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"Face--to Television Screen--to Face": Testimony by Closed-Circuit Television in Cases of Alleged Child Abuse and the Confrontation Right

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Comments

"Face—to Television Screen—to Face": Testimony by Closed-Circuit Television in Cases of Alleged Child Abuse and the Confrontation Right

There is something in a face,
An air, and a peculiar grace,
*Which boldest painters cannot trace.**

*Today we have means of communication not available only a few years ago. We can now by electronic means project the image and voice of man clearly and distinctly at the speed of light and control that means and insure its integrity by closed circuit and monitors.***

INTRODUCTION

Commentators argue that the experience of a child who testifies at trial, as an accuser of child abuse, is quite traumatic.[1]

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* W SOMERVILLE, THE LUCKY HIT (1727).

** Kansas City v. McCoy, 525 S.W.2d 336, 339 (Mo. 1975).

[1] *See* Bauer, *Preparation of the Sexually Abused Child for Court Testimony*, 11 BULL. AM. ACAD. PSYCHIATRY & L. 287 (1983). "Invariably the trial adds procedural assault to the initial sexual assault, with the child carrying considerable responsibility for its outcome. Subsequent guilt feelings, distortions, and denials are frequently encountered; such psychiatric residuals require treatment and emotional support." *Id.* at 287; Libai, *The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System*, 15 WAYNE L. REV. 977 (1968-69).

> Psychiatrists have identified components of the legal proceedings that are capable of putting a child victim under prolonged mental stress and endangering his emotional equilibrium: repeated interrogations and cross-examination; facing the accused again; the official atmosphere in court; the acquittal of the accused for want of corroborating evidence to the child's trustworthy testimony; and the conviction of a molester who is the child's parent or relative.

Although no agreement exists that child abuse is increas-

Id. at 984; Vartabedian & Vartabedian, *Striking a Delicate Balance*, JUDGES' J., Fall 1985, at 16.

> There are few communication settings with a higher apparent stress factor than that involved in the testimony of the child victim of sexual assault. The child who is aware and articulate enough to be qualified by the judge to testify can be affected by feelings of guilt, fear, and isolation.

Id. at 18; Weisberg, *Sexual Abuse of Children: Recent Developments in the Law of Evidence*, CHILDREN'S LEGAL RTS. J., Fall 1984, at 2.

> The American criminal justice system requires that the victim of a criminal offense come forward and make a public complaint against the alleged perpetrator. When a child victim of a sexual offense is involved in the prosecution of an offender, typically the child is treated in the same manner as an adult victim. Although procedures vary from jurisdiction to jurisdiction, most states require several separate interviews, usually conducted by police and the district attorney among others. The victim must answer numerous questions concerning the incident, such as information on dates, time, sequence, description of the suspect and of the offense location. The victim may be obliged to identify the offender by picture or line-up. A preliminary hearing may occur, during which the victim must again recount details of the offense. If the suspect fails to plead guilty, a trial ensues in which the victim again testifies and is subject to cross-examination while facing the accused. Such testimony, if given in an adult criminal proceeding, takes place in a public courtroom. This process may last from several months to several years.

Id.; *see also* Reply Brief for Petitioner, Kentucky v. Stincer, 107 S. Ct. 2658 (1987).

> The significant conflicts among the interests of the state, the defendant and the victim come into sharpest focus in child sexual abuse cases. The only eyewitness is usually a child of tender years who has been betrayed by a powerful, trusted adult. Asking such a witness to understand, not to be afraid, and to respond in a courtroom as a mature adult is asking too much in most cases. For this reason, many charges will never be prosecuted.

Id. at 12. *But see* Brief of Amicus Curiae American Psychological Association in Support of Petitioner, Kentucky v. Stincer, 107 S. Ct. 2658 (1987). "Thus far, [however,] no compelling case has been made that sexually abused children as a class are sufficiently different from other witnesses to justify abrogation of [the] longstanding attributes of [our] adversary system." *Id.* at 15 (quoting Melton, *Children's Testimony in Cases of Alleged Sexual Abuse*, to be published in ADVANCES IN DEVELOPMENTAL AND BEHAVIORAL PEDIATRICS (Wolraich & Routh eds. 1987)).

> [P]articularly for young children, it is equally plausible that children's responses are less severe on average than those of adults. Provided that parents and others do not overreact and that they are supportive of the child during the legal process, it may well be that the trial experience will cause little trauma. At least for some child victims, the experience may be cathartic; it provides an opportunity for taking control of the situation, achieving vindication, and symbolically putting an end to the episode.

Id. at 16-17 (quoting Melton, *Sexually Abused Children and the Legal System: Some Policy Recommendations*, 13 AM. J. FAM. THERAPY 61, 64-65 (1985)).

> Amicus is aware of no social science studies that have focused exclusively on the psychological effects on child victims of sexual assault of testifying

ing,[2] cases of alleged child abuse continue to attract media attention.[3] In response to the heightened awareness of child abuse and to the trauma child witnesses may encounter, many states have enacted statutes that seek to protect the child from a possibly

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> in the presence of their alleged offenders. Until those studies have been performed, however, it is possible to extrapolate, with some qualifications, from the few existing studies on child victims' reactions to their involvement in the legal process, including testifying in court. Essentially, those studies suggest that although involvement in the legal process is harmful to some children, it is beneficial to others. The significance of these findings for the issues raised by this case is two fold: first, these studies show that children's reaction to involvement in the legal process in general, and testifying in courts in particular (without regard to the presence of the alleged offender in the courtroom), are complex and variable; second, these studies suggest that previously widely held assumptions about the effects on child victims who participate as witnesses in the legal process are not supported by the scientific data. Thus, existing studies in this area, both by their results and by their example, caution courts and policymakers concerned with the effects on child victims of testifying in front of their alleged abusers, to proceed slowly and to avoid generalized assumptions in this area.

Id. at 17-18.

[2] *Compare Child Sexual Abuse Victims in the Courts: Hearings Before the Subcomm. on Juvenile Justice of the Senate Comm. on the Judiciary*, 98th Cong., 2d Sess. 77 (1984) ("The molestation of children has now reached epidemic proportions. Even by conservative estimates, a young American will be sexually molested once every two minutes.") (statement of Senator Arlen Specter, Chairman, Subcommittee on Juvenile Justice) *with* Vartabedian & Vartabedian, *supra* note 1, at 17 ("Investigations . . . and filings of criminal complaints have no doubt increased in part because of public awareness campaigns. Children's television programming is peppered with public service announcements featuring child celebrities urging children to tell someone if they have been abused. Many cartoon programs contain story lines with the same message.").

Certainly *reported* cases have increased. *See* ABUSED CHILDREN IN AMERICA: VICTIMS OF OFFICIAL NEGLECT, REPORT OF THE SELECT COMMITTEE ON CHILDREN, YOUTH, AND FAMILIES, H.R. REP. No. 260, 100th Cong., 1st Sess. (1987). Based on an extensive survey with detailed statistics of the 50 states and the District of Columbia, this Report indicates that "[c]hild abuse and neglect, as reported to State child welfare agencies, have increased steadily since 1976 when reports were first available. Between 1981-85, reports of child abuse and neglect rose by more than half (54.9%) nationwide." *Id.* at 1. "In 1985 alone, an estimated 1,876,564 children [in the United States] were reported to child protective service agencies as having been abused or neglected. . . ." *Id.* at 4; *see also* Lexington Herald-Leader, April 11, 1987, at B2, cols. 3-6 (According to the Kentucky Department for Social Services, "[t]here were just over 2,000 confirmed sexual attacks [on children reported in Kentucky during 1986], compared with 400 in 1980, and 10,160 cases of physical [child] abuse in 1986 compared with 3,811 in 1980.").

[3] *See, e.g.*, Postell, *Preliminary Hearings in Mass Child Abuse Case*, TRIAL, Nov. 1984, at 64-65 (an account of the preliminary hearings in a Los Angeles Municipal Court in which four members of the Buckey family and three other teachers were charged with 208 counts of child molestation and conspiracy involving 42 children at the Virginia McMartin Pre-School in Manhattan Beach, California).

frightening testimonial experience.[4] For example, some states have created new hearsay exceptions which permit a child's out-of-court statements to be admitted into evidence at trial;[5] other states have adopted procedures for the admission of a child's videotaped deposition.[6]

The most recent legislative innovation involves the use of closed-circuit television to present the live testimony of a child witness.[7] Although procedures vary from state to state, some

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[4] *See Handling Evidence and Testimony in Child Abuse Cases*, JUDGES' J., Fall 1984, at 2.

> These new reforms, which primarily benefit prosecutors, are a response to a growing public awareness about child abuse and the realization that often the only witnesses to crimes against children are the children themselves. Because young children in particular can be easily traumatized and confused, some courts have created special provisions to elicit their testimony.

Id.

[5] *See, e.g.*, WASH. REV. CODE § 9A.44.120 (1985).

[6] *See, e.g.*, WIS. STAT. ANN. § 967.04(7) (West Supp. 1987). Several courts have addressed the issue of whether the admission into evidence of the videotaped deposition or testimony of a child violates a defendant's confrontation right. *See, e.g.*, United States v. Benfield, 593 F.2d 815 (8th Cir. 1979) (unconstitutional); State v. Melendez, 661 P.2d 654 (Ariz. Ct. App. 1982) (constitutional); McGuire v. State, 706 S.W.2d 360 (Ark. 1986) (constitutional); People v. Johnson, 497 N.E.2d 308 (Ill. App. Ct. 1986) (constitutional); State v. Tafoya, 729 P.2d 1371 (N.M. Ct. App.) (constitutional), *cert. denied*, 728 P.2d 845 (N.M. 1986), *petition for cert. filed*, 56 U.S.L.W. 3026 (U.S. Feb. 12, 1987) (No. 86-1343); State v. Vigil, 711 P.2d 28 (N.M. Ct. App. 1985) (constitutional); State v. Cooper, 353 S.E.2d 451 (S.C. 1987) (constitutional); Clark v. State, 728 S.W.2d 484 (Tex. Ct. App. 1987) (constitutional); Pierce v. State, 724 S.W.2d 928 (Tex. Ct. App. 1987) (constitutional); Amescua v. State, 723 S.W.2d 266 (Tex. Ct. App. 1986) (constitutional); Buckner v. State, 719 S.W.2d 644 (Tex. Ct. App. 1986) (unconstitutional); Romines v. State, 717 S.W.2d 745 (Tex. Ct. App. 1986) (unconstitutional); Tolbert v. State, 697 S.W.2d 795 (Tex. Ct. App. 1985) (constitutional); Long v. State, 694 S.W.2d 185 (Tex. Ct. App. 1985) (unconstitutional), *aff'd*, No. 867-85 (Tex. Crim. App. July 1, 1987); Alexander v. State, 692 S.W.2d 563 (Tex. Ct. App. 1985) (constitutional); Powell v. State, 694 S.W.2d 416 (Tex. Ct. App. 1985) (unconstitutional); *cf.* Gaines v. Commonwealth, 728 S.W.2d 525 (Ky. 1987).

> We are of the opinion the [videotape] statute which permits testimony from a child who has not been declared by the trial court competent to testify as a witness is an unconstitutional infringement on the inherent powers of the judiciary, as declared in Sections 27 and 28 of the Constitution of Kentucky.

Id. at 527.

[7] *See* ALA. CODE § 15-25-3 (Supp. 1986); ARIZ. REV. STAT. ANN. § 13-4253(A) (Supp. 1986); CAL. PENAL CODE § 1347 (West Supp. 1987); CONN. GEN. STAT. ANN. § 54-86g (West Supp. 1987); FLA. STAT. ANN. § 92.54 (West Supp. 1987); GA. CODE ANN. § 17-8-55 (Supp. 1987); HAW. R. EVID. 616(d) (1985); IND. CODE ANN. § 35-37-4-8(b)

statutes permit the child witness to testify in front of a television camera in a room adjacent to the courtroom in the company of the prosecuting and the defense attorneys who examine and cross-examine the child.[8] In the courtroom, the judge, the jury, and the defendant watch the testimony on television monitors outside the child's presence.[9]

This Comment proposes that using closed-circuit testimony in cases of alleged child abuse poses a serious threat to the defendant's sixth amendment confrontation right[10] and, therefore, is unconstitutional.[11] Following an examination of the pol-

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(Burns Supp. 1987); IOWA CODE ANN. § 910A.14(1) (West Supp. 1987); KAN. STAT. ANN. § 22-3434(a)(1) (Supp. 1986); KY. REV. STAT. ANN. § 421.350(3) (Bobbs-Merrill Supp. 1986); LA. REV. STAT. ANN. § 15:283 (West Supp. 1987); MD. CTS. & JUD. PROC. CODE ANN. § 9-102 (Supp. 1987); MASS. ANN. LAWS ch. 278, § 16D (Law. Co-op. Supp. 1987); MINN. STAT. ANN. § 595.02(4) (West Supp. 1987); MISS. CODE ANN. § 13-1-405 (Supp. 1986); N.J. STAT. ANN. § 2A:84A-32.4 (West Supp. 1987); N.Y. CRIM. PROC. LAW § 65.00-.30 (McKinney Supp. 1987); OHIO REV. CODE ANN. § 2907.41(C) (Anderson 1987); OKLA. STAT. ANN. tit. 22, § 753(B) (West Supp. 1987); 42 PA. CONS. STAT. ANN. § 5985 (Purdon Supp. 1987); R.I. GEN. LAWS § 11-37-13.2 (Supp. 1986); TEX. CODE CRIM. PROC. ANN. art. 38.071(3) (Vernon Supp. 1987); UTAH CODE ANN. § 77-35-15.5(2) (Supp. 1987); VT. R. EVID. 807(e) (Supp. 1986).

[8] *See, e.g.*, KY. REV. STAT. ANN. § 421.350(3) (Bobbs-Merrill Supp. 1986) ("[T]he testimony of the child [shall] be taken in a room other than the courtroom and [shall] be televised by closed circuit equipment. . . ."). Note that KY. REV. STAT. ANN. § 421.350(3) is identical to TEX. CODE CRIM. PROC. art. 38.071(3) (Vernon Supp. 1987). *But cf.* CAL. PENAL CODE § 1347(b) (West Supp. 1987) (The attorneys remain in the courtroom and conduct examination and cross-examination by two-way closed-circuit television.).

[9] *See, e.g.*, N.Y. CRIM. PROC. LAW § 65.30(1) (McKinney Supp. 1987) ("The courtroom shall be equipped with monitors sufficient to permit the judge, jury, defendant and attorneys to observe the demeanor of the vulnerable child witness during his or her testimony."); *cf.* KY. REV. STAT. ANN. § 421.350(3) (Bobbs-Merrill Supp. 1986) ("The court shall permit the defendant to observe and hear the testimony of the child in person, but shall ensure that the child cannot hear or see the defendant.").

[10] For analysis of the problems of child witnesses, legislative innovations, and the confrontation right, see generally Berliner, *The Child Witness: The Progress and Emerging Limitations*, 40 U. MIAMI L. REV. 167 (1985-86); Graham, *Indicia of Reliability and Face to Face Confrontation: Emerging Issues in Child Sexual Abuse Prosecutions*, 40 U. MIAMI L. REV. 19 (1985-86); Mlyniec & Dally, *See No Evil? Can Insulation of Child Sexual Abuse Victims Be Accomplished Without Endangering the Defendant's Constitutional Rights?*, 40 U. MIAMI L. REV. 115 (1985-86).

[11] *But see* Note, *The Constitutionality of the Use of Two-Way Closed Circuit Television to Take Testimony of Child Victims of Sex Crimes*, 53 FORDHAM L. REV. 995 (1984-85).

> Courts and commentators have tried and suggested various ways to balance the defendant's right of confrontation and the state's interest in bringing

icies behind the confrontation clause,[12] this Comment analyzes the issue of whether the closed-circuit testimony procedure permits the accused to exercise his or her confrontation right.[13] This Comment concludes that the use of television to present the live testimony of a child witness is not a constitutionally permissible substitute for physical confrontation.[14]

I. THE POLICIES OF CONFRONTATION

The sixth amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ."[15] In *Mattox v. United*

> child molestation cases to prosecution. The use of two-way closed circuit television to take 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.

Id. at 1018; Comment, *Criminal Procedure: Closed-Circuit Testimony of Child Victims*, 40 OKLA. L. REV. 69 (1987).

> Oklahoma is to be commended for recognizing its duty to protect its children both in and out of the courtroom. The closed-circuit television statute is a step toward protecting children who would be further injured by the legal system. It is certainly possible to apply the innovative procedure without unduly restricting the defendant's right to confront adverse witnesses.

Id. at 98; Comment, *The Use of Closed-Circuit Television Testimony in Child Sexual Abuse Cases: A Twentieth Century Solution to a Twentieth Century Problem*, 23 SAN DIEGO L. REV. 919 (1986).

> Society has a substantial and compelling need to protect child sexual abuse victims from further psychological and emotional harm. Society also has a compelling need to preserve the rights of defendants. These two needs, however, are not mutually exclusive. They must be balanced against each other, and their respective weights determined. Indeed, since [testimony via two-way closed-circuit television] can be used without any substantial infringement of a defendant's rights and because the need to protect the victimized child witness is overwhelming, the scale must tip towards the child.

Id. at 938.

[12] *See infra* notes 15-44 and accompanying text.

[13] *See infra* notes 45-109 and accompanying text.

[14] *See infra* notes 110-19 and accompanying text.

[15] U.S. CONST. amend. VI. In Pointer v. Texas, 380 U.S. 400 (1965), the Supreme Court held that the confrontation right of the sixth amendment is binding upon the

States,[16] the United States Supreme Court stated that the "primary object" of this clause is to prevent the use of "depositions or *ex parte* affidavits . . . against the prisoner in lieu of a personal examination and cross-examination of the witness."[17] Also, the clause gives the accused the opportunity of "compelling [the witness] to stand face to face with the jury in order that they may look at him, and judge . . . his demeanor upon the stand."[18] The intent of the drafters of the Bill of Rights is unclear;[19] therefore, the

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states under the due process clause of the fourteenth amendment:

> The Sixth Amendment is a part of what is called our Bill of Rights. In Gideon v. Wainwright, [372 U.S. 335 (1963)], in which this Court held that the Sixth Amendment's right to have assistance of counsel is obligatory upon the States, we did so on the ground that "a provision of the Bill of Rights which is 'fundamental and essential to a fair trial' is made obligatory upon the States by the Fourteenth Amendment." . . . We hold today that the Sixth Amendment's right of an accused to confront the witnesses against him is likewise a fundamental right and is made obligatory on the States by the Fourteenth Amendment.

Id. at 403.

[16] 156 U.S. 237 (1895).

[17] *Id.* at 242.

[18] *Id.*

[19] *See* California v. Green, 399 U.S. 149, 175-76 (1970) (Harlan, J., concurring):

> Similar guarantees to those of the Sixth Amendment are found in a number of the colonial constitutions and it appears to have been assumed that a confrontation provision would be included in the Bill of Rights that was to be added to the Constitution after ratification. The Congressmen who drafted the Bill of Rights amendments were primarily concerned with the political consequences of the new clauses and paid scant attention to the definition and meaning of particular guarantees. Thus, the Confrontation Clause was apparently included without debate along with the rest of the Sixth Amendment package of rights—to notice, counsel, and compulsory process—all incidents of the adversarial proceeding before a jury as evolved during the 17th and 18th centuries. If anything, the confrontation guarantee may be thought, along with the right to compulsory process, merely to constitutionalize the right to a defense as we know it, a right not always enjoyed by the accused, whose only defense prior to the late 17th century was to argue that the prosecution had not completely proved its case.

But cf. Graham, *supra* note 10, at 63 (citing Graham, *The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One*, 8 CRIM. L. BULL. 99 (1972)):

> The right of the defendant to confront available complaining witnesses stems from the trial of Sir Walter Raleigh. Sir Walter Raleigh was convicted of treason after a trial by affidavit, without ever being able to confront his accusers. Not only did the government fail to produce live witnesses,

Supreme Court[20] and other authorities[21] often discuss the language of *Mattox* when interpreting the confrontation right.

Justice White, writing for the Court in *California v. Green*,[22] expanded upon *Mattox* by explaining that the policies of the clause provide basic safeguards.

> Confrontation: (1) insures that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to *cross-examination*, the "greatest legal engine ever invented for the discovery of truth"; (3) permits the jury that is to decide the defendant's fate to observe the *demeanor of the witness* in making his statement, thus aiding the jury in assessing his credibility.[23]

Therefore, confronting the accused "with the witnesses against him"[24] forces the government to provide procedures that give the accused the ability to test the accuracy of the witness' accusations before the trier of fact.[25]

Sir Walter Raleigh was not permitted to summon witnesses on his own behalf.

[20] *See, e.g.*, Barber v. Page, 390 U.S. 719 (1968). "The right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness." *Id.* at 725.

[21] *See, e.g.*, 5 J. WIGMORE, EVIDENCE § 1395(1)-(2) (1974).

> The main and essential purpose of confrontation is *to secure for the opponent the opportunity of cross-examination*. . . . There is, however, a secondary advantage to be obtained by the personal appearance of the witness; the *judge* and the *jury* are enabled to obtain the elusive and incommunicable evidence of a *witness' deportment while testifying*, and a certain subjective moral effect is produced upon the witness.

Id. (emphasis in original); Note, *Reconciling the Conflict Between the Coconspirator Exemption from the Hearsay Rule and the Confrontation Clause of the Sixth Amendment*, 85 COLUM. L. REV. 1294, 1302 (1985) ("The *Mattox* interpretation of the confrontation clause and its emphasis on cross-examination has been reaffirmed repeatedly by the Supreme Court.").

[22] 399 U.S. 149 (1970).

[23] *Id.* at 158 (emphasis added) (quoting J. WIGMORE, *supra* note 21, at § 1367).

[24] U.S. CONST. amend. VI.

[25] See Ohio v. Roberts, 448 U.S. 56, 71 (1980) in which the Court stated that "the principal *purpose* of cross-examination [is] to challenge 'whether the declarant was sincerely telling what he believed to be the truth, whether the declarant accurately perceived and remembered the matter he related, and whether the declarant's intended

Contrary to the literal language of the sixth amendment, however, the Supreme Court has fashioned an exception to the requirement of physical confrontation between the defendant and the witness.[26] In *Ohio v. Roberts*,[27] the Court, in discussing the admissibility of hearsay[28] under the confrontation clause, recognized that the clause establishes rules of necessity and trustworthiness.[29] To show necessity of admission, "[i]n the usual case . . ., the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant."[30] To be trustworthy, the hearsay statement must have "indicia of reliability" that "augment accuracy in the fact finding process."[31] Hearsay, which meets the *Roberts* test,[32] is admissible at trial, even though the defendant

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meaning is adequately conveyed by the language he employed.' " *Id.* (quoting Davenport, *The Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions: A Functional Analysis*, 85 HARV. L. REV. 1378, 1378 (1971-72)); *see also Pointer*, 380 U.S. at 404:

> This Court in *Kirby v. United States*, 174 U.S. 47, 55, 56, referred to the right of confrontation as "[o]ne of the fundamental guarantees of life and liberty," and "a right long deemed so essential for the due protection of life and liberty that it is guarded against legislative and judicial action by provisions in the Constitution of the United States and in the constitutions of most if not all the States composing the Union."

[26] *See Roberts*, 448 U.S. at 78 (Brennan, J., dissenting) ("[O]ur cases have recognized the necessity for a limited exception to the confrontation requirement for the prior testimony of a witness who is unavailable at the defendant's trial.").

[27] 448 U.S. 56 (1980).

[28] Rule 801(c) of the Federal Rules of Evidence defines "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."

[29] *Roberts*, 448 U.S. at 65.

[30] *Id. But cf.* United States v. Inadi, 106 S. Ct. 1121 (1986).

> *Roberts* must be read consistently with the question it answered, the authority it cited, and its own facts. All of these indicate that *Roberts* simply reaffirmed a longstanding rule . . . that applies unavailability analysis to prior testimony. *Roberts* cannot fairly be read to stand for the radical proposition that no out-of-court statement can be introduced by the government without a showing that the declarant is unavailable.

Id. at 1126. The Supreme Court has noted that most confrontation cases "fall into two broad categories: cases involving the admission of out-of-court statements and cases involving restrictions imposed by law or by the trial court on the scope of cross-examination." Delaware v. Fensterer, 474 U.S. 15, 18 (1985) (per curiam).

[31] *Roberts*, 448 U.S. at 65.

[32] The Court determined that "certain hearsay exceptions rest upon such solid foundations that admission of virtually any evidence within them comports with the

did not have the opportunity to cross-examine the declarant before the trier of fact.[33]

Recently, in *Lee v. Illinois*,[34] a divided United States Supreme Court[35] held that a trial judge violated Millie Lee's rights under the confrontation clause. The judge, expressly relying on portions of her codefendant's confession, found Lee guilty of a double murder.[36] Based on *Roberts*, the Court held that the judge's reliance on the confession to convict Lee was unconstitutional because the codefendant's statement "was presumptively unreliable and it did not bear sufficient independent 'indicia of reliability' to overcome that presumption."[37] The object of the clause is to guard against the danger of a defendant's conviction based on this "presumptively unreliable evidence."[38]

Justice Brennan, writing for the Court in *Lee*, stressed that the right to confront adverse witnesses promotes a fair system of criminal justice "by ensuring that convictions will not be based on the charges of unseen and unknown—and hence unchallengeable—individuals."[39] He explained that the purpose of

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'substance of the constitutional protection.' " *Id.* at 66 (quoting *Mattox*, 156 U.S. at 244).

[33] *See Mattox*, 156 U.S. at 243:

> There is doubtless reason for saying that the accused should never lose the benefit of any [confrontation] safeguards even by the death of the witness; and that, if notes of his testimony are permitted to be read, he is deprived of the advantage of that personal presence of the witness before the jury which the law has designed for his protection. But general rules of law of this kind, however beneficial in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case. To say that a criminal, after having once been convicted by the testimony of a certain witness, should go scot free simply because death has closed the mouth of that witness, would be carrying his constitutional protection to an unwarrantable extent. The law in its wisdom declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused.

[34] 106 S. Ct. 2056 (1986).

[35] Justice Brennan delivered the opinion of the Court in which Justices White, Marshall, Stevens, and O'Connor joined. Chief Justice Burger, Justices Blackmun, Powell, and Rehnquist dissented. *Id.*

[36] *Id.* at 2061. Lee and Edwin Thomas, her codefendant, did not testify at trial. Their counsel withdrew motions for separate trials because the trial was without a jury and the judge agreed to consider the evidence for each defendant separately. *Id.* at 2060.

[37] *Id.* at 2061.

[38] *Id.* at 2063.

[39] *Id.* at 2062.

the right is essentially to advance reliability in criminal trials.[40] The "mechanisms of confrontation"[41] that the Court identified in *Green*[42]—cross-examination of a witness under oath enabling a jury to observe the demeanor of the witness—encourage presentation of reliable evidence at trial.[43] To be constitutional under the confrontation clause, the Court examines procedures, such as the closed-circuit testimony procedure, to determine whether they advance, not inhibit, the "truthfinding function of the Confrontation Clause."[44]

II. CLOSED-CIRCUIT TESTIMONY AND THE CONFRONTATION CLAUSE: A FUNCTIONAL ANALYSIS

The basic policy behind the confrontation right is to advance the presentation of reliable and, ultimately, true evidence in a criminal trial; therefore, the language of the sixth amendment reflects "the Framers' preference for face-to-face accusation."[45] Advocates of closed-circuit testimony argue that procedures that separate the child witness from the accused provide reasonable and constitutional substitutes to confrontation in person;[46] others

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[40] *Id.*

[41] *Id.*

[42] *See supra* text accompanying note 23.

[43] *Lee*, 106 S. Ct. at 2062.

[44] *Id.*; *see* Tennessee v. Street, 471 U.S. 409 (1985). "[T]he Confrontation Clause's very mission [is] to advance 'the accuracy of the truth-determining process in criminal trials.' " *Id.* at 415 (quoting Dutton v. Evans, 400 U.S. 74, 89 (1970)); *see also* Kentucky v. Stincer, 107 S. Ct. 2658 (1987). "The right to cross-examination, protected by the Confrontation Clause, thus is essentially a 'functional' right designed to promote reliability in the truth-finding functions of a criminal trial. The cases that have arisen under the Confrontation Clause reflect the application of this functional right." *Id.* at 2662-63.

[45] Ohio v. Roberts, 448 U.S. 56, 65 (1980).

[46] *See, e.g., Child Victim Witness Protection Act of 1985: Hearings Before the Subcomm. on Juvenile Justice of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 95 (1985).

> There is nothing in the Constitution that says that the right to the confrontation of the accused must be two feet, three feet or within the same room. It simply says that the defendant has the right to confront his accuser. And we feel that with removing those constraints that technology has removed, that you can interpret those issues of confrontation meaning maybe not necessarily physical confrontation in a courtroom, but confron-

disagree, emphasizing that the clause requires physical confrontation.[47] Ultimately, the constitutionality of the closed-circuit testimony procedure under the confrontation clause depends upon whether the procedure is fair to the defendant by facilitating the production of trustworthy evidence.[48] Closed-circuit testimony is trustworthy only if the "mechanisms of confrontation"[49] are present.

A. Cross-Examination

The closed-circuit testimony procedure presents two distinct, practical problems which inhibit the defendant's ability to cross-examine[50] the child witness effectively. First, the child's departure from the courtroom eliminates the possibility of physical, or face-to-face, confrontation between the accused and the witness. Second, procedures that separate the defendant from his or her attorney[51] during the child's testimony create communication difficulties that may inhibit full cross-examination of the witness.[52]

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tation through electronic means.

Id. (statement of H. Mark Kennedy, Circuit Court Judge, Montgomery County, Alabama, and Chairman of the Children's Trust Fund for the State of Alabama); *cf.* Brief for Petitioner at 18, Kentucky v. Stincer, 107 S. Ct. 2658 (1987) ("The Confrontation Clause does not guarantee presence for presence's sake. The right to confront or to be present is ancillary to the right to test the reliability of evidence and thereby to advance the truth-seeking function.").

[47] *See, e.g.*, Commonwealth v. Willis, 716 S.W.2d 224, 234 (Ky. 1986) (Stephens, C.J., dissenting).

[48] *See* Lee v. Illinois, 106 S. Ct. 2056, 2062 (1986).

[49] *Id.*; *see supra* text accompanying note 23; *see also* People v. Algarin, 498 N.Y.S.2d 977, 981 (N.Y. Sup. Ct. 1986) ("Today, it is, thus, generally agreed that the Confrontation Clause serves two distinct purposes: first and primarily, to secure the opportunity of cross-examination and secondarily, to enable a jury to observe a witness' demeanor when brought face to face with the accused.").

[50] The Supreme Court has stressed the importance of cross-examination. *See, e.g.*, Davis v. Alaska, 415 U.S. 308, 316 (1974) ("Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested.").

[51] The defendant has a constitutional right to represent himself. *See* Faretta v. California, 422 U.S. 806, 819 (1975) ("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."); *see also Willis*, 716 S.W.2d at 233 (Leibson, J., concurring) ("It is my opinion that where the defendant has legitimately undertaken to defend himself *pro se*, his right to question all witnesses (including the child) cannot be impaired."); Mlyniec & Dally, *supra* note 10, at 133.

[52] *See Willis*, 716 S.W.2d at 235 (Stephens, C.J., dissenting).

1. *Elimination of Physical Confrontation*

Before the advent of television, adequate cross-examination demanded physicial confrontation between the accused and the witness;[53] however, proponents of the closed-circuit testimony procedure contend that it does not inhibit cross-examination of the witness.[54] Statutes that authorize courts to utilize the procedure[55] operate on the premise that testimony via closed-circuit television is the equivalent of physical confrontation.[56]

State v. Sheppard,[57] a trial court opinion, is the first published case concerning closed-circuit testimony of a child witness.[58] Sheppard was indicted for sexual assault upon his ten-year-old stepdaughter.[59] At a hearing in response to the prosecution's motion to present the child's testimony by closed-circuit television, a forensic psychiatrist testified that the child's experience in open court would be traumatic.[60] The court decided

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[53] *See* J. WIGMORE, *supra* note 21, at § 1395 ("The opponent demands confrontation, not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross-examination, which cannot be had except by the direct and personal putting of questions and obtaining immediate answers.").

[54] *See, e.g., Child Sexual Abuse Victims in the Courts: Hearings Before the Subcomm. on Juvenile Justice*, *supra* note 2, at 81 ("[C]ontemporaneous examination by means of closed circuit television permits examination of the witness by both the prosecution and the defense in the presence of the defendants. The defendants therefore will not be deprived of their sixth amendment rights of confrontation and cross-examination.") (statement of Lael Rubin, Deputy District Attorney, Los Angeles, California); Note, *supra* note 11, at 1013 ("The procedure proposed in this Note gives the defendant's counsel full opportunity to cross-examine the child witness.").

[55] *See supra* note 7.

[56] *See, e.g.*, N.Y. CRIM. PROC. LAW § 65.30(7) (McKinney's Supp. 1987) ("The examination and cross-examination of the vulnerable child witness shall, in all other respects, be conducted in the same manner as if the vulnerable child witness had testified in the courtroom.").

[57] 484 A.2d 1330 (N.J. Super. Ct. Law Div. 1984).

[58] Apparently the only case before *Sheppard* that discusses the closed-circuit procedure and the defendant's right to confront the witness is Kansas City v. McCoy, 525 S.W.2d 336 (Mo. 1975) (en banc). McCoy was convicted in municipal court of possession of marijuana. On appeal, in circuit court and upon trial de novo, an expert witness testified, by means of closed-circuit television which connected the crime laboratory with the courtroom, that the substance the police found in McCoy's possession was marijuana. *Id.* at 337-38. The Supreme Court of Missouri, affirming the 30-day conviction, held that the procedure did not violate the sixth amendment. *Id.* at 339. *See generally supra* the introductory quotation from *McCoy*.

[59] *Sheppard*, 484 A.2d at 1331.

[60] *Id.* at 1332.

that "[a]dequate opportunity for cross-examination will be provided" and permitted the use of closed-circuit testimony.[61] The court believed that "[t]he use of the video technique is a permissible restriction of cross-examination"; therefore, it held that the procedure did not violate Sheppard's constitutional right to confront the child witness.[62] While the *Sheppard* court determined that the absence of physical confrontation involved in televised testimony realistically limited *full* exercise of cross-examination,[63] other courts have held that the procedure acts as an interchangeable substitute[64] for "face-to-face"[65] confrontation.

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[61] *Id.* at 1343. After the court's decision in *Sheppard*, the New Jersey legislature passed a statute enumerating the closed-circuit testimony procedure. *See* N.J. STAT. ANN. § 2A:84A-32.4 (West Supp. 1987).

[62] *Sheppard*, 484 A.2d at 1349. The New Jersey Constitution, art. I, § 10 contains a confrontation clause: "In all criminal prosecutions the accused shall have the right . . . to be confronted with the witnesses against him. . . ."

[63] The court concluded: "The use of video technique is a permissible *restriction* of cross-examination." *Sheppard*, 484 A.2d at 1349 (emphasis added).

The United States Supreme Court has indicated that the confrontation clause may forbid restricted cross-examination *at trial*. *See* California v. Green, 399 U.S. 149 (1970). "Viewed historically, then, there is good reason to conclude that the Confrontation Clause is not violated by admitting a declarant's out-of-court statements, as long as the declarant is testifying as a witness and subject to *full and effective cross-examination*." *Id.* at 158 (emphasis added); *see also* Kentucky v. Stincer, 107 S. Ct. 2658 (1987). The trial court excluded Stincer from a hearing to determine whether the alleged victims of Stincer's abuse were competent to testify. *Id.* at 2660. Nevertheless, the Supreme Court stressed that the trial court did not restrict Stincer's "ability to cross-examine the witnesses at trial. Any questions asked during the competency hearing, which [Stincer's] counsel attended and in which he participated, could have been repeated during direct examination and cross-examination of the witnesses in [Stincer's] presence." *Id.* at 2664. Concluding that the trial court did not violate the confrontation right, the Supreme Court pointed out that Stincer "had the opportunity for *full and effective cross-examination* of the two witnesses during trial." *Id.* at 2666 (emphasis added).

[64] *See Willis*, 716 S.W.2d at 227, 230 (The procedures do not put restrictions on cross-examination. "There is no constitutional right to eyeball to eyeball confrontation. The choice of words 'face to face' may have resulted from an inability to foresee technological developments permitting cross-examination and confrontation without physical presence."); State v. Daniels, 484 So. 2d 941, 945 (La. Ct. App. 1986) ("[T]his trial technique serves as the functional equivalent of in-court testimony."); *Algarin*, 498 N.Y.S.2d at 985 (The procedure preserves the right to cross-examine.). *But cf.* Herbert v. Superior Court, 172 Cal. Rptr. 850 (Cal. Ct. App. 1981) (The defendant's right to confront the witness is abridged when he is seated so that he can hear but cannot see the child witness.).

[65] While the U.S. Constitution, *see supra* text accompanying note 15, and many state constitutions, *see, e.g., supra* note 62, state that the defendant has the right "to be confronted," nineteen state constitutions use the words "face to face." *See* ARIZ.

2. *Difficulty of Defendant-Attorney Communication*

The result of using the closed-circuit testimony procedure is not simply the elimination of "face-to-face" or "eyeball-to-eyeball"[66] confrontation; statutes creating the procedure usually require the defendant's attorney to join the prosecuting attorney and the child for examination and cross-examination outside the courtroom, while the defendant remains behind to watch the testimony on a television screen with the judge, the jury, and the public.[67] Although statutes may provide for a system of audio communication between the defendant and his or her attorney,[68] this separation hampers effective cross-examination.

CONST. art. 2, § 24; COLO. CONST. art. II, § 16; DEL. CONST. art. I, § 7; ILL. CONST. art. 1, § 8; IND. CONST. art 1, § 13; KAN. CONST. § 10; KY. CONST. § 11; MASS. CONST. Part 1, art. XII; MO. CONST. art. I, § 18(a); MONT. CONST. art. II, § 24; NEB. CONST. art. I, § 11; N.H. CONST. Part 1, art. 15; OHIO CONST. art. I, § 10; OR. CONST. art. I, § 11; PA. CONST. art. 1, § 9; S.D. CONST. art. VI, § 7; TENN. CONST. art. 1, § 9; WASH. CONST. art. 1, § 22; WIS. CONST. art. 1, § 7.

[66] *Willis*, 716 S.W.2d at 231.

[67] *See, e.g.*, MD. CTS. & JUD. PROC. CODE ANN. § 9-102(b) (Supp. 1987):

> (1) Only the following persons may be in the room with the child when the child testifies by closed circuit television:
>
> (i) The prosecuting attorney;
>
> (ii) The attorney for the defendant;
>
> (iii) The operators of the closed circuit television equipment; and
>
> (iv) Unless the defendant objects, any person whose presence, in the opinion of the court, contributes to the well-being of the child, including a person who has dealt with the child in a therapeutic setting concerning the abuse.
>
> (2) During the child's testimony by closed circuit television, the judge and the defendant shall be in the courtroom.

This statute fails to recognize that the trial judge is not a passive observer of a criminal trial. He may wish to question the child also. This statute requires the judge to remain in the courtroom without any ability to ask the child questions or even to give immediate supervision of the proceedings.

[68] *See, e.g.*, LA. REV. STAT. ANN. § 15:283(B) (West Supp. 1987) ("The court shall also ensure that the defendant is afforded the ability to consult with his attorney during the testimony of the child."). Some courts have found that the separation of the attorney from the defendant is not significant as long as they can communicate with each other by some means. *See Daniels*, 484 So. 2d at 943-44 ("[The defendant] was able to maintain audio contact with her attorney throughout the child's testimony. . . . As long as the defendant can hear the child's testimony and can confer with her attorney, the essential safeguards of cross-examination are preserved."); *cf. Algarin*, 498 N.Y.S.2d at 980 ("[A] two-way private communication system was set up from the defense table to the testimonial room so immediate conversations could take place among the defendant and his attorneys.").

Certainly, when the defendant has no means of communicating with his or her attorney during the child's testimony, the procedure is violative of the confrontation right.[69] *State v. Warford*[70] demonstrates that the absence of communication drastically interferes with the defendant's ability to participate in cross-examination by giving recommendations and suggestions to his or her attorney during the prosecution's examination or during cross-examination of the witness. Warford was convicted of sexual assault on a child, the daughter of the woman with whom he had been living.[71] At trial, the child was uncooperative, refusing to answer questions from the witness stand.[72] The court permitted the child's removal to a separate room for examination and allowed the defendant and the jury to observe the testimony on a closed-circuit monitor in the courtroom.[73] When the child witness was again uncooperative, the court authorized a therapist to question the child with the attorneys present.[74] After the child failed to respond to this interview, the court granted the state's motion to continue the child's testimony with the therapist in the separate room and with all other parties located in the court watching the examination on a television screen.[75]

The Supreme Court of Nebraska, reversing the conviction, held that "the trial court did not require the State to stay within minimum constitutional guidelines and, hence, denied the defendant his rights under the due process and confrontation

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[69] *See* State v. Warford, 389 N.W.2d 575 (Neb. 1986).

[70] 389 N.W.2d 575 (Neb. 1986).

[71] *Id.* at 577-78.

[72] *Id.* at 578.

[73] *Id.* The trial court was not acting according to a statutory provision in permitting the closed-circuit testimony. Other courts have denied the prosecution's motion to implement special procedures to facilitate child testimony in the absence of statutory guidelines. *See In re* S. Children, 424 N.Y.S.2d 1004 (N.Y. Fam. Ct. 1980) (The court denied an application to hear a child's testimony in camera in the absence of a statutory provision explicitly permitting this procedure.); *see also* Hochheiser v. Superior Court, 208 Cal. Rptr. 273, 276 (Cal. Ct. App. 1984) (The court held that closed-circuit testimony is "such a far-reaching innovation in a criminal trial [that it] 'is more appropriately left to the Legislature for initial consideration.' ") (quoting People v. Collie, 177 Cal. Rptr. 458, 464 (Cal. Ct. App. 1981)). For a discussion of the California state legislature's reaction to the *Hochheiser* decision, see Vartabedian & Vartabedian, *supra* note 1, at 19.

[74] *Warford*, 389 N.W.2d at 579.

[75] *Id.*

clauses."[76] Separating the witness from the courtroom foreclosed the possibility of physical confrontation. Also, Warford could not communicate with his attorney during part of the testimony; therefore, he was unable to "confront the witness through counsel."[77]

Some state statutes do not have explicit provisions outlining methods of defendant-attorney communication when the attorney leaves the courtroom to cross-examine the child.[78] Even though a trial court may order some method of communication, such as a telephone system, practical problems remain which endanger effective cross-examination.[79] Telephone communica-

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[76] *Id.* at 581.

[77] *Id.* at 582; *cf.* Hightower v. State, 736 S.W.2d 949 (Tex. Ct. App. 1987). Hightower was convicted of "the offenses of aggravated kidnapping and indecency with a child." *Id.* at 950. Pursuant to Texas Code of Criminal Procedure article 38.071(3), the trial judge allowed the child to testify via closed-circuit television from the jury room. The attorneys, the video operator, the judge, and the court reporter accompanied the child. Hightower and the jury watched the child's testimony on monitors in the courtroom. The judge denied Hightower's request for two-way radio or telephone communication between Hightower and his attorney during the televised testimony. The judge only told Hightower that he could "interrupt the questioning at any time he wanted to confer with his attorney" by asking "the bailiff to knock on the door to the room where the child was being questioned." The Texas Court of Appeals held that neither article 38.071(3) nor the particular trial procedures violated the confrontation right because Hightower had "ample opportunity to confer with counsel and through counsel to cross-examine the witness who testified against him." *Id.* at 952.

The Texas Court of Appeals failed to recognize that Hightower's ability to interrupt the child's testimony did *not* permit full and effective cross-examination of the child. Requesting that the bailiff knock on the jury room door to interrupt the testimony did not allow spontaneous and continuous communication between Hightower and his attorney. The particular procedure is so much more awkward than communicating in person that a defendant may decide not to interrupt the child's testimony even though he wishes to communicate with his attorney; since the defendant must "interrupt" to communicate, he may feel pressure to suppress any inclinations to confer with his attorney.

The Texas Court of Appeals also ignored the trial judge's apparent violation of article 38.071(3). Contrary to the express language of this statute, the trial judge and the court reporter left the courtroom to attend the questioning of the child in the jury room. *Id.*

[78] *See, e.g.*, KY. REV. STAT. ANN. § 421.350(3) (Bobbs-Merrill Supp. 1986).

[79] *See Willis*, 716 S.W.2d at 235 (Stephens, C.J., dissenting).

> The majority opinion—no matter how carefully one slices it—has virtually eliminated the right of *effective* cross-examination. One can only imagine the multitude of unacceptable logistical scenarios when the accused is in one room attempting to communicate with his counsel in another room. One can picture the accused or a messenger attempting to run back and

tion does not allow the defendant and his or her attorney to convey information to each other in writing, through body language, or by simple nudges; this communication could be extremely important, especially when the prosecution is examining the witness and the defendant wishes to convey information to his or her attorney which may be influential to rebut the prosecution during cross-examination.[80]

In an attempt to protect the child from trauma associated with the testimonial process of child abuse cases and to reduce the state's infringements into the rights of the accused, the New York legislature enacted somewhat lengthy provisions for closed-circuit testimony.[81] After a finding that a child witness is "vulnerable," and that "under the facts and circumstances of the particular case, the defendant's constitutional rights to an impartial jury or of confrontation will not be impaired," a court may order the child's removal from the courtroom.[82] The statute allows the attorneys to examine the child witness in a separate room away from the defendant, or, in the alternative, it permits the attorneys to remain in the courtroom to examine the child through the use of two-way closed-circuit television.[83] The drafters of the New York statute attempted to solve the defendant-attorney communication difficulties by providing the two-way

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> forth with notes everytime a question seems necessary. Or, perhaps, a private telephone line or a private radio communication system would be provided. Under these circumstances it is difficult to imagine that cross-examination could exist as a helpful tool for the defense and I believe any trial attorney would find these conditions intolerable. Any substantial limitation on the effectiveness of cross-examination strikes right to the heart of the right of confrontation.

Id. (emphasis in original).

[80] In addition to interfering with the right to confront the witness, communication difficulties may impede the right to effective representation by counsel. *Cf.* Illinois v. Allen, 397 U.S. 337 (1970).

[81] *See* N.Y. CRIM. PROC. LAW § 65 (McKinney Supp. 1987). For an application of this procedure, see People v. Henderson, 503 N.Y.S.2d 238 (N.Y. Sup. Ct. 1986).

[82] N.Y. CRIM. PROC. LAW § 65.20(11) (McKinney Supp. 1987).

[83] *Id.* at § 65.30(5) ("[T]he attorney for the defendant and the district attorney shall also remain in the courtroom unless the court is satisfied that their presence in the testimonial room will not impede full and private communication between the defendant and his or her attorney. . . .").

closed-circuit alternate procedure;[84] however, this procedure makes cross-examination difficult because the child may not respond to the questions and because the defendant's attorney may be unable to communicate effectively with the child witness via closed-circuit television.[85]

B. Demeanor of the Witness

The fact finder in a child abuse case may have problems observing the demeanor of the child witness to weigh the credibility of his or her statements.[86] While some advocates of the closed-circuit procedure do not demonstrate concern for demeanor observation problems,[87] courts often point out that technological advances in the telecommunications field enable a court to employ a closed-circuit testimony procedure that gives the fact finder an adequate opportunity to judge the child's credibility.[88]

Recently, in *Commonwealth v. Willis*,[89] the Kentucky Supreme Court narrowly held[90] that provisions of the Kentucky statute which permit the use of closed-circuit testimony[91] and

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[84] Other state statutes also provide for the use of two-way closed-circuit television. *See, e.g.*, CAL. PENAL CODE § 1347 (West Supp. 1987).

[85] *But see Child Sexual Abuse Victims in the Courts: Hearings Before the Subcomm. on Juvenile Justice, supra* note 2, at 81 ("Two-way transmission of the testimony will allow the defendants and each child witness to see and hear each other. As such, the testimony will be presented in a manner which is legally indistinguishable from testimony given by a witness who is physically present in the courtroom.") (statement of Lael Rubin, Deputy District Attorney, Los Angeles, California).

[86] *See* Burt, *The Case Against Courtroom TV*, TRIAL, July 1976, at 62, 66 (Televised testimony may prevent "the jury from accurately observing the actual demeanor of the witness.").

[87] *See, e.g., supra* note 46.

[88] *See Sheppard*, 484 A.2d at 1333 (At the hearing on the state's motion for closed-circuit testimony, a video expert testified that the transmission of image and voices would be clear.); *Algarin*, 498 N.Y.S.2d at 981 ("It is apparent to this court from a demonstration of the equipment used in this case that closed-circuit television has the capacity to present clear and accurate sounds and images to the defendant, the witness, the judge, the jury and the public.").

[89] 716 S.W.2d 224 (Ky. 1986).

[90] Justice Wintersheimer delivered the opinion of the court in which Justices Gant, Leibson, and Vance concurred. Chief Justice Stephens, Justices Stephenson, and White dissented. *Id.*

[91] KY. REV. STAT. ANN. § 421.350(3) (Bobbs-Merrill Supp. 1986).

recorded video testimony for trial use[92] do not violate the sixth amendment[93] or section eleven[94] of the Kentucky Constitution.[95] Willis was indicted for first-degree sexual abuse upon a five-year-old child.[96] After a competency hearing in which the child was unresponsive, the prosecution submitted a motion to proceed under Kentucky Revised Statutes sections 421.350(3) or (4), the closed-circuit and recorded television testimony provisions.[97] The trial court refused to allow the use of the television procedures, holding that they were unconstitutional.[98]

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[92] *Id.* at § 421.350(4).

[93] *See supra* text accompanying note 15.

[94] "In all criminal prosecutions the accused has the right . . . to meet the witnesses face to face." KY. CONST. § 11.

[95] Even though the Kentucky Constitution uses different words than the United States Constitution, *see supra* note 65, the Kentucky Supreme Court emphasized that "[t]he requirement in the Kentucky Constitution to 'meet witnesses face-to-face' is basically the same as the Sixth Amendment to the federal constitution which provides a right of confrontation." *Willis*, 716 S.W.2d at 227.

[96] *Id.* at 226.

[97] *Id.* "The Commonwealth's proposal urged that if a videotape of the testimony could be made under KRS § 421.350(4), the court would be able to judge from a review of the tape prior to trial whether the witness was competent." Brief for Appellant at 2, Commonwealth v. Willis, 716 S.W.2d 224 (Ky. 1986).

[98] *Willis*, 716 S.W.2d at 226. The trial court, in its unpublished opinion, stated:

> The question is whether the privilege of viewing a witness through a one-way mirror or a video monitor is a constitutionally acceptable substitute for face to face confrontation. It is the opinion of this Court that it is not.
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> This Court is aware of the strong public interest in the prosecution of child abuse cases, particularly sexual abuse. This Court is also aware of the sometimes unsurmountable [sic] difficulties in getting a small child to tell in a courtroom in the presence of the Defendant the events of sexual abuse. Children, even of tender years, can be and frequently are competent witnesses to their own sexual abuse. Certainly, there is no truth in the idea that children never tell the truth.
>
> On the other hand, closely following the wave of public concern regarding child abuse may be seen the wave of public concern regarding false accusations of child abuse and the irreparable damage which can occur. The fact is that it is a very difficult and sometimes impossible decision to be made as to whether a child is telling the truth under certain circumstances. At best, it is a difficult determination even for well trained and experienced investigators.
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> Nevertheless, the difficulty of the task alone should not be justification for abbrogating well established constitutional rights. Our traditional methods of criminal law enforcement simply do not lend themselves well to protect against child abuse. Methods that are more effective and less

On appeal, the Kentucky Supreme Court reversed the trial court by holding that the closed-circuit and recorded testimony procedures do not violate the defendant's confrontation right.[99] In deciding that "a video monitor is a constitutionally acceptable substitute for face-to-face confrontation,"[100] the court emphasized that the procedures permit the jury to "evaluate the demeanor and credibility of the witness."[101]

In his dissent, Chief Justice Stephens strongly protested the court's decision: "The majority has put the imprimatur of this Court on a new revision of the rule which says that the right of confrontation is no longer 'face to face,' but is rather, 'face—to television screen—to face.' "[102] Chief Justice Stephens argued that the jury could not have a "*complete* picture" of the child witness by watching the child's testimony on a television monitor.[103]

> dangerous to the welfare both of the child and the accused must be developed.
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> Evidently, it was the thought of the Legislature that the rights of children, traditionally wards of the state, should outweigh the rights of the individual. However, the individual rights and liberties provided our citizens under our constitutions have served us well and should not be abandoned except in the very last resort. Under our constitution a criminal accused has the right to meet witnesses against him face to face and it is the opinion of this Court that "face to face" does not include a one-way mirror or a T.V. monitor nor do such procedures adequately protect the Defendant's rights of personal confrontation and cross examination.

Opinion and Order of George E. Barker, Judge, Fayette Circuit Court, Commonwealth v. Willis, No. 84-CR-346, at 4-5.

[99] *Willis*, 716 S.W.2d at 232. The court also dismissed Willis' argument that the statute violates the separation of powers doctrine of the Kentucky Constitution. *Id.*

[100] *Id.* at 228.

[101] *Id.* at 227; *cf.* People v. Kasben, 404 N.W.2d 723 (Mich. Ct. App. 1987). In *Kasben*, the trial court ordered the use of televised testimony at a hearing to determine the competency of a four-year-old alleged victim of child abuse. *Id.* at 723-24. At trial, however, the child testified in the defendant's presence. The Michigan Court of Appeals held that the trial court procedures "were sufficient to protect the defendant's rights." *Id.* at 724. The child was subject to full cross-examination at trial; therefore, *Kasben* appears to be consistent with *Stincer*, 107 S. Ct. at 2658. On the other hand, however, the Kentucky Supreme Court in *Willis* addressed the constitutionality of a televised testimony statute rather than simply examining the use of televised testimony in competency hearings; therefore, *Willis* goes far beyond *Kasben* and *Stincer*. *See supra* note 63.

[102] *Willis*, 716 S.W.2d at 234 (Stephens, C.J., dissenting).

[103] *Id.* at 235 (Stephens, C.J., dissenting) (emphasis in original).

Although the closed-circuit testimony procedure allows the fact finder to examine the child's demeanor and to evaluate credibility, a juror's decision on whether the child is telling the truth will be influenced by the technology.[104] As a result, a juror's judgment on the child's credibility may be different when the child is physically present in the courtroom than when the child's testimony comes to a juror by television.

Also, the closed-circuit testimony procedure may cause the fact finder to grant special significance to the child's testimony. "[I]t is quite conceivable that the credibility of a witness whose testimony is presented via closed-circuit television may be enhanced by the phenomenon called status-conferral; it is recog-

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[104] On appeal, Willis argued that the available technology does not allow the jury to observe adequately the child's demeanor:

> [W]hile on the surface the videotape statute purports to identically transmit an image to the jury which it would otherwise see in person, common sense shows that this cannot be so, under the current state of the art. First, the projected image on the screen is by nature onedimensional. Second, the camera operator will have the function of focusing and zooming in and out on the witness and the surroundings, a function jurors automatically perform on their own. If the camera zooms in on the child's face, the jurors will be unable to observe her entire body, including hand and leg movements. The opposite effect is also to be expected if the camera is focused on the entire person.

Brief for Appellee at 7, Commonwealth v. Willis, 716 S.W.2d 224 (Ky. 1986); *cf.* G. MILLER & N. FONTES, VIDEOTAPE ON TRIAL (1979).

> Full-screen videotaped presentations have the potential of reducing the amount of nonverbal information provided to jurors. The nonverbal behaviors exhibited by witnesses and attorneys might be more difficult to observe when a full-screen panoramic shot of the trial proceedings is used. More specifically, the facial affect displays would be difficult to see when video cameras are not tightly focused in on testifying witnesses. It is also conceivable, given this loss of information, that juror interest in videotaped proceedings may be adversely affected. However, a camera shot which only presented the testifying witness and perhaps the interrogating attorney would also result in a loss of information for jurors. They would be denied access to the nonverbal responses of other trial participants sitting in the courtroom.

Id. at 139-40. *But see Sheppard*, 484 A.2d at 1341.

> We can also take judicial notice of the fact of the ubiguity of television sets, as revealed by the 1970 census [96% of all households had at least one black and white television set], and recent availability of low-cost television cameras. With such widespread availability of television comes a familiarity with its technical characteristics and distortions.

Id. (quoting People v. Moran, 114 Cal. Rptr. 413, 420 (Cal. Dist. Ct. App. 1974)).

nized that the media bestows prestige and enhances the authority of an individual by legitimizing his status."[105] The jury, watching testimony on television, may give the child's statements greater weight than other testimony.[106] More significantly, shielding the child witness may stigmatize the defendant and lead the jury to presume guilt.[107] Trial court instructions informing the jury not

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[105] *Hochheiser*, 208 Cal. Rptr. at 279.

[106] *See* Graham, *supra* note 10, at 75 ("Whenever litigants use an alternative to face to face confrontation, there is a risk that the jury will give weight to the alternative procedure itself in deciding guilt or innocence."); Vartabedian & Vartabedian, *supra* note 1, at 48 ("[T]he juror might attach excessive importance to the fact of televising and give the testimony greater weight than would otherwise be the case.").

[107] *See Hochheiser*, 208 Cal. Rptr. at 279 ("[T]he presentation of a witness' testimony via closed-circuit television may affect the presumption of innocence by creating prejudice in the minds of the jurors towards the defendant similar to that created by the use of physical restraints on a defendant in the jury's prsence."); *see also* Appellee's Petition for Rehearing, Commonwealth v. Willis, 716 S.W.2d 224 (Ky. 1986).

> In the first sentence of the Opinion of the Court by Justice Wintersheimer, the child witness against Leslie Willis is referred to as a "5-year-old sexual abuse victim." The Opinion repeatedly refers to both the child in this case and other children in similar circumstances to be "victims" and the tenor of the Opinion suggests a pre-conceived notion that a person accused with the crime of sexually abusing a child is most certainly guilty, with the constitutional protections afforded such a person but legal hurdles to be jumped to achieve the inevitable conviction.
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> The Opinion's constant reference to the child as a victim is indicative of the public's tendency to pre-judge a person accused of a sex abuse crime. The presumption of innocence should not be taken lightly; it should be effectively preserved by this Court's acceptance of the fact that a jury will obviously think Leslie Willis is guilty of doing *something* to the young girl who must be hidden behind the screen for her protection.

Id. at 5-6 (emphasis in original); *cf.* Pauley, *The Emerging "Victim Factor" in the Supreme Court's Criminal Jurisprudence: Should Victim's Interests Ever Prevent a Court from Overturning a Conviction and Ordering a Retrial?*, 61 IND. L.J. 149, 157 (1985-86):

> It may be quickly conceded that the victims of crime are worthy of sympathy and that their interests have in general been too long neglected. It may also be taken as a "given" that society has a stake in not unnecessarily prolonging or intensifying a victim's ordeal in testifying beyond constitutional requirements, since the ordeal, if deemed too onerous, may deter victims from reporting to the proper authorities violations involving peculiarly degrading experiences. These precepts do not, however, begin to justify a rule of law that would require courts to make judgmental decisions about the extent of a victim's anticipated ordeal and, when deemed severe, to refrain from reversing a conviction and ordering a new trial when the basis for the reversal is a new or novel right or the invocation of a

to draw inferences from the use of closed-circuit testimony[108] may be ineffective.[109]

CONCLUSION

In an attempt to protect a child witness from a traumatic testimonial experience, proponents of the closed-circuit testi-

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supervisory power.

But see State v. Coy, 397 N.W.2d 730 (Iowa 1986), *prob. juris. noted,* 107 S. Ct. 3260 (1987). The trial court placed a screen in front of Coy during the testimony of two girls, the alleged victims of Coy's abuse. *Id.* at 733. On appeal, Coy argued that the "trial court's ruling allowing use of the screening device impermissibly prejudiced his right to a fair trial in violation of the fourteenth amendment." He argued that the screen "created the same inference of guilt as can prison garb, or the use of handcuffs or leg irons." *Id.* at 734. The Iowa Supreme Court affirmed Coy's conviction by concluding that the "use of the screen was not inherently prejudicial." *Id.* at 735. For more information about the *Coy* case, see Coyle, *Application of Confrontation Clause a Difficult Issue in Child Abuse Cases,* Nat'l L.J., Nov. 2, 1987, at 1, col. 2.

> Prof. Paul J. Papak of the University of Iowa College of Law, who is representing Mr. Coy before the [United States] Supreme Court, says he recreated the scene by entering the courtroom where the defendant was convicted and dragging out the screen to see how it worked.
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> "It's hard to adequately describe its impact," he says. The courtroom's lights were turned off, its blinds were drawn, and a panel of four, bright-focus lights were trained onto the screen in order to activate the one-way coating.
>
> The two girls could see only the reflection of the judge's bench next to them, he says. The defendant saw a darkened image of the two witnesses. In the trial record, Professor Papak notes, the judge described the effect as "dramatic" and "eerie."

Id. at 10, col. 1.

[108] *See* CAL. PENAL CODE § 1347(d)(2) (West Supp. 1987) (The court shall "[i]nstruct the members of the jury that they are to draw no inference from the use of two-way closed-circuit television as a means of facilitating the testimony of the minor."); N.Y. CRIM. PROC. LAW § 65.30(6) (McKinney Supp. 1987) ("Upon request of the defendant, the court shall instruct the jury that they are to draw no inference from the use of live, two-way closed-circuit television in the examination of the vulnerable child witness.").

[109] *See* Bruton v. United States, 391 U.S. 123 (1968). "[T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." *Id.* at 135. *But see* Wildermuth v. State, 530 A.2d 275 (Md. 1987).

> Nor do we think that the use of the closed-circuit television necessarily suggests anything about a defendant's culpability. The jury was instructed not to give the televised testimony any greater or lessor weight than if it had been given in the courtroom. It might well have assumed that televising a child's testimony was simply a procedure used to reduce the trauma any child might suffer through public testimony. We are not persuaded that this procedure tended to brand [the defendant] as guilty.

Id. at 292.

mony procedure have overlooked the constitutional importance of safeguarding the rights of the accused.[110] Sympathy for the child witness does not justify infringements upon a defendant's confrontation right.[111] If the defendant does not have the op-

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[110] *See Children's Justice Act: Hearing on S. 140 Before the Subcomm. on Children, Family, Drugs and Alcoholism of the Senate Comm. on Labor and Human Resources*, 99th Cong., 1st Sess. 3 (1985).

> Given the misuse of the right of confrontation and to cross-examination by defense attorney's [sic] until it becomes not a method of determining the truth but a means to destroy evidence, the crucial testimony of the child, is it any wonder that so few child molesters ever get convicted?
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> . . . .
>
> These disturbing trends must be reversed. Teaching children to speak out and report their abuse is just a first step, we need to be able to guarantee them that they will not be further abused and traumatized by the administrative and judicial system after they make that initial cry for help.

Id. (statement of Senator Paula Hawkins); Brief for Respondent, Kentucky v. Stincer, 107 S. Ct. 2658 (1987).

> One of the most disturbing aspects of the Commonwealth's position in this matter is its unspoken, but apparent, belief that the prosecuting witnesses in these types of cases are invariably telling the truth and that the defendants are invariably guilty. This premise is necessarily implicit in the Commonwealth's argument. Their position, quite simply, is that the defendant in a sex abuse case is guilty and that the end (securing a conviction) justifies the means (violating the constitutional rights of confrontation and due process).

Id. at 50; *cf.* Freedman, *Videotaped Testimony Allowed for Child Victims of Sex Crimes*, N.Y.L.J., Aug. 10, 1984, at 1, col. 3. Upon approving amendments to New York's Criminal Procedure Law to allow videotaped testimony in child abuse cases, Governor Mario Cuomo said: "This new law will limit that trauma and prevent needless anguish for young crime victims while encouraging the aggressive prosecution of the perpetrators of these crimes." *Id. But see* Bulkley, *Evidentiary and Procedural Trends in State Legislation and Other Emerging Legal Issues in Child Sexual Abuse Cases*, 89 DICK. L. REV. 645 (1984-85). "New methods to protect children nevertheless must be considered in the context of our constitutional system that values liberty and assumes an individual innocent until proven guilty by the state." *Id.* at 665.

[111] *See* Commonwealth v. Willis, 716 S.W.2d 224 (Ky. 1986).

> [T]he accused constitutional rights are preeminent. They cannot rightfully be impaired by either the General Assembly or the Judiciary, no matter how appealing the reason for doing so may appear at the time. This includes the constitutional protections afforded the accused in both the United States and Kentucky Bill of Rights. There are no counterbalancing constitutional guarantees of victim's rights which justify their impairment.

Id. at 232 (Leibson, J., concurring).

> It is my personal view that this *right* is not to be abbrogated. Convenience or ease of prosecution or any criminal offense is not, and should

portunity to participate fully in the cross-examination of the child and if the jury cannot observe adequately the child's demeanor, then the defendant does *not* enjoy the right "to be confronted with the witnesses against him."[112] Without these "mechanisms of confrontation,"[113] a danger exists that unreliable evidence may lead to the defendant's conviction.[114]

Ending physical confrontation between the accused and the child witness eliminates the defendant's ability to participate fully in cross-examination[115] and makes defendant-attorney com-

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not be, a factor in interpreting the basic rights of an accused person.

. . . .

. . . No one does, and I certainly do not, condone the virulent and growing crime of child abuse. But, no one should, and I certainly do not, condone any policy of the General Assembly which effectively negates a constitutional right.

Id. at 234-36 (Stephens, C.J., dissenting) (emphasis in original); *see also* State v. Warford, 389 N.W.2d 575 (Neb. 1986). "The need to adopt measures to ease the emotional burden placed on a child witness cannot, however, be an excuse for stripping the defendant of his constitutional rights." *Id.* at 580; *6th Amendment Outweighs Desire to Protect Children*, Lexington Herald-Leader, January 24, 1987, at A6, col. 1 (editorial) ("[W]e would not question the argument that these [child-abuse] victims need to be protected to the fullest extent possible. But neither the weight of public opinion nor the need to protect victims can override the rights afforded to every American citizen under the U.S. Constitution."). *But see* People v. Algarin, 498 N.Y.S.2d 977 (N.Y. Sup. Ct. 1986). "[T]he compelling state interests involved with the protection of the emotional well-being of child sex offense victims and the need for their testimony to ensure successful prosecutions more than outweigh any infringement of defendant's right of confrontation arising out of the selective utilization of closed-circuit television." *Id.* at 983.

[112] U.S. CONST. amend. VI.

[113] Lee v. Illinois, 106 S. Ct. 2056, 2062 (1986); *see supra* text accompanying note 23.

[114] *Cf.* Brief for Respondent, Kentucky v. Stincer, 107 S. Ct. 2658 (1987).

Actual sex abuse case histories, as reflected in articles and other publications, reflect that it is not always the child who is the innocent victim. It is well known that custody battles can result in sexual abuse charges being leveled by one parent upon the other parent. Because small children can often be manipulated and are susceptible to influence, especially by parents, this type of charge is easy to make and difficult to defend.

Id. at 47; Reynolds, *Courts Struggle to Balance Suspect's Rights, Child's Needs*, Lexington Herald-Leader, February 16, 1987, at A12, col. 1 (David Richart, Executive Director of Kentucky Youth Advocates, Inc., said that "[f]alse allegations of sexual abuse in child-custody cases are increasing . . . [and that] his agency had received numerous calls lately from parents who say they have been accused of sexual abuse as a ploy by the other parent to win custody.").

[115] *See supra* notes 50-65 and accompanying text.

munication difficult.[116] A jury, unable to examine a child's demeanor completely by watching testimony via closed-circuit television, cannot evaluate credibility sufficiently.[117] Furthermore, the use of the closed-circuit procedure legitimizes the child's alleged status as a victim of child abuse which may lead the jury to presume that the accused is guilty.[118]

The use of the closed-circuit testimony procedure in cases of alleged child abuse decreases the defendant's opportunity to challenge the witness through cross-examination and increases the chance that the jury will misjudge the child's credibility. Therefore, a "face—to television screen—to face"[119] encounter violates the defendant's sixth amendment confrontation right: it inhibits the finding of truth in a criminal trial.

*John Patrick Grant****

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[116] *See supra* notes 66-85 and accompanying text.

[117] *See supra* notes 86-104 and accompanying text.

[118] *See supra* notes 105-09 and accompanying text.

[119] *Willis*, 716 S.W.2d at 234 (Stephens, C.J., dissenting); *see supra* text accompanying note 102.

*** I give my apologies to U.S. Court of Appeals Judge Abner J. Mikva for my footnotes. *See* Mikva, *Goodbye to Footnotes*, 56 U. COLO. L. REV. 647 (1984-85). "If footnotes were a rational form of communication, Darwinian selection would have resulted in the eyes being set vertically rather than on an inefficient horizontal plane." *Id.* at 648.