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Child Victims of Sexual Abuse: Balancing a Child's Trauma against the Defendant's Confrontation Rights – Coy v. Iowa

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NOTE

CHILD VICTIMS OF SEXUAL ABUSE: BALANCING A CHILD'S TRAUMA AGAINST THE DEFENDANT'S CONFRONTATION RIGHTS—*COY V. IOWA*

Child abuse,[1] particularly sexual abuse,[2] is a problem that has risen to epidemic proportions in today's society.[3] Although child abuse is recognized as a pervasive wrong,[4] its incidence continues to increase.[5]

Despite the fact that states have increased staff and agencies to combat the problem of increased abuse,[6] the conviction rate for abusers is strikingly low.[7] Compared to other crimes, child abuse is exceptionally difficult to dis-

1. Child abuse is defined as "Any form of cruelty to a child's physical, moral or mental well being." BLACK'S LAW DICTIONARY 217 (5th ed. 1979). The term is also used to describe a form of sexual attack which may or may not amount to rape. These acts are criminal offenses in most states. *Id.*

2. Sexual abuse has been defined as "the utilization of the child for sexual gratification or an adult's permitting another adult to so use the child." R. GEISER, HIDDEN VICTIMS 7 (1979). It has also been defined as "forced, pressured, or stressful sexual behavior committed on a person under the age of 17." A. BURGESS, A. GROTH, L. HOLSTROM, & S. SGOI, SEXUAL ASSAULT OF CHILDREN & ADOLESCENTS xi (1978).

3. Child abuse reports nationwide increased by nine percent in the first half of 1985, according to a study by the Chicago-based National Committee for Prevention of Child Abuse. The data suggested a projected figure of 1.793 million abused and neglected children for 1985. In the subcategory of child sexual abuse, statistics indicated a 24 percent increase in 1985. Fuller, *Child Abuse Rises*, A.B.A. J. 34 (Feb. 1986) [hereinafter *Child Abuse Rises*]. *See generally* Libai, *The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System*, 15 WAYNE L. REV. 977 (1969).

4. "Sexual activity with children is prohibited by custom in all known societies and is illegal in every state of this country . . . regardless of the degree or type of coercion by the adult, or accommodation by the victim." Berliner & Barbieri, *The Testimony of the Child Victim of Sexual Assault*, 40 J. SOC. ISSUES 125, 126 (1984).

5. *See Child Abuse Rises*, *supra* note 3. *See also A Hidden Epidemic*, NEWSWEEK, May 14, 1984, at 30. The article states that the problem is so widespread that "somewhere between 100,000 and 500,000 American children will be [sexually] molested this year." *Id.* at 31.

6. The National Committee for Prevention of Child Abuse's 1985 semiannual report revealed that 33 states increased their agency staff or services in the prevention of child abuse but that child abuse remains a serious problem in society. *Child Abuse Rises*, *supra* note 3.

7. There are many problems involved in child victimization and the child's role in prosecuting the perpetrators of such crimes. For example, child victims are often easily accessible to

cover and ultimately to prosecute.[8] The difficulty in prosecution stems from the fact that there is just one witness to the crime - the child victim: the child is likely to be viewed as an unreliable witness and could be severely traumatized by the experience.[9] Because of the problems attending the testimony of children, a high percentage of child abuse cases are "either dismissed before trial or end in acquittals."[10]

In an effort to reduce the trauma for child victims in the courtroom[11] and

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their abusers, who are frequently members of the child's family or are somehow acquainted with the child. *See* State v. Warford, 223 Neb. 368, 375, 389 N.W.2d 575, 579 (1986). The fact that the perpetrator is rarely a stranger leads to a low percentage of actual assaults that are even brought to the attention of authorities. Even when cases of sexual abuse are reported, few are prosecuted. *See* D. WHITCOMB, E. SHAPIRO & L. STELLWAGEN, WHEN THE VICTIM IS A CHILD: ISSUES FOR JUDGES AND PROSECUTORS 4 (1985).

8. Commonwealth v. Ritchie, 480 U.S. 39, 60 (1987); State v. Sheppard, 197 N.J. Super. 411, 417, 484 A.2d 1330, 1333 (1984) ("In most cases, prosecutions are abandoned or result in generous plea agreements, either because the child's emotional condition prevents her from testifying or makes the testimony obviously inaccurate."); *See also Warford*, 223 Neb. at 373, 389 N.W.2d at 579. Oftentimes the prosecutor will decide not to prosecute because without physical evidence the only evidence available is the child's testimony who "by the standards of our adult legal system, [may] be perceived to be incompetent, unreliable or otherwise not credible as a witness." Berliner & Barbieri, *supra* note 4, at 126-27. The authors suggest four main reasons why cases of sexual abuse of children are so difficult to prosecute. The first reason is that adults are often "skeptical when children report having been molested." *Id.* The second reason is that people "believe that sexual abuse is caused by a mental disorder and therefore that the mental-health system, not the criminal justice [system] is the proper forum for dealing with the matter." *Id.* The third reason is that many people fear that children will be further victimized by the traumatic experience involved in legal proceedings. Finally, prosecutors are hesitant to pursue a trial that rests heavily on the child victim's testimony because of their fear that the child will not be a good witness. *Id.*

9. Avery, *The Child Abuse Witness: Potential For Secondary Victimization*, 7 CRIM. JUST. J. 1 (1983); *Sheppard*, 197 N.J. Super. at 411, 484 A.2d at 1334. *See also* Berliner & Barbieri, *supra* note 4, at 127.

10. People v. Algarin, 129 Misc. 2d 1016, 1023, 498 N.Y.S.2d 977, 982 (1986). The court stated "either the child cannot testify at all without having a total emotional breakdown or their testimony in the strange setting of a courtroom in the presence of their victimizer is hesitant, forgetful and inconsistent." *Id. See* State v. Melendez, 135 Ariz. 390, 661 P.2d 654 (1982); *Sheppard*, 197 N.J. Super. 411, 484 A.2d 1330 (1984); Ordway, *Proving Parent Child Incest: Proof at Trial Without Testimony In Court By The Victim*, 15 U. MICH. J.L. REF. 131 (Fall 1981); Note, *The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations*, 98 HARV. L. REV. 806 (1985).

11. *See* Parker, *The Rights of Child Witnesses: Is The Court a Protector or Perpetrator*, 17 NEW ENG. L. REV. 643-45 (1982).

> Criminal procedures that operate solely to vindicate a societal interest often fail to take into account the psychological damage that can be done to a young child in the role of witness. For example, a witness has no constitutional rights to protect him through the ordeal of a criminal investigation, pre-trial proceedings, and the trial itself. He has no right to counsel and no general right to remain silent even though public testimony may do him considerable harm. In contrast the defendant is protected by the sixth amendment of the United States Constitution. While this balance

also increase the rate of prosecution of these crimes, many states have enacted statutes allowing alternative procedures for the presentation of the victim's testimony.[12] Many of these remedies, however, have been challenged as violating the defendant's sixth amendment right to confront a witness.

In several state cases, procedures implemented to protect the health of the child have been found to be in conflict with the confrontation clause.[13] The first state case to address this narrow issue was the California Supreme Court decision in *Herbert v. Superior Court*.[14] The United States Supreme Court only recently considered the issue in January of 1988, in *Coy v. Iowa*.[15]

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of rights may be appropriate when the complaining witness is an adult, a child victim has a greater need for protection.

The child who is the victim of a sex crime provides a poignant example. While the assault itself is emotionally damaging, the ordeal of bringing criminal charges can compound the danger. Although juvenile offenders are treated in a different manner than adult offenders, a child victim called to assist the prosecution of his or her accused assailant is not.

Id. *See also* Libai, *supra* note 3, at 984.

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.

Id. (citations omitted).

12. *See, e.g.,* 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*); IND. CODE ANN. § 35-37-4-8(*b*) (Burns Supp. 1989); IOWA CODE ANN. § 910A.14(1) (West Supp. 1989); KAN. STAT. ANN. § 22-3434(*a*)(1) (1988); KY. REV. STAT. ANN. § 421.350(3) (Michie/Bobbs-Merrill Supp. 1988); LA. REV. STAT. ANN. § 15:283 (West Supp. 1989); MD. CTS. & JUD. PROC. CODE ANN. § 9-102 (Supp. 1989); MASS. ANN. LAWS CH. § 278 16D (Law. Co-op. Supp. 1989); MINN. STAT. ANN. § 595.02(4) (West Supp. 1988); MISS. CODE ANN. § 13-1-405 (Supp. 1989); N.J. STAT. ANN. § 2A:84A32.4 (West Supp. 1988); N.Y. CRIM. PROC. LAW § 65.30 (McKinney Supp. 1989); OHIO REV. CODE ANN. § 2907.41(*c*) (Anderson 1987); OKLA. STAT. ANN. tit. § 22 753(*B*) (West Supp. 1989); 42 PA. CONS. STAT. ANN. § 5985 (Purdon Supp. 1989); R.I. GEN. LAWS § 11-37-13.2 (Supp. 1986); TEX. CODE. CRIM. PROC. ANN. art. § 38.071(3) (Vernon Supp. 1989); UTAH CODE ANN. § 77-35-15.5(2) (Supp. 1989); VT. R. EVID. 807(*e*); WASH. REV. CODE § 9A.44.120 (1988); WIS. STAT. ANN. § 967.04(7) (West Supp. 1988).

13. *See* Wildermuth v. Maryland, 310 Md. 496, 530 A.2d 275 (1987); Commonwealth v. Bergstrom, 402 Mass. 534, 524 N.E.2d 366 (1988); State v. Warford, 223 Neb. 368, 389 N.W.2d 575 (1986).

14. 117 Cal. App. 3d 661, 172 Cal. Rptr. 850 (1981). In *Herbert*, the defendant was charged with oral copulation and lewd acts upon his five year old stepdaughter. At the preliminary hearing, on the direction of the judge, the defendant was seated so that he could hear but not see the witness. The court held that the defendant's confrontation right had been abridged because the defendant and child could not view each other.

15. 108 S. Ct. 2798 (1988).

In the six years between *Herbert* and *Coy*, several state courts upheld alternative testimonial procedures to accommodate alleged child victims of sexual abuse over defendant's arguments that the procedures violated the confrontation clause.[16] The Court in *Coy*, however, held that a screen placed between the child witness and the defendant to prevent the witness from viewing the defendant while testifying was a violation of the defendant's sixth amendment right to confront a witness.[17] Although the majority of the Supreme Court struck down the procedure because it lacked the "core" confrontation right to physically face witnesses at trial,[18] Justice O'Connor authored a concurrence that stressed the right to face-to-face confrontation may give way in an appropriate case to other competing interests such as the protection of child witnesses.[19] The question now is how will the decision in *Coy* affect the state statutes designed to protect child victims of sexual abuse from trauma as well as the state court decisions upholding the alternative procedures.

This Note discusses the traumatic effects that the courtroom experience, absent protections or safeguards, may have on child victims of sexual abuse.[20] The Note also discusses the prior law surrounding the confrontation clause and the specific stances various state courts have taken in attempting to reduce the trauma child victims of sexual abuse experience in the courtroom. The Note then analyzes the decision in *Coy v. Iowa*[21] and its

16. Herbert v. Superior Court, 117 Cal. App. 3d 661, 172 Cal. Rptr. 850 (1981); Commonwealth v. Willis, 716 S.W.2d 224 (Ky. 1986); Wildermuth v. State, 310 Md. 496, 530 A.2d 275 (1987); State v. Sheppard, 197 N.J. Super. 411, 484 A.2d 1330 (1984); People v. Henderson, 132 Misc. 2d 51, 509 N.Y.S.2d 238 (1986); People v. Algarin, 129 Misc. 2d. 1016, 498 N.Y.S.2d 977 (1986); Commonwealth v. Ludwig, 366 Pa. Super. 361, 531 A.2d 459 (1987).

17. 108 S. Ct. 2798 (1988). The Supreme Court remanded the case to the state court. On remand, the Iowa Supreme Court was forced to reverse Coy's conviction because it could not determine that the error found by the Supreme Court was harmless. The girls' testimony, which was stricken by the Supreme Court's order, was the only direct evidence available to prove the elements of the case. The Iowa Supreme Court remanded the case to the lower court for a new trial. State v. Coy, 433 N.W.2d 714 (1988).

18. 108 S. Ct. 2798 (1988).

19. *Id.* at 2803 (O'Connor, J., concurring).

20. The author recognizes that a criminal prosecution for the alleged sexual assault of a child often causes all those involved some form of trauma. For instance, the adult who is on trial, whether innocent or guilty, faces the possibility of a prison term, public stigma and alienation from family members and friends. This Note is limited to the narrow issue of the experience young child victims of sexual abuse endure in the courtroom, and the balancing of a defendant's confrontation right with efforts to use alternative testimonial procedures to reduce any trauma children may be subjected to. For a discussion of the problem of child sexual abuse focusing on the adult defendant's perspective see O'Brien, *Pedophilia: The Legal Predicament Of Clergy*, 4 J. CONTEMP. HEALTH L. & POL'Y 91 (1988).

21. 108 S. Ct. 2798 (1988).

possible implications on the many state legislative acts and judicial decisions designed to reduce the psychological damage to young victims.

I. THE TRAUMA EXPERIENCED BY CHILD VICTIMS AS WITNESSES

Aside from the initial abuse, the experience of the courtroom procedure often adds to the trauma child victims of sexual abuse suffer.[22] It is well documented that the trial process can be very traumatic for a child sexual abuse victim.[23]

Testifying in a courtroom in the presence of the defendant is often an "extremely intimidating experience" for the child witness.[24] Studies by mental health professionals have shown that a child victim's involvement in "legal proceedings can have a profoundly disturbing effect on the mental and emotional health" of the child.[25] "Stigma, embarrassment and trauma to the child, sometimes with lifelong ramifications, are increased by involvement in the [current] judicial system."[26]

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22. *See* Harshbarger, Botsford & Kepler, *Prosecuting Child Abuse Cases in Middlesex County*, 30 BOSTON B.J. 7 (Mar./Apr. 1986) [hereinafter Harshbarger, Botsford & Kepler]; Goodman, *The Child Witness: An Introduction*, 40 J. SOC. ISSUES 1 (1984); Avery, *The Child Witness: Potential for Secondary Victimization*, 7 CRIM. JUST. J. 3 (1983).

23. Harshbarger, Botsford & Kepler, *supra* note 22, at 7. *See* Berliner & Barbieri, *The Testimony of the Child Victim of Sexual Assault*, 40 J. SOC. ISSUES 125 (1984); Note, *The Young Victim as Witness for the Prosecution: Another Form of Abuse?* 89 DICK. L. REV. 721 (1985); Parker, *The Rights of Child Witnesses: Is the Court a Protector or Perpetrator?* 17 NEW ENG. L. REV. 643 (1982).

24. Harshbarger, Botsford & Kepler, *supra* note 22, at 7.

25. *See* Avery, *supra* note 9, at 3.

> The study of the damaging psychological effects of legal proceedings, on a child victim, the so-called "legal process trauma" is exceptionally difficult, since subjects of this kind of study are already suspected of suffering from either a:
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> 1) *Prior Personality Defect* - even if mental trauma is observed immediately after the occurrence of the offense, it may well be either a latent or an overt emotional disturbance in the victim which existed prior to the sexual offense.
> 2) *Crime Trauma* - is the psychological damage directly resulting from the offense. Some factors which are involved in a sexual offense are more likely than others to cause mental trauma to the child victim, e.g., the use of force against the victim. It is evident from the studies of Landis, Gagnon, and Brunold, that serious sexual assaults on children have a very high incidence of physical or mental damage, resulting in long-term institutionalization. According to Landis and Gagnon, 80% of the coerced victims suffered permanent or serious damage.
> (3) *Environmental Reaction Trauma* - is a psychological ill-effect attributed to the reaction, opinion and behavior of adults not in official positions and also of the victim's peers. A common finding in studies concerning child victims is that sexual offenses which are followed by disclosure of the facts to the parents are generally more traumatic than offenses which have not been reported to anyone.

Id. *See also* People v. Algarin, 129 Misc. 2d 1016, 1023, 498 N.Y.S.2d 977, 982.

26. Avery, *supra* note 9, at 3.

For instance, in *Commonwealth v. Ludwig*,[27] a six-year-old girl, who was sexually abused by her father, testified at the preliminary hearing that she was abused. She could not describe the sexual acts in front of her father, however, because she was afraid of him.[28] She was psychiatrically evaluated a week after her unsuccessful attempt at testifying in front of her father. The psychiatrist, after observing "signs of increased apprehension and fear" in the child, determined that she was psychologically injured as a result of the experience and recommended that she undergo therapy.[29]

In *State v. Sheppard*, a forensic psychiatrist interviewed the child victim to determine whether she would be able to testify in open court in the presence of the defendant, her stepfather.[30] In the interview the child said she was willing to testify in court.[31] Her willingness, however, stemmed from the fact that she wanted to send her stepfather, "who had threatened to kill her if she revealed his activities," to jail to insure her protection.[32] The child believed her stepfather would not be sentenced to jail if she testified through the use of video equipment.[33]

Although in the psychiatrist's opinion the victim would be able to testify truthfully and was well-oriented with a good memory, he predicted that if she testified in court in front of the defendant she would suffer serious long-lasting emotional effects.[34] The "[p]robable long-range emotional consequences resulting from [the child's] in-court testimony would be the continued presence of fear, guilt, and anxiety. . . . Possible long-term effects of [the child's] testimony in court would be nightmares, depression, eating, sleeping and school problems, behavioral difficulties, including 'acting out', and sexual promiscuity."[35]

The fact that the trial process, including testifying in front of the defendant, is traumatic to the child witness, has a direct adverse effect on the prosecution of child sex abuse cases. In most cases, the child witness is not strong enough emotionally to testify at all; or, if the child does testify in front of the defendant, his testimony is "hesitant, forgetful and inconsistent."[36] In addition, the prosecutor may decide not to pursue a case further because the child's testimony is the only evidence of the crime and children are generally

27. 366 Pa. Super. 361, 531 A.2d 459 (1987).
28. *Id.* at 370, 531 A.2d at 463.
29. *Id.*
30. 197 N.J. Super. 411, 416, 484 A.2d 1330, 1332 (1984).
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. People v. Algarin, 129 Misc. 2d 1016, 1023, 498 N.Y.S.2d 977, 982 (1986).

perceived to be "incompetent, unreliable or otherwise not credible witnesses."[37] Children who do appear to be competent witnesses "often cannot, will not, or are not allowed to testify due to the very real psychological harm that results from forcing the child to repeat the terrifying experience before the entire courtroom which includes the defendant."[38]

Several courts have also recognized the prosecutorial problems caused by the fact that young children can be easily traumatized and confused in the courtroom.[39] The court in *State v. Sheppard* stated:

> great harm befalls the victims of child abuse. It destroys lives and damages our society. Known abusers are not being prosecuted because evidence against them cannot be presented. Children who are prevailed upon to testify may be more damaged by their traumatic role in the court proceedings than they were by their abuse.[40]

In *People v. Algarin*,[41] the court decided, after observing the child, that a five-year-old girl was a vulnerable witness, and would only be able to testify through the use of closed-circuit television. The court described the child's experience in the court room as the following:

> she was visibly frightened by the jury, the defendant and the entire courtroom setting; that she was unable to answer any questions other than the neutral questions asked of her outside the jury's presence . . . ; that she had left the courtroom clutching her mother and crying hysterically and that the hysteria continued for a time thereafter; that she expressed terror of the defendant and that therefore she was suffering and would continue to suffer great mental and emotional harm unless her testimony was taken outside of the jury's and defendant's presence.[42]

As a result of the combination of a lack of evidence in child sex abuse cases and the difficulties in obtaining adequate testimony from the victims, many prosecutions are dismissed or resolved through plea bargaining, "either because the child's emotional condition prevents him/her from testifying or makes the testimony obviously inaccurate or inadequate."[43]

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37. State v. Warford, 223 Neb. 368, 372, 389 N.W.2d 575, 579 (1986).

38. *Id.*

39. *Handling Evidence and Testimony in Child Abuse Cases*, JUDGES J, 2 (Fall 1984); Herbert v. Superior Court, 117 Cal. App. 3d 661, 172 Cal. Rptr. 850 (1981); Commonwealth v. Willis, 716 S.W.2d (Ky. 1986); Wildermuth v. State, 310 Md. 496, 530 A.2d 275 (1987); State v. Sheppard, 197 N.J. Super. 411, 484 A.2d 1330 (1984); People v. Henderson, 132 Misc. 2d 51, 509 N.Y.S.2d 238 (1986); People v. Algarin, 129 Misc. 2d 1016, 498 N.Y.S.2d 977 (1986); Commonwealth v. Ludwig, 366 Pa. Super. 361, 531 A.2d 459 (1987) .

40. 197 N.J. Super. at 431, 484 A.2d at 1342.

41. 129 Misc. 2d 1016, 498 N.Y.S.2d 977 (1986).

42. *Id.* at 1019, 498 N.Y.S.2d at 979.

43. State v. Sheppard, 197 N.J. Super. 411, 417, 484 A.2d 1330, 1333 (1984). Two attor-

"Despite the debate surrounding the scope of the rights conferred by the confrontation clause, one proposition remains undisputed. The essential purpose of the confrontation clause is truth-finding."[44] The use of video for the child's testimony increases the probability of obtaining truthful testimony.[45] While the child's testimony is essential to prosecution, children are known to be unhelpful witnesses.[46] Children's poor performance as witnesses is attributed to the fact that they have a "subjective sense of time, an inaccurate memory . . . and [a] limited ability to communicate what they do not understand and recall."[47] These limitations, which affect the child's ability to testify, magnify during times when the child is "afraid or under

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neys who are experienced in the prosecution of child abuse cases testified to the difficulties in presenting children's testimony. The first attorney testified that in most cases the victim could not testify in court face-to-face with the accused and other relatives. *Id.* The victim either refused to testify or "froze when she got to court." *Id.* Children who did testify in a preliminary hearing or before the grand jury, "frequently forgot details, changed stories or presented inconsistent facts. Ultimately many broke down, cried, ignored questions and eventually refused to answer." *Id.* Out of up to 40 of these cases handled for the state, the attorney was only able to complete a trial in one.

The other attorney had reviewed approximately 80 child abuse cases. He testified that nearly 90% of the cases were dismissed as a result of problems attending the testimony of children who could not handle the possibility of facing a crowd of relatives and strangers in the courtroom. *Id.* The following are three child abuse cases which illustrate the problems.

1) A twelve-year-old child was the victim of a strangers' sexual molestation. The facts did not become known to the prosecutor (often the case) until the child reached the age of 17. The case was dismissed on the basis of psychiatric advice that the child could not testify without having a complete emotional breakdown. The child's approach to emotional survival, typically, had been to forget, forget, forget. Reinforcing her memory of this traumatic event would have been devastating.
2) A seven-year-old boy was abused by a friend. He was precocious and articulate when speaking to the prosecuting attorney. When presented to the grand jury, the presence of many people made him hesitant, forgetful and inconsistent. Shortly afterward, for unknown reasons, he and his family moved to Italy and the matter was resolved by a plea agreement.
3) A father was charged with sexually abusing his daughter. The child found it very difficult to articulate the facts, and refused to discuss them with anyone except the prosecuting attorney. The complaint was therefore dismissed; the necessary facts could not be presented to the grand jury.

Id.

44. Wildermuth v. State, 310 Md. 496, 509, 530 A.2d 275, 281 (1987).

45. *Sheppard*, 197 N.J. Super. at 434, 484 A.2d at 1344. The court stated "the ambivalent position in which the child must find himself, her fear, guilt, and anxiety, become doubly oppressive when she is subjected to the courtroom atmosphere. Those factors become less burdensome through the use of video." *Id.*

46. *Id.* (quoting *Proving Parent-Child Incest: Proof at Trial Without Testimony in Court by The Victim*, 15 U. MICH. J.L. REF. 131, 137 (1981)).

47. *Id.* For a discussion of children's credibility, see People v. Chaten, 32 Ill. 2d 416, 206 N.E.2d 697 (1965); People v. Price, 33 Misc. 2d 476, 226 N.Y.S.2d 460 (1962).

emotional stress."[48] Testifying in a courtroom puts the child in a fearful and stressful situation and, as a result, produces unreliable evidence.[49] Therefore using video to present children's testimony, "enhances the quality of a child victim's testimony, [and] serves the essential demand for truth while satisfying the constitutional mandate."[50]

II. THE STATE LEGISLATURE'S RESPONSE TO THE PROBLEM

In an effort to reduce the trauma experienced by young child victims of sexual abuse in the courtroom, many state legislatures have enacted statutes authorizing alternate procedures for testimony by these children.[51] In fact, the movement to protect child victims of sexual abuse from further trauma in the courtroom has increased rapidly in the past few years.

In 1980, only four states permitted the use of pre-trial depositions in lieu of live testimony by child witnesses.[52] Today, thirty-three states permit a videotaped deposition or pre-trial testimony to be presented at trial.[53] Half of the states have authorized the use of one or two-way closed circuit television to transmit the child's testimony and image live into the courtroom.[54] Eighteen of these states specifically provide that the child will not see or hear

48. *Sheppard*, 197 N.J. Super. at 434, 484 A.2d at 1344 (quoting *Proving Parent-Child Incest: Proof at Trial Without Testimony in Court by the Victim*, 15 U. MICH. J.L. REF. 131, 137 (1981)).

49. *Id.*

50. *Id.*

51. ALA. CODE § 15-25-3 (Supp. 1987); CAL. PENAL CODE § 1347 (West Supp. 1988); GA. CODE ANN. § 17-8-55 (Supp. 1987); IOWA CODE § 910A.14 (1987); MASS. GEN. L. ch. 278 § 16D(*b*)(1) (1986); N.J. STAT. ANN. § 2A:84A-32.4(*b*) (West Supp. 1988); N.Y. CRIM. PROC. LAW § 65.00-65.30 (McKinney Supp. 1988). *See also Handling Evidence and Testimony in Child Abuse Cases*, *supra*, note 39, at 2. "These new reforms, [court decisions and legislative actions] which primarily benefit prosecutors, are a response to a growing public awareness about child abuse and the realization that often the only witness to crimes against children are the children themselves. Because young children are easily traumatized and confused, some courts have created special provisions to elicit their testimony." *Id.*

52. McDaniel, *Child Trauma Aid*, 71 A.B.A. J. 33 (May 1985).

53. Coyle, *Application of Confrontation Clause: A Difficult Issue In Child Abuse Cases*, 10 NAT'L L.J. 1, 11 (Nov. 2, 1987). The following states permit video taped depositions or prior testimony at trial: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Indiana, Iowa, Kansas, Kentucky, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Mexico, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Wisconsin, and Wyoming. Fifteen of these states permit the defendant to be in the room with the child during the making of the videotape but hidden from the child's view. *Id.*

54. *Id.* States sanctioning one-way systems generally permit the child to testify in a separate room in which only the judge, counsel, technicians, and in some cases the defendant are present. The child's testimony is broadcast into the courtroom for viewing by the jury. Two-way systems permit the child witness to see the courtroom and the defendant over a video monitor. *Id.*

the defendant while testifying.[55] Currently, Iowa is the only state authorizing the use of a screen between the defendant and witness in order to block the witness's view of the defendant.[56] Such a screen was used in *Coy*. While the legislative efforts work to protect child witnesses from further trauma, the judiciary has been left to struggle with the question of whether these protections violate the defendant's confrontation right.

III. THE CONFRONTATION CLAUSE

The sixth amendment to the United States Constitution states that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ."[57] The confrontation clause is held to be a fundamental right to which the states are subject through the fourteenth amendment.[58] As early as 1895, however, the United States Supreme Court recognized that the right to confrontation "must occasionally give way to considerations of public policy and the necessities of the case."[59]

Recently, in *Lee v. Illinois*, the Court set out three distinct functions of confrontation.[60] First, confrontation "insures that the witness will give his [or her] statements under oath - thus impressing him or her with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury."[61] Second, confrontation "forces the witness to submit to cross examination, the 'greatest legal engine' for the discovery of truth."[62] Third, confrontation "permits the jury . . . to observe the demeanor of the witness

55. *Id.* at 11. These states are: Alabama, Arizona, Connecticut, Florida, Georgia, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, Mississippi, New Jersey, Oklahoma, Pennsylvania, Rhode Island, Texas, Utah, and Vermont.

56. 108 S. Ct. 2798, 2804 (1988) (O'Connor, J., concurring).

57. U.S. CONST. amend VI.

58. Pointer v. Texas, 380 U.S. 400, 403-05 (1965).

59. Mattox v. United States, 156 U.S. 237, 243 (1895). The witness in this case testified at the first trial but died before the retrial could take place. The Court stated, "[t]he 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." *Id.*

60. 476 U.S. 530, 540 (1986) (citing California v. Green, 399 U.S. 149, 158 (1970)). Previously in *Mattox*, the Court stated that the primary object of the confrontation clause is to prevent depositions or ex-parte affidavits from being used against a person in lieu of personal examination and cross-examination of a witness. *Mattox*, 156 U.S. 237, 242 (1895). These examinations offer the accused an opportunity not only to test the recollection and sift the conscience of a witness, but also compel the witness to stand face-to-face with the jury. This direct contact with the jury allows them to observe the witness and judge, by his demeanor on the stand and the manner in which he gives his testimony, whether he is worthy of belief. *Id.* at 242-43.

61. *Lee*, 476 U.S. at 540.

62. *Id.* (quoting 5 J. WIGMORE, EVIDENCE § 1367 (3d ed. 1940)).

making his statement, thus aiding the jury in assessing his credibility."[63] The "main and essential purpose of confrontation," however, is to secure the opportunity of cross-examination.[64]

While face-to-face confrontation is the preferred method of presenting testimony at trial,[65] there is no constitutional right to confrontation,[66] and "no case has held eye contact to be a requirement."[67] The Supreme Court has held that an opportunity to cross examine the witness can satisfy the confrontation clause even if the witness does not physically confront the defendant.[68] Therefore, the preference for face-to-face confrontation at trial is not "absolute and inelastic,"[69] but rather, allows many exceptions.[70]

The many accepted exceptions to the literal interpretation of the confrontation clause illustrate that the Court has "never embraced the view that the right of confrontation unconditionally mandates that all witnesses" must testify in the presence of the accused and confront him or her face-to-face.[71] To the contrary, the Supreme Court has said that "a technical adherence to the letter of a constitutional provision may occasionally be carried farther than is necessary to the just protection of the accused, and farther than the safety of the public will warrant."[72]

A number of lower courts have followed the reasoning that the confrontation clause does not demand an "eyeball-to-eyeball" encounter between the

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63. *Id.*

64. 5 J. WIGMORE, EVIDENCE § 1395 (3d ed. 1940); Davis v. Alaska, 415 U.S. 308, 316 (1974) ("The opponent demands confrontation, not for the idle purposes of gazing the 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."). *See also* California v. Green, 399 U.S. 149, 166 (1970) ("[t]he right of cross examination . . . provides substantial compliance with the purposes behind the confrontation requirement . . . "). *Id.*

65. Ohio v. Roberts, 448 U.S. 56, 63-64 (1980).

66. Commonwealth v. Willis, 716 S.W.2d 224, 230 (Ky. 1986).

67. State v. Sheppard, 197 N.J. Super. 411, 432, 484 A.2d 1330, 1343 (1984).

68. Douglas v. Alabama, 380 U.S. 415, 418 (1965).

69. Commonwealth v. Ludwig, 366 Pa. Super. 361, 365, 531 A.2d 459, 461 (1987).

70. *Id.* As an example of exceptions to the confrontation clause, the *Ludwig* court cited the fact that the clause does not "preclude the use of hearsay evidence in criminal trials under circumstances which otherwise render such evidence reliable." *See* United States v. Inadi, 475 U.S. 387 (1986) (statement of co-conspirator); Ohio v. Roberts, 448 U.S. 56, 66 (1980) (where evidence involving former testimony of an unavailable witness bears sufficient "indicia of reliability"); Dutton v. Evans, 400 U.S. 74 (1970) (statement of co-conspirator); Mattox v. United States, 156 U.S. 237 (1895) (former testimony); Williams v. Melton, 733 F.2d 1492 (11th Cir.), *cert. denied*, 469 U.S. 1073 (1984) (out-of-court statement of witness falling under res gestae exception); Haggins v. Warden, 715 F.2d 1050 (6th Cir. 1983), *cert. denied*, 464 U.S. 1071 (1984) (excited utterance).

71. *Ludwig*, 366 Pa. Super. at 365, 531 A.2d at 461.

72. *Mattox*, 156 U.S. at 242. *See also* Mancusi v. Stubbs, 408 U.S. 204 (1972).

accusing witness and the accused in cases involving child sexual abuse.[73] The courts have reasoned that the "protection of minor victims of sex crimes from further trauma and embarrassment" is a compelling government interest.[74] Those courts which have considered the use of alternative forms of testimony to protect a child witness from the traumatic effects of testifying in the physical presence of his or her abuser have generally found there to be no violation of confrontation guarantees.[75]

IV. THE CONFRONTATION CLAUSE APPLIED TO CHILD SEXUAL ABUSE

A. Courts Denying the Use of Procedures Designed to Protect Child Witnesses

Courts that have disallowed alternative testimonial procedures designed to reduce the trauma of child victims of sexual abuse on the witness stand have followed several different lines of reasoning.

1. Taking The Clause Literally.

The California Court of Appeals in *Herbert v. Superior Court* was the first court to decide the narrow issue of whether to allow an exception to the confrontation clause in order to protect a child victim of sexual assault from trauma while testifying. The court in *Herbert* took a literal approach to the clause.[76] At the preliminary hearing the victim was found to be reluctant and unable to testify.[77] In response, the trial court arranged the seating so that the defendant and the witness could not see each other, though the defendant could hear the witness' testimony.[78]

While the appellate court did admit that the circumstances are "delicate wherein a five-year-old witness is asked to testify to alleged conduct that is very private and personal," the court held that the defendant's right to con-

73. Commonwealth v. Willis, 716 S.W.2d 224, 227-31 (Ky. 1986); People v. Algarin, 129 Misc. 2d 1016, 1021, 498 N.Y.S.2d 977, 981 (1986).

74. Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607 (1982).

75. State v. Johnson, 240 Kan. 326, 729 P.2d 1169 (1986), *cert. denied*, 481 U.S. 1071 (1987); Commonwealth v. Willis, 716 S.W.2d 224 (Ky. 1986); Wildermuth v. State, 310 Md. 496, 530 A.2d 275 (1987); Craig v. State, 76 Md. App. 250, 544 A.2d 784 (1988); State v. Sheppard, 197 N.J. Super. 411, 484 A.2d 1330 (1984); People v. Henderson, 132 Misc. 2d 51, 503 N.Y.S.2d 238 (1986); People v. Algarin, 129 Misc. 2d 1016, 498 N.Y.S.2d 977 (1986); Commonwealth v. Ludwig, 366 Pa. Super. 361, 531 A.2d 459 (1987).

76. 117 Cal. App. 3d 661, 172 Cal. Rptr. 850 (1981). The defendant was charged with oral copulation and other lewd acts upon his five-year-old step-daughter. *Id.*

77. *Id.* at 664, 172 Cal. Rptr. at 851. The trial court concluded that the child was "disturbed by the number of people in the courtroom and in particular with the presence of the defendant." *Id.*

78. *Id.* The defendant was seated in front of and to the side of the bench with the judge in the jury box and the child in the witness stand.

frontation had been violated because the defendant and the child witness could not view each other during the hearing.[79] Although the *Herbert* court recognized that the right to confrontation is not absolute, it did not find room for an exception on the facts before it.[80] A later court, in ruling in favor of a child witness testifying via closed circuit television, noted that the *Herbert* court did not consider the use of video testimony or any problems unique to child witnesses.[81]

The Massachusetts Supreme Court in *Commonwealth v. Bergstrom*,[82] which was decided just sixteen days before *Coy* was handed down, also took a literal approach to the confrontation clause. The court ruled out admitting any testimony by an available witness given outside the presence of the defendant.[83] The *Bergstrom* court struck down the state statute designed to protect child witnesses from courtroom trauma as unconstitutional.[84] The court indicated that to interpret the words of the constitution as requiring only that the defendant be able to see and hear the witness would "render[ ] superfluous the words 'to meet' and 'face-to-face'."[85]

Therefore, despite the fact that the *Bergstrom* court recognized the plight of child witnesses in sexual assault cases and the legitimate concern surrounding the difficulties such children may face testifying in court, it concluded that "[t]he right of the accused to be tried in the manner which our Constitution guarantees cannot dissolve under the pressures of changing so-

79. *Id.* at 669, 172 Cal. Rptr. at 853.

80. *Id.* at 668, 172 Cal. Rptr. at 853.

81. State v. Sheppard, 197 N.J. Super. 411, 425, 484 A.2d 1330, 1338 (1984).

82. 402 Mass. 534, 524 N.E.2d 366 (1988).

83. *Id.* at 540-41, 524 N.E.2d at 370. The two child witnesses testified in a room other than the courtroom. The only people in the room with the child witnesses were the judge, the prosecutor, defense counsel, the girls' grandmother and a video technician. The defendant was able to observe the testimony from a television monitor inside the courtroom and also enjoy two-way communication with his counsel.

84. *Id.* at 546-47, 524 N.E.2d at 374. The court stated, "[f]or constitutional purposes, no principled distinction can be drawn between a child witness and any other class whom the Legislature might in the future deem in need of special treatment. General Laws c. 278 § 16D creates a rule that is too broad to pass constitutional muster." *Id.* (The Massachusetts court resolved the issue solely under Article 12 of the Massachusetts Declaration of Rights) *Id.* at 540 n.8, 524 N.E.2d at 370 n.8.

85. *Id.* at 542, 524 N.E.2d at 371. The *Bergstrom* court also ruled out the use of testimony by electronic means outside the presence of the jury in this case because the Commonwealth did not show a compelling need for the procedure. The court said that such a need could be shown where, "by proof beyond a reasonable doubt, the recording of the testimony of a child witness outside the courtroom, (but in the presence of the defendant) is shown to be necessary so as to avoid severe and long lasting trauma to the child." *Id.* at 547, 524 N.E.2d at 376. In this case, the court was also concerned that the witness was not made aware that she was giving testimony against the accused in a court of law. There was no evidence the child knew the defendant would be watching and listening. *Id.* at 540, 524 N.E.2d at 370.

cial circumstance or societal focus."[86]

2. Requirement of a Specific, Individual Need for Protection

Both the Nebraska State Supreme Court and the Maryland Court of Appeals also disallowed the use of closed-circuit television testimony by a child witness in a sexual assault case as a violation of the defendant's confrontation right in *State v. Warford*[87] and *Wildermuth v. State*[88] respectively. Unlike the *Herbert* and *Bergstrom* decisions, the Nebraska and Maryland courts did not rule out the alternative procedure, but rather held that the state must show "a compelling need to protect the child witness from further injury."[89]

The Maryland Court of Appeals rejected the argument that the statute allowing for the closed-circuit testimony was unconstitutional as a violation of the confrontation clause.[90] The *Wildermuth* court reversed and remanded one of the lower court decisions on the grounds that the state had not met the statutory threshold. To meet the threshold requirement, the state must make a particularized showing that if the individual child testifies in the courtroom it "will result in the child suffering serious emotional distress such that the child cannot reasonably communicate."[91] This threshold showing is essential before invoking the statute allowing for closed-circuit testimony.[92]

Both the Maryland and Nebraska courts required more than a general compelling interest before granting the requested testimonial safeguard. The one seeking protection on behalf of the child must prove a need for the protection that is specific to the particular child whose testimony is sought.[93] The Maryland court emphasized that "there can be no more justification for excusing all child victims from testifying than for imposing the duty on all of

86. *Id.* at 553, 524 N.E.2d at 377.

87. 223 Neb. 368, 389 N.W.2d 575 (1986).

88. 310 Md. 496, 530 A.2d 275 (1987). This case consisted of the combined appeals of two separate jury trials for the sexual abuse of children in two unrelated incidents in which the children were allowed to testify via live closed-circuit television.

89. *Warford*, 223 Neb. at 376, 389 N.W.2d at 581.

90. *Wildermuth*, 310 Md. at 520, 530 A.2d at 287.

91. *Id.* (appellant James Sylvester McKoy, for whom the court of appeals upheld the closed-circuit television testimony, did not challenge the procedure on the ground that the prerequisite condition of emotional unavailability had not been established).

92. *Id.* at 519, 530 A.2d at 286. The Nebraska Supreme Court's standard, similar to this threshold, requires a "particularized showing on the record that the child would be further traumatized or was intimidated by testifying in the courtroom in front of the defendant." *Warford*, 223 Neb. at 377, 389 N.W.2d at 581.

93. *Wildermuth*, 310 Md. at 519, 530 A.2d at 286. The court found that the expert used to prove the child's inability to testify spoke in terms of any child and not specifically of the particular potential child witness.

them. Each case merits its own individual decision."[94] The courts also required that once this particularized showing of need is made the use of the new evidentiary tool should be carried out in the least intrusive manner.[95]

B. Courts Upholding the Use of Procedures Designed to Protect Child Witnesses

Courts allowing alternative testimonial procedures designed to protect child sexual abuse victims from being further traumatized when testifying in the presence of the defendant have uniformly used a balancing test in deciding to admit the witnesses' testimony. The courts balanced the emotional well-being of the child witness against the confrontation right of the defendant in an effort to not significantly impair either.

In *State v. Sheppard*,[96] a prosecution for the sexual abuse of the defendant's ten-year-old stepdaughter and the first published case concerning closed-circuit testimony of a child witness,[97] the Superior Court of New Jersey found the video procedure did not significantly impair the rights of the defendant.[98] The court weighed the "confrontation right of the defendant against the 'right' of a child victim to testimonial protection."[99] In recognizing that the risk face-to-face testimony presented to the witness was too great to be allowed, the court stated that "[t]he concern which the court must have for her, and for all children, dictates a different course, when that course will not significantly impair the rights of the defendant."[100]

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94. *Id.* Similarly, People v. Algarin, 129 Misc. 2d 1016, 1018-19 n.4, 498 N.Y.S.2d 911, 979-80 n.4, involved 15 different child victims, the court ruled that only three of the victims were "sufficiently vulnerable to justify" having the witness testify via closed-circuit television. *Id.*

95. *Warford*, 223 Neb. at 377, 389 N.W.2d at 581. The Nebraska court in *Warford* found deficiencies in the manner in which the procedure was implemented. The defendant did not have a means of communicating with his attorney during the testimony and the judge was not able to control the examination by interrupting the questioning to rule on objections. *Id.*

96. 197 N.J. Super. 411, 489 A.2d 1330 (1984).

97. *See also* Comment, *Face-to Television Screen-to Face: Testimony by Closed Circuit Television Cases of Alleged Child Abuse and the Confrontation Right*, 6 KY. L.J. 273 (1987-88). While this Comment discusses the same narrow issue of the confrontation clause and child victims of sexual abuse as witnesses, it takes the opposite stance. The author maintains that the confrontation clause is absolute and attempts to lessen the trauma experienced by children in court.

98. 197 N.J. Super. 411, 484 A.2d 1330 (1984).

99. *Id.* at 441, 484 A.2d at 1348.

100. *Id.* at 443, 484 A.2d at 1343. The Kentucky Supreme Court in deciding Commonwealth v. Willis, 716 S.W.2d. 224 (Ky. 1986) agreed with this rationale of the *Sheppard* court and stated that the "exception to the confrontation clause is far outweighed by the inability to effectively prosecute child abusers where the evidence against them cannot be presented without intimidation." *Id.* at 229. In reversing the trial court, Kentucky's highest court upheld the closed circuit television testimony of a five-year-old girl sexually abused by her uncle. The

In *Sheppard*, by using the video procedure the child would not see the defendant or be in the courtroom at all. The defendant, the jury and everyone else in the courtroom, however, could see and hear the witness while she testified. Also, the defendant was able to cross-examine the witness.[101] The court characterized this procedure as a "modest erosion of the clause," with "enough to satisfy the demands of the confrontation clause."[102]

The *Sheppard* court distinguished *Herbert* by pointing out that in the California case the defendant could not see the witness.[103] The court also pointed out that the *Herbert* decision, finding a violation of the confrontation clause, was "motivated in part by the fact that there was no record showing that the child's conduct required the arrangement, no record of any intimidating action by the defendant, no oath taken by the victim and no request from either party to make a special arrangement."[104]

In 1986, two New York courts also upheld the use of live closed-circuit testimony. The court permitted the testimony of emotionally traumatized child victims of sexual abuse over defendants' objections that the procedure violated their confrontation rights.[105] The New York courts used a balancing test similar to that of the New Jersey court in *Sheppard*. In both cases, the New York Court of Appeals held that the compelling state interest of protecting 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 . . . ."[106]

In *Henderson*, the New York court emphasized that the state must meet the statutory burden of proving that it is likely,

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court declared the state statute permitting television cameras to present testimony of sex abuse victims under the age of 12 to be constitutional. *Id.*

101. *Sheppard*, 197 N.J. Super. at 432, 484 A.2d at 1343.

102. *Id.*

103. *Id.* at 425, 484 A.2d at 1338.

104. *Id. Sheppard* included a record of the problems the child experienced, which was supported by a psychiatric opinion that "emotional damage could be caused by in-court testimony," the witness testified under oath and the prosecutor specifically requested that the child's testimony be taken with the aid of video equipment. *Id.*

105. People v. Algarin, 129 Misc. 2d 1016, 498 N.Y.S.2d 977 (1986); People v. Henderson, 132 Misc. 2d 51, 503 N.Y.S.2d 238 (1986). The two-way closed circuit television procedure was implemented pursuant to a statute which amended the criminal procedure law by adding Article 65 on July 24, 1985 and was effective immediately. The statute permits a child witness in a sexual abuse case, who is twelve years-old or less, to testify from a comfortable and less formal testimonial room via live two-way closed-circuit television. *Henderson*, 132 Misc. 2d at 56, 503 N.Y.S.2d at 243.

106. *Algarin*, 129 Misc. 2d at 1024, 498 N.Y.S.2d at 983; *Henderson*, 132 Misc. 2d at 53, 503 N.Y.S.2d at 240. The *Henderson* case, decided three months after the *Algarin* decision, agreed with the court's reasoning concerning the constitutionality of the testimonial procedure.

> as a result of extraordinary circumstances that such child witness will suffer severe mental or emotional harm if required to testify at a criminal proceeding without the use of live, two-way closed circuit television and that the use of such live, two-way closed circuit television will help prevent, or diminish the likelihood or extent of such harm.[107]

This statutory burden must be met in each case in order to have the child witness declared vulnerable and therefore be permitted to use the procedure.

Pennsylvania also upheld the closed-circuit testimony of a child victim of sexual abuse in *Commonwealth v. Ludwig*.[108] The *Ludwig* court followed the previous cases in balancing and relaxed the requirements of the confrontation clause "only where it is necessary because of a compelling interest" as long as the infringement is as "minimally intrusive as possible."[109] According to the *Ludwig* court, by upholding the testimony done by closed circuit television, it "did nothing more than adopt modern technological means to allow the jury to hear testimony which otherwise have been unavailable . . . . It served only to enhance the fact-finding process."[110] The child's closed-circuit testimony had all the elements of conventional testimony. The defendant and jury could observe the witness while she testified, she was under oath and the defendant had an adequate opportunity for cross-examination. In the court's opinion, the only variations in the closed circuit testimony from conventional testimony were that the witness was in a different room and that she "was not required to look at the defendant [while] testifying."[111]

The alternative testimonial procedures used by courts in an effort to reduce the emotional stress on children have been implemented in a manner which preserves the other essential elements of confrontation as set out by *Lee v. Illinois*.[112] The jury is able to observe the witness' demeanor, the testimony is taken under oath and the defendant is afforded an opportunity for cross-examination.

In deciding *Coy v. Iowa*, the Supreme Court construed the sixth amend-

107. *Henderson*, 132 Misc. 2d at 56, 503 N.Y.S.2d at 242. This statutory burden is very similar to the threshold used by the Maryland court in *Wildermuth* and the requirement by the Nebraska Supreme Court in *Warford*. All require a showing that the particular child witness will suffer emotionally if forced to give traditional in-court testimony in front of the defendant. *See id. Wildermuth*, 310 Md. at 520, 530 A.2d at 287; *Warford*, 223 Neb. at 376, 389 N.W.2d at 581.

108. 366 Pa. Super. 361, 531 A.2d 459 (1987).

109. *Id.* at 369, 531 A.2d at 463.

110. *Id.* at 371-72, 531 A.2d at 464.

111. *Id.* at 363, 531 A.2d at 460.

112. 476 U.S. 530 (1986). *See supra* notes 60-64 and accompanying text.

ment's confrontation clause and applied a line of reasoning similar to that of the state courts which have disallowed alternative testimonial procedures. The product of this analysis is that the right to confront one's accusers face-to-face is considered fundamental to the confrontation clause.

V. THE *COY* DECISION

The defendant in *Coy* was charged with sexually assaulting two 13-year-old girls while they were sleeping in a makeshift tent in one of the girl's backyard next door to him.[113] The girls claimed that, their attacker awakened them when he came into their tent in the early morning.[114] The attacker, whose face was concealed by a stocking, shined a flashlight into their eyes and told them not to look at him.[115] He then fondled both girls and forced them to perform oral sex.[116] Neither child was able to describe his face.[117]

The state moved, pursuant to a recently enacted state statute which creates a legislatively imposed presumption of trauma, to allow the victims to testify either by closed-circuit television or from behind a screen.[118] The trial court permitted the use of a screen placed between the defendant and the child witnesses during their testimony.[119] After adjusting the lighting in the courtroom, the screen enabled the defendant to perceive the witnesses dimly while the witnesses could not see the defendant at all.[120]

The Iowa State Supreme Court rejected the defendant's confrontation clause argument on the ground that, since the ability to cross-examine the witness was not impaired by the screen, there was no violation of the confrontation clause.[121] The Supreme Court then granted a writ for

113. 108 S. Ct. 2798, 2799 (1988).

114. *Id.*

115. *Id.*

116. Note, *To Keep The Balance True: The Case of Coy v. Iowa*, 40 HASTINGS L.J. 437 (1989).

117. *Id.*

118. *Id.* at 444. The statute provides in part:

> The court may require a party be confined to an adjacent room or behind a screen or mirror that permits the party to see and hear the child during the child's testimony, but does not allow the child to see or hear the party. However, if a party is so confined, the court shall take measures to insure that the party and counsel can confer during the testimony and shall inform the child that the party can see and hear the child during the testimony.

IOWA CODE § 910A.14(1) (1987).

119. *Coy*, 108 S. Ct. at 2799.

120. *Id.*

121. State v. Coy, 397 N.W.2d 730, 733-34 (1986). The Iowa Supreme Court also rejected the defendant's due process argument on the ground that the screening procedure was not inherently prejudicial. *Id.* at 734-35.

certiorari.[122]

A. The Majority

The majority in *Coy*[123] interpreted the sixth amendment confrontation clause literally when it held that a screen placed between the defendant and two young witnesses violated the defendant's right to confrontation. Yet, in *Ohio v. Roberts* the Supreme Court rejected a literal interpretation of the confrontation clause as "unintended and too extreme."[124] The *Coy* majority stated that there is "something deep in human nature that regards face-to-face confrontation between accused and accuser as 'essential to a fair trial in a criminal prosecution.' "[125] To illustrate this point the majority cited President Eisenhower's description of face-to-face confrontation as part of the code of his home town of Abilene, Kansas,[126] along with other literary references. At the same time, however, the majority pointed out that the "confrontation clause does not, of course, compel the witness to fix his eyes upon the defendant; he may studiously look elsewhere."[127] While the court recognized that a confrontation with the accused may "upset the truthful rape victim or abused child" it pointed out that it may also "confound and undo the false accuser, or reveal the child coached by a malevolent adult. It is a truism that constitutional protections have costs."[128]

Although the majority also recognized that there have been cases in which it has held that the right to confrontation is "not absolute and may give way to other important interests,"[129] it pointed out that the rights at issue in

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122. Coy v. Iowa, 483 U.S. 1019 (1987).

123. 108 S. Ct. 2798 (1988).

124. Ohio v. Roberts, 448 U.S. 56, 63 (1980).

125. Coy v. Iowa, 108 S. Ct. at 2801 (quoting Pointer v. Texas, 380 U.S. 400, 404 (1965)).

126. *Id.* (citing Pollit, *The Right of Confrontation: Its History and Modern Dress*, 8 J. PUB. L. 381, 384-87 (1959)):

> The Abilene code made it a necessity to '[m]eet anyone face to face with whom you disagree. You could not sneak up on him from behind, or do any damage to him, without suffering the penalty of outraged citizenry. . . . In this county, if someone dislikes you, or accuses you, he must come up in front. He cannot hide behind the shadow.'

Id.

127. Coy v. Iowa, 108 S. Ct. at 2802. While the witness is not compelled to make eye contact with the defendant, the majority states that trier of fact will draw its own conclusions from the witness' choice. *Id.*

128. *Id.* "Because children, like adults, are not always scrupulously honest and accurate in their narrations, courts are alert to detect fantasy and falsehood in any testimony, and child-victim complainants in sex offense cases, being children, raise special problems of their own." Libai, *The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System*, 15 WAYNE L. REV. 977, 1003 (1969).

129. *Coy*, 108 S. Ct. at 2801.

those cases "were not the rights narrowly and explicitly set forth in the Clause, but rather rights that are, or were, asserted to be reasonably implicit."[130] The majority said that upholding these earlier exceptions is not the same as "holding that we can identify exceptions, in light of other important interests, to the irreducible literal meaning of the clause: a right to meet face-to-face all those who appear and give evidence at trial."[131]

Supreme Court cases show that prior to the availability of television, confrontation generally involved a face-to-face meeting with one's adversaries.[132] While modern cases also use the term "face-to-face,"[133] there is an argument that these words refer to the right to cross-examine the witness rather than actually physically confront him, and that the particular language of the court "may have resulted from its inability to foresee technological developments" which allow cross examination without actual physical confrontation.[134] It is recognized that the drafters of the Constitution did not and could not have imagined or planned for the technological advances utilized in courtrooms today in an effort to reduce the trauma experienced by children involved in legal proceedings.[135]

The state in *Coy* maintained that the important interest, which must be demonstrated before the rights in the confrontation clause give way, is established by the statute which imposes a legislative presumption of trauma.[136] However, the majority in disallowing the screen emphasized that something more than the type of generalized finding in the statute is needed when the exception is not "firmly . . . rooted in our jurisprudence."[137] The court concluded that because there had been "no individual findings that these particular witnesses needed special protection," the procedure could not be

130. Coy v. Iowa, 108 S. Ct. 2802. The Court noted that these implicit rights include the right to cross-examine. *See* Kentucky v. Stincer, 482 U.S. 730, 750 (1987) (asserted right to face-to-face confrontation at some point in the proceedings other than the trial itself); Ohio v. Roberts, 448 U.S. 56, 63-65 (1980) (the right to exclude out-of-court statements); Chambers v. Mississippi, 410 U.S. 284, 295 (1973).

131. *Coy*, 108 S. Ct. at 2803 (quoting California v. Green, 399 U.S. 149, 175 (1970) (Harlan, J., concurring).

132. Mattox v. United States, 156 U.S. 237, 242-43 (1895); United States v. Benfield, 593 F.2d 815, 819 (8th Cir. 1979).

133. *Roberts*, 448 U.S. at 63.

134. Note, *The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations*, 98 HARV. L. REV. 806, 823 n.108 (1985).

135. Coyle, *supra* note 53, at 1. *See* Kentucky v. Stincer, 482 U.S. 730 (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.") *Id.*

136. *Coy*, 108 S. Ct. at 2803.

137. *Id.* (quoting Bourjaily v. United States, 483 U.S. 171, 183 (1987) citing Dutton v. Evans, 400 U.S. 74 (1970)).

upheld.[138]

B. *The Effect of* Coy

The question now is how will the decision in *Coy* affect the state statutes designed to protect child victims of sexual abuse from trauma as well as the state court decisions which have upheld these alternative procedures. The majority left a small opening in the door, seemingly closed to alternative testimonial procedures, that may supply the answer. The Court stated, "[w]e leave for another day, however, the question whether any exceptions exist. Whatever they may be, they would surely be allowed only when necessary to further an important public policy."[139] Both the concurrence by Justice O'Connor and a state court case considering the issue following the *Coy* decision[140] used these words as an opportunity to leave hope for the future of the legislative and judicial protections for child witnesses enacted around the country.

Justice O'Connor penned her concurrence specifically to note that confrontation rights are "not absolute but rather may give way in an appropriate case to other competing interests so as to permit the use of certain procedural devices designed to shield a child witness from the trauma of courtroom testimony."[141] She emphasized that nothing in the majority opinion dooms efforts by state legislatures to protect child witnesses.[142] She explicitly stated that it is "not novel to recognize that a defendant's 'right physically to face those who testify against him,' even if located at the 'core' of the Confrontation Clause, is not absolute, and I reject any suggestion to the contrary in the Court's opinion."[143]

The concurrence clearly states that the protection of child witnesses is an important public policy which would call for something other than face-to-face confrontation. It is possible Justice O'Connor sees this protection as the same important public policy which the majority refers to as a possible ex-

138. *Id.* The majority states that "[t]he exception created by the Iowa statute, which was passed in 1985, could hardly be viewed as firmly rooted. Since there have been no individualized findings that these particular witnesses needed special protection . . . . " *Id.*

139. *Id.*

140. Craig v. State, 76 Md. App. 250, 544 A.2d 784 (1988).

141. *Coy*, 108 S. Ct. at 2803 (O'Connor, J., concurring).

142. *Id.* at 2804. ("Initially many such procedures may raise no substantial Confrontation Clause problem since they involve testimony in the presence of the defendant.") *Id. See, e.g.*, ALA. CODE § 15-25-3 (Supp. 1987) (one-way closed-circuit television; defendant must be in same room as witness); CAL. PENAL CODE § 1347 (West Supp. 1988); GA. CODE ANN. § 17-8-55 (Supp. 1987) (one-way closed circuit television; defendant must be in same room as witness); N.Y. CRIM. PROC. LAW § 65.00-65.30 (McKinney Supp. 1988) (two-way closed circuit television).

143. 108 S. Ct. at 2804 (O'Connor, J., concurring).

ception left for "another day."[144] The focus, however, would be on the necessity prong of the test and a court must make a case-specific finding of a need for an alternative method of presenting testimony for the strictures of the confrontation clause to give way.[145] Interestingly, while the majority opinion did make reference to the dissent, there was no effort made on the part of the majority to dispute these statements made by Justice O'Connor and concurred with by Justice White.[146]

Since *Coy*, several state courts have considered the issue of whether to admit testimony by children where the witness does not confront the defendant face-to-face. Most of the courts interpreting *Coy*, in conjunction with Justice O'Connor's concurrence, have agreed that the decision "does not preclude, under appropriate circumstances, the use of trial procedures that supplant physical confrontation at trial."[147]

In Maryland, a case decided just five weeks after *Coy* upheld the use of closed-circuit television for the presentation of seven-year-old girl's testimony despite the ruling in *Coy*.[148] The Court of Special Appeals of Maryland upheld the use of the closed-circuit testimony procedure because it believed that there had been an adequate specific showing of vulnerability for the witness in question.[149]

However, this decision was ultimately overruled by Maryland's highest court.[150] In reversing the lower court the Maryland Court of Appeals explicitly rejected the contention that *Coy* held "nothing less than a physical, face to face courtroom encounter between witness and accused can ever satisfy the constitutional rights of confrontation."[151] Rather, the reversal was

144. *Id.* at 2803.

145. *Id.* at 2804-05.

146. *Id.* at 2801-02 & n.2.

147. Craig v. State, 316 Md. 551, 560 A.2d 1120 (1989) (citing State v. Thomas, 150 Wis. 2d 374, 442 N.W.2d 10 (1989)). *See, e.g.*, State v. Vincent, 159 Ariz. 418, 768 P.2d 150 (1989); State v. Bonello, 210 Conn. 51, 554 A.2d 277, *cert. denied*, 109 S. Ct. 2103 (1989); State v. Thomas, 770 P.2d 1324 (Colo. Ct. App. 1988), *cert. granted*, (1989); Glendening v. State, 536 So. 2d 212 (Fla. 1988); Brady v. State, 540 N.E.2d 59 (Ind. 1989); State in Interest of J.D.S., 436 N.W.2d 342 (Iowa 1989); State v. Eaton, 244 Kan. 370, 769 P.2d 1157 (1989); State v. Crandall, 231 N.J. Super. 124, 555 A.2d 35 (1989); State in Interest of B.F., 230 N.J. Super. 153, 553 A.2d 40 (1989); State v. Davis, 229 N.J. Super. 66, 550 A.2d 1241 (1988); People v. Rivera, 141 Misc. 2d 1031, 535 N.Y.S.2d 909 (1988); Ohio v. Eastman, 39 Ohio St. 3d 307, 530 N.E.2d 409 (1988). *But see* State v. Murray, 375 S.E.2d 405 (W. Va. 1988).

148. Craig v. State, 76 Md. App. 250, 544 A.2d 784 (1988).

149. *Id.* at 282-83, 544 A.2d at 801-02.

150. Craig v. State, 316 Md. 551, 560 A.2d 1120 (1989).

151. *Id.* at 566, 560 A.2d at 1121. *Craig* concluded that the Supreme Court in *Coy* requires that any exceptions to the confrontation clause be construed narrowly. *Id.* at 562, 560 A.2d at 1125. These exceptions should be construed more narrowly than the Maryland court had previously held in *Wildermuth*. *See* notes 91-93 and accompanying text.

prompted by the fact that the prosecution did not make a showing that the particular child witness required the use of closed-circuit television for her emotional protection adequate to meet the "high threshold" required by *Coy*.[152]

Both the Court of Special Appeals and the Court of Appeals in Maryland believed that the issue the *Coy* majority chose to reserve for another day was before it to be decided.[153] In *Craig*, the Court of Appeals answered the question by redefining the parameters of the inquiry into a child's need for the use of alternative testimonial procedures that supplant confrontation. The court stated that: "[t]he question of whether a child is unavailable to testify . . . should not be asked in terms of inability to testify in the ordinary courtroom setting, but in the much narrower terms of the witness's inability to testify in the presence of the accused."[154] It is not sufficient to determine the child's ability to testify in terms of the general courtroom atmosphere. But rather, any emotional trauma experienced by the child must arise "primarily" from confrontation with the witness.[155]

While the *Craig* court's reading of *Coy* did require it to reverse the lower court, the Maryland court did not accept a literal interpretation of the confrontation clause and was very clear that a child who meets the threshold of need will be allowed to testify by closed-circuit testimony.[156] The Supreme Court has granted certiorari of *Craig* and will review the accuracy of this determination.[157]

Similarly, the Wisconsin Supreme Court reconsidered *State v. Thomas*, decided one day before *Coy*, to determine if the Supreme Court's ruling dictated a reversal in that case.[158] According to the Wisconsin Supreme Court, however, the lower court was "remarkably prescient" in "foreshadowing" the test outlined by *Coy*.[159] Both *Thomas* and *Coy* required "individual findings" that the witness' special circumstances called for "special protection from further traumatization."[160]

As illustrated by the interpretations of both *Thomas* and *Craig*, *Coy* did not completely close the door to testimonial procedures designed to protect child victims from additional emotional harm.

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152. *Id.* at 567, 560 A.2d at 1121.

153. *Craig*, 76 Md. App. at 280, 544 A.2d at 799 (1988); Craig v. State, 316 Md. 551, 560 A.2d 1123 (1989).

154. Craig v. State, 316 Md. 551, 564, 560 A.2d 1120, 1126 (1989).

155. *Id.* at 566, 560 A.2d at 1127.

156. *Id* at 567-68, 560 A.2d at 1128.

157. State v. Craig, 110 S. Ct. 834 (1990).

158. 150 Wisc. 2d 374, 442 N.W.2d 10 (1989).

159. *Thomas*, 150 Wisc. 2d 374, 393, 442 N.W.2d 10, 19 (1989).

160. *Id.*

C. The Dissent

The dissenters in *Coy*, Chief Justice Rehnquist and Justice Blackmun, strongly disagreed with the majority's analysis of the confrontation clause and concluded that the testimonial procedure used at the trial level was constitutional.[161] According to Blackmun's dissent, the use of the screen to block the victim's view of the defendant did not interfere with the "purposes of confrontation."[162] The essential elements — including having the witness under oath, the opportunity for cross-examination, and the jury's ability to observe the witness' demeanor — were all present.[163] Coy's "sole complaint," in the words of the dissent, is the "very narrow objection that the girls could not see him while they testified about the sexual assault they endured."[164]

Justice Blackmun gave two reasons for his disagreement with the majority. First, the majority did not consider the "minimal extent of infringement on 'Coy's confrontation rights in determining whether' competing public policies justify" the trial procedure.[165] Second, the majority's literal interpretation of the confrontation clause may lead states attempting to make use of techniques to protect child witnesses to "sacrifice other, more central, confrontation interests," in an effort to preserve face to face confrontation.[166] The scant support for the majority's interpretation of the confrontation clause, in the dissent's opinion, is obvious from the majority's "reliance on literature, anecdote and dicta from opinions a majority of this Court did not join."[167]

VI. The Confrontation Clause After *Coy*

Coy has said that the "literal right to confront the witness at the time of trial" forms the "core of the values furthered by the confrontation clause" and does not give way to exceptions.[168] The majority in *Coy*, however, left open a door to possible exceptions to this literal face-to-face confrontation by leaving for another day the question of whether any exceptions exist.[169]

Since *Coy* several state courts have attempted to answer this question. The *Craig* court made use of this open door by putting its own limit on the

161. Coy v. Iowa, 108 S. Ct. 2798, 2805 (1988) (Blackmun, J., dissenting).
162. *Id.* at 2806 (quoting California v. Green, 399 U.S. 149, 158 (1970)).
163. *Id* at 2805.
164. *Id.* at 2806.
165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.* at 2798, 2801.
169. *Id.* at 2803.

threshold required by *Coy*. Similarly, while *Thomas* allowed a child witness to testify through a video-taped deposition in which the defendant was not present - a procedure seemingly forbidden by *Coy*. Upon reconsideration, *Thomas* held that it was consistent with the Supreme Court's holding. The *Thomas* court held this on the basis that the state showed a specific need for the exception for that particular witness.[170]

It is likely that in the future other courts wishing to reduce the trauma of testifying for children will proceed with the use of a protective testimonial technique only after there has been a specific showing that the witness will be harmed if he or she testified in the defendant's presence. Courts looking to allow alternative testimonial procedures to protect child victims of sexual abuse from further trauma in the courtroom will construe *Coy* as did *Craig* and the concurring justices. These courts will construe the decision as "simply striking down the procedure used in that case and reserving for further consideration whether the more common approaches authorized by most of the States will suffice."[171] Since *Coy*, state courts are bound to show, at least, a specific need for each child witness to be protected in order to use any alternative procedures for presenting their testimony. The decision in *Coy* has been a signal to state legislatures and courts to require a specific showing of need for alternative testimonial procedures and also to tailor statutes to allow for only a slight erosion of the confrontation right. The Supreme Court's review of *Craig* will most likely clearly define the limits of the threshold required by *Coy*.

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170. 150 Wisc. 2d 374, 387, 442 N.W.2d 10, 16 (1989).
171. Craig v. State, 76 Md. App. 250, 280, 544 A.2d 784, 799 (1988).