld from the defense if the defendant failed to demonstrate that the testimony would be both material and favorable to him.[77] In her concurrence, Justice O'Connor warned, however, that governmental policies that deliberately place potential defense witnesses beyond the reach of compulsory process could not be easily reconciled with the clause.[78]

Despite the relatively clear standard set forth in *Valenzuela-Bernal*, the Court's other statements about the presentation of a defense suggest that the right may be further qualified. In *Washington*, the Court noted that the decision should not be read to disapprove testimonial privileges or competency rules.[79] In *Chambers v. Mississippi*,[80] a complex decision involving confrontation, compulsory process and due process considerations, the Court recognized that important rights may bow to accommodate other legitimate interests in the criminal trial process.[81] The Court in *Valenzuela-Bernal* also rejected compulsory process for witnesses

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72. United States v. Burr, 25 F. Cases 30, 34 (C.C.D. Va. 1807) (No. 14,692d). Although the Court based its decision on the right to compulsory process, it mistakenly cites the eighth amendment instead of the sixth amendment as the source of this right. *Id.* at 33.

73. 388 U.S. 14 (1967).

74. *Id.* at 16-17.

75. *Id.* at 23.

76. 458 U.S. 858 (1982). In *Valenzuela-Bernal*, the government deported witnesses before the defense counsel could interview them. *Id.* at 861.

77. *Id.* at 873.

78. *Id.* at 876 (O'Connor, J., concurring).

79. Washington v. Texas, 388 U.S. at 23 n.21.

80. 410 U.S. 284 (1973) (the right to confront and cross-examine is not absolute).

81. *Id.* at 295 (citing Mancusi v. Stubbs, 408 U.S. 204 (1972)).

whose testimony was merely cumulative.[82] When these other interests can restrict the right to compulsory process, Justice O'Connor's admonition must be taken seriously. Thus, courts must closely examine the asserted governmental interest and find it substantial before they deny the defendant the right to subpoena a witness and introduce his testimony into evidence.

B. *Variations*

Courts have denied defendants access to witnesses by upholding privileges in certain situations and overriding them in others. For example, courts have given the defense access to the identity and testimony of informers, but only where the defense had shown this information to be essential to a fair trial.[83] Testimony cannot generally be compelled from those who can properly exercise a fifth amendment privilege.[84] The courts generally have held that while the compulsory process clause is significant, it cannot be used to force another person to give up his constitutional rights or to force the government to accommodate the interests of both people.[85] The courts have resolved cases involving the reporters' privilege both ways;[86] however, the courts have found that the marital privilege[87] and the attorney-client privilege[88] will override the compulsory process clause.

Courts also have used judicial economy as a justification to deny severance of joint defendants where one seeks to testify on behalf of the other but cannot do so without implicating himself.[89] Courts will grant severance only when the defendant can show that the co-defendant actually will testify in an exculpatory, noncumulative fashion so as to further the defense without unduly burdening the court.[90] Although these practices have not been tested in the Supreme Court since *Valenzuela-Bernal*, lower courts consist-

82. 458 U.S. at 873.

83. *E.g.*, Roviaro v. United States, 353 U.S. 53, 60-61 (1957).

84. *See, e.g.*, United States v. Turkish, 623 F.2d 769, 774-75 (2d Cir. 1980); W. LaFave & J. Israel, Criminal Procedure 880-81 (1985).

85. *See* United States v. Reese, 561 F.2d 894, 900 (D.C. Cir. 1977).

86. *Compare* State v. Rinaldo, 36 Wash. App. 86, 101, 673 P.2d 614, 615-16 (1983) (upholding the privilege over demands for testimony based on compulsory process) *with In re* Farber, 78 N.J. 259, 268, 394 A.2d 330, 334, *cert. denied sub nom.* New York Times Co. v. New Jersey, 439 U.S. 997 (1978) (upholding the supremacy of the compulsory process clause).

87. *E.g.*, United States v. Brown, 634 F.2d 819, 826 (5th Cir. 1981).

88. *E.g.*, Valdez v. Winans, 738 F.2d 1087, 1090 (10th Cir. 1984).

89. *See, e.g.*, United States v. Rice, 550 F.2d 1364, 1370 (5th Cir. 1977).

90. *Id.* at 1369.

ently uphold their validity.[91]

C. *General Application to Sexual Abuse Cases*

Despite these countervailing practices, it is not difficult to see how the courts may invoke the compulsory process clause to defeat the new statutes that create hearsay exceptions for the admission of statements child sexual abuse victims make to other people.

It is conceivable that if courts uphold the hearsay exceptions when challenged as a denial of the right to confrontation, a defendant may nonetheless invoke his right to compulsory process to subpoena the child and place her on the witness stand. At least one court has rejected a statutory challenge based on the confrontation cluase in part because the defendant did not avail himself of his right to compulsory process.[92] In order to demand the testimony of the child witness, the defendant will have to show that the evidence is material, favorable to his cause, and not merely cumulative.[93] The defendant will have little difficulty showing that the evidence is material. When the victim is the sole possessor of the information and that information is the basis of the government's case, materiality is apparent. To some extent, the notions of favorable and cumulative are intertwined. If the testimony will merely reiterate the government's evidence, it is cumulative, and most likely, not favorable. If the defendant seeks to introduce new information through the witness, it will not be cumulative, and most likely will be favorable to his defense.

Courts rarely discuss the concept of "favorable" in the context of the compulsory process clause. Nonetheless, other areas of the law provide some guidance. In the context of the government's duty to provide favorable information to the defendant, most courts agree that evidence is favorable even if "it does no more than demonstrate that 'a number of factors which could link the defendant to the crime do not.' "[94] Additional facts and attack on the credibility of a witness may elicit favorable evidence.[95]

If the defendant seeks to compel the attendance and testimony of the child, his purpose most likely will be to cast doubt

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91. *See, e.g.*, U.S. v. Bovain, 708 F.2d 606 (11th Cir.), *cert. denied sub nom.* Brown v. U.S., 464 U.S. 898 (1983).

92. Jolly v. State, 681 S.W.2d 689, 695 (Tex. Crim. App. 1984) (defendant had opportunity to call child as a witness but chose not to do so).

93. *See Valenzuela-Bernal*, 458 U.S. at 873.

94. W. LAFAVE & J. ISRAEL, *supra* note 84, at 760.

95. *See* Giglio v. United States, 405 U.S. 150, 154-55 (1972).

upon the credibility of the child's story in one of two ways: by impeaching the witness using traditional methods, or by bringing to the attention of the jury other facts that could undermine prior evidence regarding the identity of the perpetrator or the occurrence of the abuse. Arguably, whenever the defendant can cast doubt upon the credibility of the child's evidence by calling the victim as his own witness, courts should allow it. If the court denies the defendant access to the child, the compulsory process clause and the right of the accused to mount a defense require that the court fashion rules that permit the defendant to attack the credibility of the child's evidence in another manner.

Little is certain in this area. Commentators have suggested, for example, that compulsory process issues and confrontation issues should be resolved in a similar manner.[96] Thus, if a child is unavailable for cross-examination purposes, she also will be unavailable for compulsory process purposes. On the other hand, it may violate both the compulsory process and confrontation clauses for the legislature to permit hearsay testimony by assuming unavailability in all circumstances. Just as *Globe Newspaper* suggested that the government must make a specific showing of need before a court can permit an infringement of first amendment guarantees, a court also may require the government to make a particularized showing of need before it restricts sixth amendment guarantees. Nevertheless, the protection of children is at least as important as judicial economy or evidentiary privilege which traditionally have been used to override the compulsory process clause.

If the footnote in *Washington* is given full effect, legislative prohibitions on access to child witnesses may be permissible.[97] Even if these prohibitions are constitutionally permissible, there is no reason why the balance between the defendant's rights and the child's protection should be altered to strengthen the prosecution. Despite sentiments to the contrary, statistical conviction patterns in these cases strongly resemble those for all felony offenses.[98] In

96. *See* Westen, *supra* note 71, at 154-55.

97. Rape shield statutes, which the courts uniformly have upheld, place certain evidence outside the scope of cross-examination without running afoul of either the confrontation clause or the compulsory process clause. *See* People v. Arenda, 416 Mich. 1, 9-10, 330 N.W.2d 814, 816-17 (1982). Elimination of an issue, however, is less serious than elimination of a witness.

98. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, BULLETIN, TRACKING OFFENDERS: THE CHILD VICTIM 1 (Dec. 1984) (showing statistics regarding child victims of sexual assault, other sex offenses, kidnapping, and family offenses in California, New York, Ohio and Pennsylvania).

fact, one-half of all child sexual abuse arrestees are convicted as compared to one-third of all felony arrestees.[99] If these statistics are accurate, it is possible that the prosecution's problems arise not from procedural guarantees accorded a defendant at the trial, but from other events that occur during the processing of the case.

IV. The Right to Pro Se Representation

A. *Historically*

In *Faretta v. California*,[100] the Supreme Court held that a criminal defendant has a constitutional right to represent himself.[101] In so holding, the Court stated:

> The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense. It is the accused, not counsel, who must be "informed of the nature and cause of the accusation," who must be "confronted with the witnesses against him," and who must be accorded "compulsory process for obtaining witnesses in his favor." . . . [T]he right to self-representation—to make one's own defense personally—is thus necessarily implied by the structure of the Amendment.[102]

Therefore, although a defendant may represent himself ultimately to his detriment, "his choice [of self-representation] must be honored out of 'that respect for the individual which is the lifeblood of the law.' "[103] The right is not only accorded to defendants who have technical knowledge of the law, but also to those who are aware of the dangers of self-representation and generally know what they are doing. If a defendant meets these requirements, he may knowingly and intelligently waive his right to counsel and proceed to defend himself.

There are limitations on this right. The first limitation involves the timing of the request. A pre-*Faretta* ruling suggests that the request is timely if made prior to the commencement of the trial.[104] *People v. Windham*,[105] however, indicates that the request

99. *Id.*

100. 422 U.S. 806 (1975).

101. *Id.* at 819.

102. *Id.* (footnote omitted).

103. *Id.* at 834 (quoting Illinois v. Allen, 397 U.S. 337, 350-51 (1970) (Brennan, J., concurring)).

104. United States *ex rel.* Maldonado v. Denno, 348 F.2d 12, 15 (2d Cir. 1965), *cert. denied sub nom.* DiBlasi v. McMann, 384 U.S. 1007 (1966) (citations omitted); *see also* Chapman v. United States, 553 F.2d 886, 887 (5th Cir. 1977) (request is timely if made

must be made within a reasonable time prior to the commencement of the trial.[106] In *Faretta*, the defendant made the request well before the date of the trial. The Supreme Court obviously thought that the request was reasonable, but gave no further guidance with respect to the timing of requests for self-representation. It is clear, however, that where a defendant has ample time to make a pretrial request for self-representation and fails to do so, a subsequent in-trial request could summarily be denied as hindering the orderly process of the judicial system.[107]

A second limitation is that the request for pro se representation must be clear and unequivocal.[108] Vacillation in requesting a lawyer[109] or permitting a lawyer to do some of the in-court work[110] can constitute waiver of pro se representation. Although the court may permit a lawyer to assist a defendant upon request, courts have not held such hybrid representation to be constitutionally mandated.[111] Further, the court may order hybrid representation or standby counsel over a defendant's objection so long as the counsel's assistance does not go beyond routine, clerical, or procedural matters and does not interfere with the defendant's choice between tactical alternatives, questioning of witnesses, or representations on matters of importance.[112]

A final limitation may be derived from *Illinois v. Allen*.[113] If the purpose of pro se representation is to disrupt or frustrate the integrity of the court, and it begins to accomplish these goals, the court may construe the defendant to have forfeited his right to pro se representation.[114] Similarly, if the purpose is to harrass or intimidate a witness, the court also may construe the defendant to have forfeited the right.[115]

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before empanelment of a jury).

105. 19 Cal. 3d 121, 560 P.2d 1187, 137 Cal. Rptr. 8, *cert. denied*, 434 U.S. 848 (1977).

106. *Id.* at 127-28, 560 P.2d at 1191, 137 Cal. Rptr. at 12.

107. *See* Russell v. State, 270 Ind. 55, 63-64, 383 N.E.2d 309, 315 (1978).

108. Anderson v. State, 267 Ind. 289, 294, 370 N.E.2d 318, 320 (1977), *cert. denied*, 434 U.S. 1079 (1978) (citations omitted).

109. United States v. Bennett, 539 F.2d 45, 51 (10th Cir.), *cert. denied*, 429 U.S. 925 (1976).

110. United States v. Conder, 423 F.2d 904, 907-08 (6th Cir.), *cert. denied sub nom.* Pegram v. United States, 400 U.S. 958 (1970) (acceptance of counsel's assistance during pretrial period and early stages of trial constitutes an intent to be represented and may result in a denial of a subsequent request for self-representation).

111. *See* McKaskle v. Wiggins, 104 S. Ct. 944, 953-54 (1984).

112. *Id.* at 951, 954.

113. 397 U.S. 337 (1970); *see supra* note 29.

114. *See Allen*, 397 U.S. at 343.

115. United States v. Carlson, 547 F.2d 1346, 1359 (8th Cir. 1976), *cert. denied*, 431

B. *General Application to Sexual Abuse Cases*

There is little to prevent a defendant from representing himself in a child sexual abuse case. If the defendant makes the request timely, unequivocally, and with full understanding of its consequences, the court must grant it. Consequently, if the prosecutor makes a pretrial request for a technologically innovative method of taking testimony,[116] the defendant may frustrate this tactic by requesting to defend himself. Since many defendants in sexual abuse cases are not indigent, they will be able to derive maximum benefit from their retained counsel even if the court does not permit active hybrid representation during the trial itself. Consequently, the prosecutor may be forced to forego closed circuit television and prerecorded videotaped testimony or subject the victim to the more intimidating process of questioning by the defendant himself.[117]

It is unlikely that a court will find that the purpose of a request for a pro se defense is disruptive or an affront to the integrity of the court. Invocation of a constitutional right is not in itself disruptive or an affront to the integrity of the judicial process. *Globe Newspaper*, *Allen*, and *Faretta* all suggest that specific instances of contumacious conduct must occur before the court can deny a defendant his right to pro se representation. It is unlikely that the request itself will reach the level of disruption or intimidation usually associated with the forfeiture of the right. Courts sometimes have held that if a defendant makes threats during the act of abuse, he waives (or more precisely, forfeits) his right to confrontation,[118] there must be a specific showing of the relation between the defendant's improper activities and the witness's reluctance to testify before the court denies the right to self-representation. Assertion of a right cannot be equated with a threat to the victim. Although the specter of the defendant's questioning may not be pleasant for a witness, it cannot be construed to be misconduct per se.

U.S. 914 (1977).

116. The prosecutor ordinarily must make the request before trial.

117. In fact, a proposed bill by the District of Columbia Council on the Judiciary will place the child victim in a small enclosed room with the prosecutor and the defendant's attorney. If a defendant chooses to represent himself, the child, in essence, will be locked into a potentially threatening situation. This fact was brought to the Council's attention during testimony. The bill is still pending. *See* Council of the District of Columbia Bill No. 6-145 entitled "District of Columbia Testimony by Minor Victims in Sexual Offense Prosecutions Act of 1985."

118. State v. Sheppard, 197 N.J. Super. 411, 441, 484 A.2d 1330, 1348 (Law Div. 1984).

Once questioning begins, the court retains some discretion in controlling the examination so that the witness is not intimidated more than he would be during normal cross-examination. This control includes declaring the right forfeited if the defendant goes beyond the bounds of vigorous defense and begins to intimidate the witness or impugn the integrity of the court.[119]

Nothwithstanding this control, prosecutors must be made aware that the tactics which they use to insulate a child witness may result unwittingly in a lessening of their prosecutorial advantage, and an increase in discomfort to the child witness. Moreover, due to the speed with which legislators are acting in this area, they may fail to carefully balance the concerns of the defendant and the child witness. Legislation should not presume guilt and seek to insure conviction. On the other hand, legitimate weapons in the hands of the defense should not frustrate all efforts to protect the child witness.

V. Conclusion

Skilled defense lawyers always will find ways to challenge and sometimes will overcome the various methods prosecutors use to protect child witnesses. Rather than spend time trying to create procedures to spare children from the anxiety that occurs during a trial, legislators should attempt to improve investigative techniques so that children will be traumatized less during the early stages of the case.[120] Multiple interviews conducted by insensitive and untrained police and other government agents do at least as much damage to children and to the prosecution's case as a court appearance by the child.[121] Rather than improve the process at the expense of the Constitution, legislators should improve pretrial procedures and investigative practices first.

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119. A court should consider a case carefully before making such a ruling. Mid-trial forfeiture of the right to a pro se defense could be grounds for a mistrial. If an appellate court reverses the trial court's decision, a retrial could violate the double jeopardy clause.

120. *See* Berliner, *infra* p. 169-172 (*The Child Witness: The Progress and Emerging Limitations* 40 U. Miami L. Rev. 169-172 (1985)).

121. *See* Goodman & Helgeson, *supra* note 69, at 200.