Michigan Law Review

Volume 85 | Issue 4

1987

Videotaping Children's Testimony: An Empirical View

Paula E. Hill
University of Michigan Law School

Samuel M. Hill
University of Michigan Law School

Follow this and additional works at: https://repository.law.umich.edu/mlr

Part of the Courts Commons, Criminal Procedure Commons, Evidence Commons, and the Juvenile Law Commons

Recommended Citation
Paula E. Hill & Samuel M. Hill, *Videotaping Children's Testimony: An Empirical View*, 85 MICH. L. REV. 809 (1987).
Available at: https://repository.law.umich.edu/mlr/vol85/iss4/6

This Note is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

Videotaping Children's Testimony: An Empirical View*

Increases in the number of reported incidents of child abuse and sexual molestation[1] have resulted in more and younger children becoming courtroom participants. Some courts refuse to consider the special needs of the child in this adversarial environment. Relying on questionable precedent, these courts hold that the defendant's right to directly confront the child, as well as strict compliance with evidentiary rules, overrides that child's interest in freedom from embarrassment or psychological trauma.[2] This Note focuses on pressures felt by the testifying child and the ways in which these pressures affect her testimony; it then proposes using videotaped testimony as a means of overcoming such pressures.

Part I reviews the psychological research undertaken in conjunction with this Note and concludes that, as compared to a courtroom setting, the quality and reliability of children's testimony is significantly enhanced in a smaller, more intimate videotape environment. Based in part on such findings, this Note argues that using videotape technology to capture and portray in court the child witness' testimony serves both to lessen emotional trauma to the child and to maintain a fair trial for the defendant.[3] Part I concludes by calling for regular use of videotapes to present children's testimony.

Part II focuses on the defendant's sixth amendment right to con-

---

* This material is based upon work supported under a National Science Foundation Fellowship. Any opinions, findings, conclusions, or recommendations expressed in this publication are those of the authors and do not necessarily reflect the views of the National Science Foundation. A copy of the complete study is on file with the *Michigan Law Review.*

1. *See, e.g.,* Collins, *Studies Find Sexual Abuse of Children is Widespread,* N.Y. Times, May 13, 1982, at C1, col. 1 (an American Humane Association study found a 200% increase in reported sexual offenses against children since 1976). Normally, the child is the only witness to such abuse and her testimony is the most valuable evidence a prosecutor can offer. *See* Berliner & Stevens, *Advocating for Sexually Abused Children in the Criminal Justice System,* in SEXUAL ABUSE OF CHILDREN: SELECTED READINGS 47, 49 (Natl. Center on Child Abuse & Neglect, U.S. Dept. Health & Hum. Services 1980). The dimensions of the child abuse problem are truly staggering; according to one report, one in five girls and one in eleven boys are victims of sexual assault. D. FINKELHOR, SEXUALLY VICTIMIZED CHILDREN 53 (1979). Most often, a relative or an acquaintance of the child is the offender. MacFarlane, *Sexual Abuse of Children,* in THE VICTIMIZATION OF WOMEN 81, 86 (1978).

2. *See, e.g.,* Ketcham v. State, 240 Ind. 107, 113, 162 N.E.2d 247, 249-50 (1959) (quoting Riggs v. State, 235 Ind. 499, 135 N.E.2d 247, 249 (1956):

> [T]he delicacies of the situation should not be permitted to outweigh the fact that a man's liberty and reputable life is at stake. The consequential embarrassment is a small price to pay in return for a showing of the witness' understanding of the details upon which such conclusion may be properly or improperly based.

3. While this Note is primarily concerned with the use of videotape to present a child's testimony, other measures might be used to lessen trauma and further reliability with or without videotapes. At a minimum, a support person should be available to help the child through the legal system. The stressful surroundings and large number of unfamiliar people encountered in the legal system can be overwhelming to a child. This unfamiliarity can reduce her ability to

frontation as developed by the United States Supreme Court, other federal appellate courts, and state courts.[4] An analysis of these decisions reveals that the right to face one's accuser is far from absolute: the confrontation clause is peppered with exceptions based on policies which embrace the use of videotaped testimony in child sexual abuse cases. This Note concludes that when properly introduced, a child's videotaped testimony will not infringe on the defendant's right to confrontation.

I. THE NEED FOR VIDEOTAPING

Children in medieval societies were perceived as diminutive adults and were expected to function like adults.[5] Today, psychological research has demonstrated that children's learning capacities develop in a very complex manner over time, and our society no longer expects a child to behave like an adult.[6] However, as a witness to or a victim of abuse, a child is cast into a system created for adults which is ill-designed to accommodate her needs. The criminal justice system is not only indifferent to a child victim-witness' needs, it actually distrusts the children's abilities to relate an incident, "and puts special barriers in their path of prosecuting their claims to justice."[7]

---

testify accurately and may even cause psychological harm. Providing the child witness with an emotionally supportive person may alleviate these problems.

A support person does not have to be a lawyer or an expert in child psychology. Anyone who makes the child more comfortable — a parent, aunt or uncle, teacher, social worker, or foster parent — can lend this support. This person can sit with the child witness while she testifies in the videotape room or in the courtroom.

Another measure that would aid child witnesses in giving testimony is the use of anatomically correct dolls. Since children often lack the appropriate adult sexual terminology to explain what happened to them, skillful use of these dolls enables children to communicate exactly what physical contact the alleged offenders had with them.

Anatomically correct dolls are generally acceptable demonstrative evidence in child abuse cases. *See, e.g.,* Alexander v. State, 692 S.W.2d 563 (Tex. 1985). A nonverbal or inarticulate child is often better able to explain a traumatic event if given the dolls and asked to use them to tell the court what happened. These dolls might be successfully used during out-of-court videotaping sessions as well. The child could use the dolls while a skilled interviewer posed questions using the dolls as references. In court or out, this process can help the child more accurately communicate her story.

4. The defendant's sixth amendment right to be confronted by his accusers has been held applicable to the states via the due process clause of the fourteenth amendment. Pointer v. Texas, 380 U.S. 400 (1965).

5. *See* P. ARIÈS, CENTURIES OF CHILDHOOD 128 (1960).

6. *See* J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 3 (1979).

7. THE PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT 51 (1982) (Testimony by David Lloyd, attorney for the Child Protection Unit, Children's Hospital National Medical Center, Washington, D.C.). Some commentators argue that this distrust of children's testimony is well-founded, not because of intentional falsehoods created by the children, but because of subtle and not so subtle pressure by social workers interviewing the children. *See, e.g.,* Slicker, *Child Sex Abuse: The Innocent Accused,* 91 CASE & COM. 12 (1986). Because child witnesses are especially susceptible to persuasion, great care must be taken to avoid leading them. The proposals offered in this Note present one effort to control such subtle pressure.

Defense counsel working to block the admission of a child's testimony can presently rely on structural and attitudinal barriers to introducing the testimony. Often the child's physical, cognitive, and emotional immaturity serve to make her courtroom testimony appear unreliable. However, recent psychological reports indicate that children can perform certain memory tasks as well as older witnesses.[8] When a child is asked a specific question, such as "What did you have for lunch at school today?," the accuracy and completeness of the answer is usually equivalent to that of an adult.[9] Researchers have also demonstrated that there is little difference in short- or long-term memory retention between school age children and adults.[10] Although the child witness can recall information stored in her memory as well as adult witnesses, her method of retrieving that information differs from adults and is hindered by the environment created by the adversarial system.[11]

A. *Children's Needs Can Affect Testimonial Abilities*

1. *Information Processing: A Background*

A generally accepted theory of cognitive functioning analogizes the

---

8. *See, e.g.,* Dent & Stephenson, *An Experimental Study of the Effectiveness of Different Techniques of Questioning Child Witnesses,* 18 BRIT. J. SOC. & CLINICAL PSYCHOLOGY 41 (1979). Dent and Stephenson conducted two studies in order to examine the effects upon accuracy of recall of different techniques used to obtain evidence from children about a previously witnessed incident. In both experiments the children were shown a film of a theft. In the first study, one-third of the children were asked to report freely what they could remember about the incident ("free report"), another third were asked general questions about the film, and the remaining third were asked specific questions. Free report produced the most accurate, but least complete responses. The second study focused on the effects of delay before free recall. Delays of two weeks and two months before the recall session had no effect on the accuracy compared to no delay, though the completeness diminished substantially.

See also Marin, Holmes, Guth & Kovac, *The Potential of Children as Eyewitnesses,* 3 L. & HUM. BEHAV. 295 (1979). Marin and her colleagues staged live interaction between the experimenter and a confederate that was witnessed by subjects between the ages of five and twenty-two. The young children gave free reports that were less complete than those of adults. However there were no age differences in ability to answer objective questions, in ability to identify the confederate from a set of photographs, or in susceptibility to leading questions. In another study, fifth graders and college students were shown a videotape of a shoplifting incident. Recall (free report) and recognition (answering questions) were then tested. The children's recall was less accurate and less complete than that of the adults. Children gave recognition reports that were as complete as those of adults, but were less accurate. J. List, *Age and Schematic Differences in the Reliability of Eyewitness Testimony,* 22 DEV. PSYCHOLOGY 50, 55 (1986). *See also* Goodman & Hegleson, *Child Sexual Assault: Children's Memory and the Law,* 40 U. MIAMI L. REV. 181, 185 (1985).

9. Goodman & Michelli, *Would You Believe A Child Witness?,* PSYCHOLOGY TODAY, Nov. 1981, at 82. *See also* Marin, Holmes, Guth & Kovac, *supra* note 8, at 301. *See generally,* Davis, Stevenson-Robb & Flin, *The Reliability of Children's Testimony,* 11 INTL. LEGAL PRAC. 95, 99 (1986).

10. Johnson & Foley, *Differentiating Fact from Fantasy: The Reliability of Children's Memory,* 40 J. SOC. ISSUES 33, 50 (1984).

11. D. WHITCOMB, E. SHAPIRO & L. STELLWAGEN, WHEN THE VICTIM IS A CHILD: ISSUES FOR JUDGES AND PROSECUTORS 17-19 (Issues and Practice in Criminal Justice, Natl. Inst. of Just., U.S. Dept. of Just., Aug. 1985).

human mind to a computer; sensory data enter the human mind and are cognitively processed. However, as the human system matures, a greater amount of processing is possible. This perspective has become known as the "information processing" viewpoint.[12]

The maturing child's increased capacity to process incoming data, complemented by familiarity with a given situation, enables processing to occur faster. An increase in age generally is accompanied by an increase in experience, and therefore in familiarity.[13] In our litigious society, adults are more likely to be familiar with courtroom practices and various kinds of crimes than are children.[14] The adults' familiarity with the system may permit them to process information concerning crimes and legal proceedings more quickly than children. If a court is not willing to allow the extra time that the child needs to become familiar with its procedures, poor testimony can result.

Another cognitive difference between adults and children centers on the ability to focus on a particular task. Some psychologists propose that children under twelve require more mental energy to concentrate on a particular task.[15] Thus, children either focus their attention on the particular task at hand, almost completely excluding everything else around them, or they allow their attention to wander, noting many details without deeply processing any of them. The latter view is an example of "incidental learning," which occurs when a child acquires information and gives responses irrelevant to the central task, as defined by the experimenter.[16]

There are two opposing views concerning the effect of incidental

---

12. Siegler, *Information Processing Approaches to Cognitive Development,* in 1 HANDBOOK OF CHILD PSYCHOLOGY: HISTORY, THEORY, AND METHODS 129 (P. Mussen ed. 1983). In one "information processing" model, memory is conceived of as having a certain number of slots which hold chunks of information, and the number of slots is thought to increase with age, at least between the ages of five and ten years. Pascual-Leone, *A Mathematical Model for the Transition Rule in Piaget's Developmental Stages,* 32 ACTA PSYCHOLOGICA 301 (1970). As opposed to this structural change, other investigators believe that functional processing capacity increases with age. J. FLAVELL, COGNITIVE DEVELOPMENT 76 (1985).

13. *See* J. FLAVELL, *supra* note 12, at 299. As the parameters of the task become automatized, more concepts can be attended to or held in working memory at a given time.

14. Anecdotal evidence supports the view that children have unrealistic expectations concerning legal trials. Children often feel that they, the witnesses, are on trial. As one fourteen-year-old said, "I thought the judge was gonna scream at me." Wiig, *Toward a Focus on Children in the Court Process,* in PROTECTING CHILDREN THROUGH THE LEGAL SYSTEM 941 (Natl. Legal Resource Center for Child Advocacy & Protection, American Bar Assn. 1981).

15. *See* Manis, Keating & Morrison, *Developmental Differences in the Allocation of Processing Capacity,* 29 J. EXPERIMENTAL CHILD PSYCHOLOGY 156, 164 (1980).

16. The capacity demands required in attaining and retaining alertness decrease to adult levels between second and sixth grade. There are two types of experiments designed to measure incidental learning. In the first, children are exposed to stimuli without being told to learn them prior to beginning the task, and are then tested to see what is retained in memory. In the second situation, children are told to focus on particular stimuli, and are then tested on those aspects of the task to which they were not told to attend. On the basis of several studies, investigators have suggested that incidental learning increases through early childhood, peaks around twelve years of age and then decreases. *See* H. STEVENSON, CHILDREN'S LEARNING 210 (1972).

learning on witnessing an event and later testimony. One view, held by the authors of this Note, proposes that noticing normally "insignificant" details may be helpful in some cases, such as observing a shoplifting in which the criminal is trying to be unobtrusive. Adults may not notice the shoplifter because there is no reason to focus on him. Children are more likely to notice, although they may not recognize the significance of what they see. Children may also observe details of a criminal's appearance, while adults concentrate on the behavior of the offender.

The opposing view is that young children focus on details to such an extent that they are not able to integrate information as well as older children and adults.[17] However, this developmental difference may actually lead to more accurate testimony. If children are able to remember several details without inferring either valid or invalid relationships, a "true" story should emerge. In contrast, adults may make inferences based on their "scripts" for what usually happens in a particular kind of situation, and in their testimony they may unintentionally fill in gaps.[18]

The mere fact that children do not process information the same way as adults does not necessarily imply that children are not competent to testify. Rather, it suggests that children who testify should be treated differently than adults.

2. *Information Processing in the Courtroom*

The authors of this Note conducted an empirical investigation to test the hypothesis that children's recall, or their willingness to report recall, differs with setting. The authors hypothesized that if children

17. Paris & Lindauer, *The Role of Inference in Children's Comprehension of Memory for Sentences,* 8 COGNITIVE PSYCHOLOGY 217, 225 (1976). In the Paris and Lindauer study, children were read a story, and then asked to identify whether certain statements relating to the story were true. For example, part of the story might have stated: "The box was under the chair. The chair was under the tree." Then an explicit prompt was presented: " 'The box was under the chair.' True or false?" An implicit prompt would be, " 'The box was under the tree.' True or false?" First and third graders were able to use only explicit prompts to remember sentences, whereas fifth graders also made use of implicit prompts, spontaneously inferring relations between prompts and sentences.

Studying children of the same ages as those in the Paris and Lindauer study, other investigators have also concluded that there is a developmental increase in integrative processing. Duncan, Whitney & Kunen, *Integration of Visual and Verbal Information in Children's Memories,* 53 CHILD DEV. 1215 (1982).

18. As a hypothetical example, assume an adult and a child both see a man carrying an empty plastic bag enter a department store. Twenty minutes later, they see the man leave the store with a full bag. Later the adult and the child discover that the store has been robbed, and the adult claims that the man with the bag is the criminal. Upon being questioned, the adult may "recall" that the suspect looked around before entering the store, carried a gun, ran when he left the store, etc. All of these details fit a script for a robbery, but they did not occur in this case. On the basis of what the adult saw, she infers that the man with the bag is the thief, and integrates information from her "burglary script" with what she saw. The child would be unlikely to make these inferences. Instead, she would probably report only what she had witnessed.

were questioned in a small setting by only one unfamiliar person, they could recount a greater amount of accurate information that they had witnessed on a videotape than if they were questioned in a typical courtroom setting.[19] The children watched a simulated father-daughter confrontation on videotape. Their ability to recall was then tested in one of two settings. One-half of the children testified in a small room that contained two one-way mirrors and a microphone suspended from the ceiling. This setting accurately reflects how videotaped testimony might be taken in an actual child sexual abuse case. The authors tested the recall of the remaining children either at a county courthouse or in the University of Michigan Law School moot courtroom.[20] The study tested free recall, with separate scores for central items, irrelevant details, and inaccuracies. After the free recall, children were asked specific questions concerning details of the videotape. Answers to these questions were scored as "correct," "incorrect," and "do not know."

The results of those analyses, which either indicated a trend to-

19. The subjects were seventeen girls and twenty boys between the ages of seven and nine. They were from predominantly middle-class families living in southeastern Michigan.

The study involved two sessions, one on each of two consecutive evenings for each child. Throughout both sessions, parents were allowed to accompany their children. The entire first session was conducted by three female experimenters. The first session began with a short pencil and paper game intended to help the child feel comfortable. Then the children watched a ten-minute videotape. The first and the last segments were scenes from educational television programs. The second segment, which was filmed solely for the purpose of this study, centered around the conversation of an ill-tempered man and a young girl who had just come home from school. After watching the videotape, the children were told that they would meet someone else the next day who had not seen the videotape, and that he would ask them questions about one of the scenes. Half of the subjects were told that they would be asked questions in a courtroom. The subjects were cautioned not to talk to anyone about the videotape until the next evening. They were also told that they could do anything they wished to try to help them remember what happened on the videotape.

20. In the second session, which was held one day after the first session, half of the children went to one of two courtrooms (the Washtenaw County Courthouse or the moot courtroom at the Michigan Law School). The other children went to a private room in a different building from that in which they met for the first session. The session began with pencil and paper games. After the games were completed, the children scheduled to go to the private room were told that they would be taken to another room where someone would ask them questions about the second scene of the videotape. In the courtroom setting, children were told what a witness is, and that they were to be witnesses in the courtroom. Then the children were taken into the room, while the initial experimenter waited outside.

In the private setting, a male interviewer questioned the children and recorded the answers on a cassette tape recorder. In the courtroom the "judge" ascertained that the children knew the difference between the truth and a lie, and asked what happened when people lie. The children were then asked if they would answer the questions as best as they could remember about the videotape. In an actual trial, this method is often used to secure a modified oath from children. Two "attorneys" conducted the questioning. The first attorney asked a few general recall questions about what happened in the second scene. In addition, he asked the child witness if the man on the videotape was in the courtroom, and if so to point to him. (He was located at the defendant's table.) The second attorney then cross-examined the child using specific questions. With the exception of the identification of the man on the videotape, these two sets of questions were the same as those asked by the interviewer in the small room. The judge used a cassette tape recorder to record the children's answers. The interviewer, judge, and attorneys were male undergraduate research assistants and law school students.

ward, or actually attained statistical significance, indicated that, compared to children in a courtroom, children in a small room tend to (1) relate more central items in free recall;[21] (2) answer specific questions correctly more often;[22] and (3) say "I don't know" or give no answer when asked specific questions significantly less often.[23] A possible ex-

21. *Free Recall*: The first question asked for a general description of what happened during the second scene of the videotape. No sex differences were found in any of the scores. There were thirteen central items in the second scene of the videotape, each assigned one point. In the small room, the central scores ranged from 0 to 10, with a mean of 4.67. Scores of subjects in the courtroom ranged from 0 to 7, with a mean of 3.36. While not significant in a one-way analysis of variance, there was a tendency for subjects in the small room to relate more central items in free recall than subjects in the courtroom ($p < .087$) (In social science research it is generally assumed that the means of two or more conditions are different if the probability of such an occurrence by chance is less than or equal to five percent. The notation $p < .087$ indicates that the likelihood that the central mean scores in the courtroom and in the small room are the result of chance is 8.7%.).

Scores for accurate details irrelevant to the story line also consisted of assigning one point per item. The scores of subjects in the small room ranged from 1 to 31 with a mean of 5.94. In the courtroom condition, scores ranged from 0 to 17, with a mean of 4.90. An analysis of variance revealed no significant differences ($p < .563$) in irrelevant details.

Due to their rarity, inaccurate responses were not analyzed. Five boys in the courtroom supplied a total of seven incorrect responses. The combined score of the three girls in the courtroom who included inaccurate information was five. Five boys and six girls in the small room rendered totals of nine inaccurate responses for each sex.

22. *Specific Questions*:

Twenty-six of the twenty-seven specific questions were scored: "correct," "incorrect," and "do not know." (One question was deleted from the analyses because it did not have a single clear answer.) These categories were not mutually exclusive; an answer to a specific question might contain correct and incorrect elements. For example, in response to question 33 ("How did the man cut his finger?"), one subject said, "He was cutting an apple, and he missed, and he cut his thumb." This answer would receive two points for being partially correct (the man was cutting something; he missed), and also a point for being incorrect (the object was an orange rather than an apple).

For the "correct" score, each question was assigned points reflecting the complexity of the possible response. The highest possible "correct" score was 41. The scores were converted to percentages (actual score divided by the weighted points of questions actually asked) because, on occasion, a question was inadvertently omitted by the questioners. In a two-way analysis of variance, no sex differences were revealed. Scores of subjects in the small room ranged from 38% to 84%, with a mean of 54.7%. In the courtroom condition, scores ranged from 37% to 59%, with a mean of 48.9%. Although this difference was not statistically significant, there was a tendency for subjects in the small room to answer more questions correctly than subjects in the courtroom ($p < .094$).

The "incorrect" scores indicated the number of specific questions to which some inaccurate account was given, regardless of the assigned weight of the questions. For the same reason described above, the scores were converted to percentages (actual score divided by the number of questions asked). Scores ranged from 8% to 46% in the small room condition, with a mean of 22.2%. In the courtroom condition, the range of scores was from 8% to 42%, with a mean of 21.6%. Neither sex nor condition was found to be significant in a two-way analysis of variance.

23. The final index, "do not know," reflected the number of questions to which the subject replied "I don't know," or gave no answer. These scores were also converted to percentages. The scores for boys in the small room ranged from 0 to 27%, with a mean of 10.4%; for girls the range was from 0 to 28%, and the mean was 14.3%. In the courtroom, boys' scores ranged from 4% to 28%, with a mean of 16%; girls' scores ranged from 0 to 61%, and the mean was 27.5%. A two-way analysis of variance revealed that the effect of the setting was significant ($p < .02$), with subjects in the courtroom saying "I don't know" or giving no answer more often. The effect of sex approached significance ($p < .056$), with girls scoring higher than boys.

The results of the study are summarized in the following table:

planation for the different responses in each setting is that children in the courtroom gave no answer to questions that children in the small room answered correctly. The responses of children in a small room were more complete than those of children in the courtroom.

The present findings lend support to the argument that current courtroom procedures militate against eliciting complete testimony from children. There were several aspects of the courtroom situation that, when compared with the small room, may have contributed to this effect: the courtroom was large; the child had to sit farther from her parent(s); several people were present; the child witness was questioned by three unfamiliar men; the robed judge sat very close to the child; and the child was facing, and in close proximity to, the unpleasant man from the videotaped portrayal. The combined effects of these variables evoked anxiety in the children, as demonstrated by their conversations with an experimenter after testifying.[24] In addition, the "attorneys" informally noted many instances of nervousness in the children testifying in court (*e.g.*, twisting hair, attempting to leave the witness stand or the courtroom before the end of the session, shaking, and in one instance crying).

When asked to point to the man from the videotape, only nine children positively identified the "defendant" in the courtroom, although three others glanced at him often throughout the session. Either these three children did not recognize the man, or they did not admit that they did.

The poor identification results of the study probably understate the effects of stress on the child's willingness or ability to testify; in actual abuse cases, the testifying child-victim usually knows the defendant.[25]

Measure	Probability	Direction
Free Recall		
— Central Items	$p \leq .087$	Small room > court-room
— Irrelevant Details	n.s.*	
Specific Questions		
— Correct	$p \leq .104$	Small room > court-room
— Incorrect	n.s.*	
— "Do Not Know"	$p \leq .021$	Small room > court-room

*n.s. = not significant

24. The experimenter asked both groups of children how they felt about testifying at the end of the second session. Most of the children said they liked answering the questions, or thought it was "okay," with a few exceptions from the children in the courtroom. Many of those who testified in the courtroom said they were nervous, embarrassed, or scared, although a few said that they felt good. In the small room, the children expressed nervousness and "feeling good" about equally. Most of the children in the courtroom said they would not ever want to testify again, although a few said they might be willing when they were older. In the small room, children expressed more willingness to participate in a similar procedure in the future.

25. *See* MacFarlane, *supra* note 1, at 86.

In the present study, the child witness was not a victim of the defendant; thus, the child did not suffer the trauma of confronting a recognized person who had assaulted her. The children participating in the study were not victims of, or witnesses to an actual crime. For children who are victims of sexual abuse, or who are in some way traumatized, it is likely that the problems indicated in this study would be much more pronounced and extend beyond reluctance to identify the assailant. In an actual trial, child sexual abuse victims must face the alleged abuser; this study could not allow so stressful a condition.[26]

These results indicate that steps should be taken to help child participants in trials be more comfortable to enable them to testify more completely and accurately. The next section examines some efforts that have been made in this area and concludes that many of them fall far short of achieving their intended result.

B. *Efficacy of State Reforms*

The National Conference of the Judiciary[27] and the Attorney General's Task Force on Family Violence[28] have recommended the use of videotapes in lieu of live testimony when children must testify in abuse cases. Most recently, the American Bar Association has approved the following recommendation of its Criminal Justice Section:

> The use of alternate means of presenting a child's testimony to the court via closed circuit television, through a one-way mirror, or by videotape represents a responsible and compassionate approach to the dilemma of securing the child's testimony with a minimum of contact with the defendant and spectators while at the same time preserving a defendant's confrontational right. Its development and use merits serious consideration.[29]

---

26. Further studies are needed to confirm the results of the present investigation. An important comparison would examine the differences between children who recognize a defendant and those who do not. Studies that separate the array of variables in the present study (*e.g.*, size of the room, number of people present, number of questioners, presence and proximity of the defendant, and presence and attire of the judge) would be invaluable in pinpointing the sources of the differences in recall ability and in willingness to speak. Another interesting comparison would be to examine how the setting affects children who had witnessed a live event rather than a videotaped scene. Additional empirical investigations would enhance understanding of children's abilities as witnesses.

27. National Institute of Justice, U.S. Department of Justice, Statement of Recommended Judicial Practices, (adopted by the National Conference of the Judiciary on the Rights of Victims of Crime) (1983).

28. Attorney General's Task Force on Family Violence, Final Report 27, 33 (1984).

29. Section on Criminal Justice, American Bar Association, Guidelines for the Fair Treatment of Child Witnesses In Cases Where Child Abuse is Alleged 30 (1985).

On May 16, 1985, Senator Jeremiah Denton introduced a bill to amend Chapter XIV of the Comprehensive Crime Control Act of 1984 to provide funds to encourage states to develop protective reforms for the investigation and adjudication of child abuse cases, entitled The Child Victim Witness Protection Act of 1985. S. 1156, 99th Cong., 1st Sess., 131 Cong. Rec. 6323 (1985). Senator Denton's bill would authorize grants to states that introduce measures for the

In an effort to diminish the trauma suffered by child witnesses in sexual abuse cases,[30] twenty-five states have adopted legislation permitting a child's videotaped statements or depositions to be introduced as evidence at child abuse trials.[31] These laws differ in several impor-

---

protection of child victims. Such measures must "minimize the additional trauma to the child and improve the chances of successful criminal prosecution or legal action." S. 1156, 99th Cong., 1st Sess. § 2(b) (1985). These measures may include "establishing procedures for the videotaping of the child victim's statement and testimony . . . ." S. 1156, 99th Cong., 1st Sess. § 3(c)(2)(D). Dr. Ellen Greenberg, Administrative Officer for Child, Youth and Family Policy of the American Psychological Association, testified before the Senate Subcommittee on Juvenile Justice supporting the bill. Dr. Greenberg explained that:

> [R]eforms designed to improve the chances of successful criminal prosecution or legal action in child abuse cases can also be expected to reduce the potential for further traumatization of the child victim. These reforms include the use of videotaping and closed-circuit television which provide alternatives to the actual courtroom participation of the child victim . . . .

The Child Victim Witness Protection Act of 1985: Hearings on S. 1156 Before the Subcomm. on Juvenile Justice of the Senate Comm. on the Judiciary, 99th Cong., 1st Sess. 187 (1985).

Senator Denton's bill was introduced just prior to unanimous Senate approval of Senator Paula Hawkins' Children's Justice Act. *Child Abuse Legislation in the 99th Cong.: Joint Hearings on S. 140 Before the Subcomm. on Select Education of the House Comm. on Education and Labor, and the Subcomm. on Court and Constitutional Rights of the House Comm. on the Judiciary,* 99th Cong., 1st Sess. 1 (1985). The Hawkins bill amends the Child Abuse Prevention and Treatment Act to establish within the Department of Health and Human Services a new federal grant program to assist the states in developing programs like those in Senator Denton's bill. Neither of these bills attempts to develop procedures to help children; they are essentially purse-string bills designed to stimulate innovation in state legislatures.

30. Sexual abuse cases that require a child to relive her harrowing experiences for the courtroom audience are not the only type of litigation in which a child who has witnessed a traumatic event may be required to explain to the court "what happened." Witnessing the death of another person is traumatic for anyone, but much more so for a child witnessing the death of a parent. Such a child is likely to exhibit post-traumatic stress disorder. The child also faces many of the same courtroom anxieties as abuse victims. *See generally* Pynoos & Eth, *The Child As Witness to Homicide,* 40, No.2 J. SOC. ISSUES 87 (1984). Fortunately, the number of child witnesses to homicide is not as overwhelming as the number of abused children. Yet, there are a number of youngsters who do witness violent crimes. Pynoos and Eth note:

> [O]f the 2000 homicides in its jurisdiction in 1982, the Los Angeles County Sheriff's Homicide Division estimates that approximately 200 had a dependent youngster as a witness . . . . The assailant's relationship to the child has fallen into one of the following three categories: the other parent (35%), a friend or other relative (30%), or a stranger (35%).

Id. at 88. These percentages indicate that the child witness of a homicide, like the sexually abused child, is likely to be asked to testify against a parent or friend. Because these children face similar difficulties as abused children, the concerns raised in this Note might apply equally well to a child who witnesses parenticide.

31. *See* ALA. CODE § 15-25-2 (Supp. 1986); ALASKA STAT. § 12.45.047 (1984); ARIZ. REV. STAT. ANN. §§ 12-2311 to -2312 (1982); ARK. STAT. ANN. §§ 43-2035 to -2036 (Supp. 1985); CAL. PENAL CODE § 1346 (Deering Supp. 1987); COLO. REV. STAT. § 18-3-413 (1986); 1985 Conn. Acts 85-587 (Jan. Sess) *reprinted in* CONN. GEN. STAT. ANN., app. at 337 (West 1986); DEL. CODE ANN. tit. 11, § 3511 (Supp. 1985); FLA. STAT. ANN. § 90.90 (West Supp. 1984); KAN. STAT. ANN. §§ 22-3433 to -3434 (Supp. 1986); KY. REV. STAT. ANN. § 421.350 (Michie/Bobbs-Merrill Supp. 1986); ME. REV. STAT. ANN. tit. 15, § 1205 (Supp. 1986); MO. ANN. STAT. § 492.304 (Vernon Supp. 1987); MONT. CODE ANN. §§ 46-15-40, 46-15-401 (1983); NEV. REV. STAT. § 174.227 (1985); N.H. REV. STAT. ANN. § 517:13-a (Supp. 1986); N.M. STAT. ANN. § 30-9-17 (Supp. 1986); N.Y. CRIM. PROC. LAW § 190.32 (McKinney Supp. 1987) (grand jury proceedings); OKLA. STAT. ANN. tit. 22, § 753 (West Supp. 1986); R.I. GEN. LAWS § 11-37-13.2 (Supp. 1986); S.D. CODIFIED LAWS ANN. §§ 23A-12-9 to -10 (Supp. 1986); TEX. CODE CRIM. PROC. ANN. art. 38.071 (Vernon Supp. 1987); UTAH CODE ANN. § 77-35-15.5 (Supp. 1986); Vt. R. Evid. 807; WIS. STAT. ANN. § 967.04(7) (West Supp. 1986). Most of these state statutes

tant respects, and this variability may be attributable to states' relative uncertainty regarding constitutional constraints imposed by the sixth amendment's confrontation clause. The defendant's constitutional right to confrontation necessarily narrows the alternatives that states may consider in providing for child witnesses. The Supreme Court has yet to address the relationship between state measures protecting child witnesses and the defendant's confrontation rights.

1. *Physical Confrontation with the Defendant*

Many states which permit videotaped testimony require the defendant's presence at the taping session.[32] Most often the videotaping occurs in the judge's chambers[33] or a similar environment,[34] and the defendant is given the opportunity to cross-examine the child fully. When these procedures are followed, the videotape can generally be presented at trial in lieu of the child's direct testimony.[35]

Statutes of this type have overemphasized the defendant's need for confrontation and underemphasized the psychological trauma for the child witness. While the intentions of such procedural reforms are admirable, the changes may not fully benefit either the child or the fair administration of justice. Empirical research suggests that requiring physical confrontation with the defendant damages the reliability,

---

contain language that explicitly or implicitly suggests that the purpose of the statute is to decrease trauma suffered by children who must participate in the criminal justice process. *See, e.g.*, CAL. PENAL CODE § 1346(d) (Deering Supp. 1987) (allowing videotaped testimony if "further testimony would cause the victim emotional trauma so that the victim is medically unavailable").

32. The states requiring that the defendant be present at the videotaping include Alaska, Arizona, Arkansas, Colorado, Florida, Kentucky, Maine, Montana, New Mexico, Texas, and Wisconsin. Typical is the Arizona statute:

> Upon request of either party, the court may order all questioning of a minor witness to be videotaped in the judge's chambers in the presence of the defendant, defendant's counsel, the prosecuting attorney or plaintiff and plaintiff's counsel as the case may be and the court for presentation to the jury as evidence at such time as the court determines is proper.

ARIZ. REV. STAT. ANN. § 12-2312 (1982). *See also* note 31 *supra* and accompanying text.

33. *See, e.g.*, ARK. STAT. ANN. § 43-2036 (Supp. 1985) ("The videotaped deposition shall be taken before the judge in chambers in the presence of the prosecuting attorney, the defendant and his attorneys.").

34. *See, e.g.*, WIS. STAT. ANN. § 967.04(8)(b)(2) (West Supp. 1986).

35. *See, e.g.*, ARK. STAT. ANN. § 43-3036 (Supp. 1985); N.M. STAT. ANN. § 30-9-17 (Supp. 1986); WIS. STAT. ANN. § 967.04(9) (West Supp. 1986). Most of the statutes explicitly require some showing of unavailability of the child. The exact nature of the showing differs from state to state. In Florida and Wisconsin, the court can grant an order to videotape only if there is a substantial likelihood that the child will suffer "severe emotional or mental strain" if required to testify in open court. FLA. STAT. ANN. § 90.90 (West Supp. 1984); S.D. CODIFIED LAWS ANN. § 23A-12-9 (Supp. 1986). The Arkansas and New Mexico statutes require the court to find "good cause shown" before granting a videotape order, ARK. STAT. ANN. § 43.2036 (Supp. 1985); N.M. STAT. ANN. § 30-9-17 (Supp. 1986), and California and Colorado require medical unavailability, CAL. PENAL CODE § 1346(d) (Deering Supp. 1987); COLO. REV. STAT. § 18-3-413 (1986). Not all of the states have unavailability requirements. The Montana statute explicitly states that "[t]he victim need not be physically present in the courtroom when the videotape is admitted into evidence." MONT. CODE ANN. § 46-15-401 (1983).

quality, and often the very existence of the child's testimony.[36] Psychological research indicates that direct confrontation with a defendant has a clearly detrimental impact on memory.[37] A survey of professionals working with child victim-witnesses in the criminal justice system revealed that the children's

> most frequently mentioned fear was facing the defendant. That experience is frightening for most adults, but to a child who does not understand the reason for confrontation, the anticipation and experience of being in close proximity to the defendant can be overwhelming. This fear was mentioned by virtually all respondents, including police, social workers, advocates, therapists, doctors, and judges.[38]

Even those states that allow videotaping in a comfortable setting — such as the judge's chambers — fail to lessen pressure on a child when they also require the defendant to be present. The defendant's presence, even in less threatening surroundings, creates anxiety and lessens the value of a child's testimony.[39] Texas and Kentucky have a more logical approach which allows the defendant to observe and hear the testimony personally but shields the defendant from the witness' view.[40]

---

36. *See, e.g.*, notes 21-26 *supra* and accompanying text.

37. *See* Dent & Stephenson, *Identification Evidence: Experimental Investigations of Factors Affecting the Reliability of Juvenile and Adult Witnesses*, in PSYCHOLOGY, LAW AND LEGAL PROCESSES 195 (1979). Dent and Stephenson revealed interesting results in several studies of eyewitness identification. In the first of these experiments, adults were shown a film of an office break-in, and then required to identify the criminal either from a live lineup or from a set of life-size color slides. There was no significant difference in the identifications. In the second study, children witnessed a workman enter their classroom, and were later asked to identify the man from a lineup or from slides. Children were correct significantly more often when identifying from slides. In the live lineup condition, agitation and nervousness were noted in the children, and two refused to participate in the identification process. A third experiment involved college students who witnessed a man and a woman enter their classroom to talk about an experiment. In this study, an additional identification procedure was included: a one-way window. There were significant differences in these conditions, with the window producing the most correct identifications, and the line-up the least correct. The difference in the last manipulation was entirely due to the responses of the women; the men responded equally in all three conditions.

These last two studies appear to contradict an experiment by Marquis, Marshall, and Oskamp. *See* Marquis, Marshall & Oskamp, *Testimony Validity as a Function of Question Form, Atmosphere and Item Difficulty*, 2 J. APPLIED SOC. PSYCHOLOGY 167 (1972). Here, adult subjects were shown a videotape, asked for free reports, and then interrogated. The interviewer was either challenging or supportive. Results indicated that the uncomfortable atmosphere associated with the challenging interviewer did not affect the accuracy or completeness of the subjects' responses. In order to understand the conflict in results between the Dent and Marquis experiments, the differences in the procedures must be emphasized. For both groups, no differences were found as a result of an intimidating atmosphere if the witnessed event was on film rather than live. In addition, subjects in the Marquis study did not have to confront the "criminal," whereas all of the subjects in the Dent studies did. Finally, the Marquis study only looked at the responses of adults, not children.

38. WHITCOMB, *supra* note 11, at 17-18.

39. *Id.* at 49.

40. "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." KY. REV. STAT. ANN. § 421.350(4) (Michie/Bobbs-Merrill Supp. 1986); TEX. CODE CRIM. PROC. ANN. art. 38.071(4) (Vernon Supp. 1987). *See also* WHITCOMB, *supra* note 11, at 55.

Not only is fear of facing the defendant and defense counsel damaging to the child witness' ability to testify, anxiety from being in a hostile environment exacerbates the damage. A child may be overwhelmed by an unfamiliar and unusual situation; she must expend considerable cognitive effort identifying items and comprehending the nature of the task at hand. Several researchers have found that accuracy and efficiency of recall diminish when a person is questioned in a hostile environment.[41] The probability of accurate testimony, therefore, is markedly reduced,[42] and the probative value of the testimony is diminished by the anxiety produced in such circumstances.[43]

2. *Cross-Examination*

Many of the states that require the defendant to be present also require an opportunity for traditional cross-examination.[44] Unlike its truth-enhancing effect on adults, cross-examination employed as a means to elicit further details from children significantly impairs the completeness and accuracy of their answers.[45] The style of cross-examination is more likely to generate inaccurate testimony than is the age of the witness.[46] "Although cross-examination can be anxiety pro-

---

41. *See* note 37 *supra,* and 45-47 *infra* and accompanying text.

42. *See* Dent & Stephenson, *supra* note 37; Lord, *Experimentally Induced Variations in Rorschach Performance,* 64 PSYCHOLOGICAL MONOGRAPHS No. 10 (1950); Zimmerman & Bauer, *Effect of an Audience Upon What Is Remembered,* 20 PUB. OPINION Q. 238 (1956).

43. *See generally* Melton, *Children's Competency to Testify,* 5 L. & HUM. BEHAVIOR 73 (1981). Anecdotal evidence of the effect of the courtroom environment on children can provide some view of what the child must endure if called to testify. Pynoos and Eth give several examples, one of which follows:

> Four-year-old Julie was not prepared for the sight of her father, the defendant, whom she had not seen in over six months, dressed in prison garb. On her way to the stand, she walked over and gave him a big hug. Without explanation to the child, the judge suddenly excused the jury who got up and left. He would not allow a trusted adult to sit with the child on the witness stand, but left her to sit in a witness chair obviously oversized for her. Once seated, she placed both hands over her mouth. The district attorney began the examination by showing her a coloring book; she shrugged silently, and the judge looked annoyed. The district attorney then asked her if she was a girl or a boy, and she fidgeted shyly. The judge interrupted by stating, "It doesn't appear to the court that she can qualify." He then abruptly dismissed her. Without her testimony, the father was acquitted and Julie was returned to his care. This child was never given the opportunity to demonstrate that she could relate the material facts of the event.

Pynoos & Eth, *supra* note 30, at 100-01. This example is taken from Evers v. State, 84 Neb. 708, 121 N.W. 1005 (1909). Julie's father was on trial for murdering her mother. While this case represents only one incident, the inability of young victim-witnesses to perform in court in many cases results in failure to provide justice for them. *See* WHITCOMB, *supra* note 11, at 20, (*citing* B. Woodling, Diagnosis for Child Molestation, paper presented at Protecting Our Children: The Fight Against Molestation, A National Symposium, Washington, D.C., Oct. 3, 1984).

44. *See, e.g.,* ALASKA STAT. § 12.45.047 (1984); MONT. CODE ANN. §§ 46-15-40, 46-15-401 (1983); S.D. CODIFIED LAWS ANN. §§ 23A-12-9 to -10 (Supp. 1986).

45. Stern, *The Psychology of Testimony,* 34 J. ABNORMAL PSYCHOLOGY 3, 20 (1939). *See also* notes 19-26 *supra* and accompanying text.

46. NATIONAL LEGAL RESOURCE CENTER FOR CHILD ADVOCACY AND PROTECTION, AMERICAN BAR ASSOCIATION, CHILD SEXUAL ABUSE AND THE LAW 136 (4th ed. 1983) [hereinafter CHILD SEXUAL ABUSE AND THE LAW].

ducing for anyone, children do not understand its purpose, or why someone is trying to discredit them. A child is no match for a defense attorney."[47]

Thus, allowing the defense attorney an opportunity to cross-examine the child witness in a small room, at close range, and usually without a support person present,[48] negates the benefits of the improved environment. It is unrealistic to expect defense counsel to be less intimidating in a smaller room, since she has an obligation to be a zealous advocate for her client.[49] The information processing theory of memory and cognition coupled with the results of the empirical work undertaken by the authors suggest that if children testify in a smaller, less threatening environment, they can provide truthful, detailed answers without traditional cross-examination.[50]

3. *Uses of Videotaped Testimony*

The state legislatures' intent to protect a defendant's right of confrontation is most apparent in the sections of state acts that direct videotape use. States have taken two basic approaches. Some, such as South Dakota, Colorado, and California[51] treat the videotape as former testimony of the child witness.[52] Courts have established that under this type of statute former testimony may be offered when "fairness allows imposing, upon the party against whom now offered, the handling of the witness on the earlier occasion."[53] Each of these states further require that cross-examination take place during the videotaping.

A second and far more disturbing use of videotaping is employed in New Mexico, Arkansas, and Wisconsin.[54] These states require that the videotaped testimony may be admissible at trial and received into

47. WHITCOMB, *supra* note 11, at 18.

48. Kentucky, Oklahoma, Louisiana, and Texas allow a support person to be present during closed circuit television testimony and cross-examination. *See* WHITCOMB, *supra* note 11, at 49-50.

49. While it seems clear that traditional in-court cross-examination and even statutorily permitted out-of-court cross-examination of the child may be damaging to the child's testimony, some prosecutors have suggested that putting the child before the jury during the direct examination is very powerful evidence. WHITCOMB, *supra* note 11, at 66, notes that one prosecutor "much preferred to 'let the jury see the little angel.' "

50. *See* WHITCOMB, *supra* note 11, at 33-34. *See also* Pynoos & Eth, *supra* note 30, at 98 ("We believe that the child and the law are better served by the child being allowed to recount the events in his or her own way, at his or her own pace, and with his or her own emphasis.").

51. S.D. CODIFIED LAWS ANN. § 23A-12-9 (Supp. 1986); COLO. REV. STAT. § 18-3-413 (1986); CAL. PENAL CODE § 1346(d) (Deering Supp. 1986).

52. The language in § 1346(d) of the California Penal Code is illustrative: "[The] court may admit the video tape of the victim's testimony at the preliminary hearing as former testimony under Section 1291 of the Evidence Code."

53. FED. R. EVID. 804(b)(1) advisory committee's note.

54. N.M. STAT. ANN. § 30-9-17 (Supp. 1986); ARK. STAT. ANN. § 43-2036 (Supp. 1985); WIS. STAT. ANN. § 967.04(7) (West Supp. 1986).

evidence in lieu of the victim's *direct testimony.* Such a procedure gives the defendant two opportunities to cross-examine and intimidate the child, since the statutes provide that the defendant be present with the child during the recording of the direct and then again during the in-court cross-examination. This procedure is more damaging to the child than merely testifying at trial.[55]

A better approach is that taken by Kentucky and Texas.[56] These statutes make a videotaped *statement* of the child admissible (where no cross-examination occurs at the recording session) and allow the opposing party to cross-examine the child on the stand. If the child's *direct testimony* is videotaped outside the courtroom, and the defendant has an opportunity to cross-examine during the recording session, the child cannot be required to testify in court. This procedure eliminates the cross-examination "double threat" facing the child witness in New Mexico, Arkansas, and Wisconsin.[57] Although these reforms are much needed, they require fine tuning. The following section contains suggestions for such improvements.

C. *A Proposal for Enhancing Child Witness Protection Statutes*

When the judicial system treats children insensitively, the quality of their participation suffers, thereby lessening the likelihood that justice will be done. The procedures outlined below will help the child tell her story clearly, fully, and accurately while shielding her from excessive trauma.[58]

Video technology could be used in two phases of the trial process, beginning with videotaping the child's initial statement prior to any legal action. This "investigatory" tape would not be used at trial unless necessary to corroborate or impeach later testimony. The tape

---

55. A recent opinion by the New Mexico Court of Appeals has interpreted the state's videotaping statute in a way that prevents this possible second cross-examination of the child victim-witness. In State v. Tafoya, 729 P.2d 1371 (N.M. 1986), the court held that a defendant in a control booth viewing the proceedings was "present" within the meaning of the statute. 729 P.2d at 1373.

56. KY. REV. STAT. ANN. § 421.350 (Michie/Bobbs-Merrill Supp. 1986); TEX. CODE CRIM. PROC. ANN. art. 38.071 (Vernon Supp. 1987).

57. Yet another group of states never explains how the videotape may be used at trial. Maine, Montana, and Florida merely direct that the recorded testimony may be presented at trial and received into evidence. The statutes do not elucidate how much weight is to be given to the videotape once admitted. *See* ME. REV. STAT. ANN. tit. 15, § 1205 (Supp.1986); MONT. CODE ANN. §§ 46-15-40, 46-15-401 (1983); FLA. STAT. ANN. § 90.90 (West Supp. 1984). The Maine and Montana statutes also require that the witness be cross-examined during the taping session. (This may indicate that the recorded testimony is to be treated as former testimony as above.) The uncertainty as to the use of the videotape at trial may mean either that the statutes were not carefully considered, or that they were attempts to give judges a great deal of discretion for proceeding with varying facts.

58. The procedures were developed with considerable help from Donald Duquette and Constance Jones of the Child Advocacy Law Clinic of the University of Michigan.

would be viewed only by social service personnel and persons needed to determine whether further legal action is warranted.

Several reasons favor a videotaping of the child's initial statement. First, since the initial statement would occur soon after the incident of alleged abuse, the child's recollection would be vivid and detailed. Second, the possibility of retraction of the child's testimony due to pressure from family members in intrafamilial cases would be reduced, as there would be less time for the child to be pressured. Third, greater accuracy would result, as testimony would not be rehearsed. Fourth, less trauma would be sustained by the child, since she would be subjected to fewer interviews.[59]

A single skilled interviewer should conduct the interview. Presently, the child may be interviewed by many persons, all with different styles of interaction and with different investigatory goals. Because many interviewers are either ignorant of or insensitive to the special needs and abilities of children in such situations, the child's testimony may appear to be, at best, not wholly reliable and, at worst, totally unusable.[60] One skilled interviewer, with special training in working with children in tense situations, is best able to elicit reliable and useful testimony from the child. Ideally a community should have a pool of interviewers trained both in evidence and in questioning children. Such a group could be developed through local child abuse/neglect programs, special police units, special prosecutor's groups, and local social services departments.

Because an investigatory videotape would not preclude a child's being called to testify,[61] a second phase of the trial process would involve videotaping the witness' actual testimony. When further legal action is deemed necessary, a "litigation" videotape would be prepared through a series of steps. Once the defendant has obtained counsel and has had time to develop a case plan, a special hearing would be held to develop a preliminary set of questions acceptable to all parties.[62] The answers to these questions will form the basis of the child's testimony. Some of the questions could be altered during testimony as needed. The testimony should be taped in a small room with a one-way mirror through which the defendant, prosecutor, defense counsel, judge and public can monitor the testimony of the child. A skilled

59. WHITCOMB, *supra* note 11, at 99-100.

60. A recent article in the *National Law Journal* tells of a Hawaiian state court's ruling that two sexually molested girls were incompetent to testify because their accusations against the defendant were likely the result of "layers and layers of interviews, questions, examinations, etc., which were fraught with textbook examples of poor interview techniques." Catterall, *Children's Testimony Blocked,* Natl. L.J., Feb. 3, 1986, at 6, col. 2.

61. The investigatory tape is merely the first statement of the child. It is not sworn testimony.

62. The need for such a hearing could be obviated in the event that the parties could agree and stipulate to the set of questions.

interviewer should question the child alone.[63]

To facilitate the examination, an interviewer should wear a hearing device that enables the judge, lawyers, and/or defendant to communicate with the interviewer and control the flow of the examination.[64] The judge should be present to rule on objections to questions asked, changed, or added, at this time. Since the attorneys would agree in advance on the full battery of questions, the child need not take the stand at trial.

This proposed use of videotapes is similar to the Texas and Kentucky statutory methods but with one major difference: a single skilled interviewer would interview the child. This idea is not novel. Dustin Ordway developed a similar proposal for videotaping child incest victims' testimony.[65] Under his proposal, the expert who works alone with the child[66] would be called to testify as to the child's nonverbal behavior.

The proposals put forth in this Note calling for the use of videotapes to present children's initial statements and testimony are based on the psychological capabilities of children. Part II balances these proposals against the defendant's right of confrontation.

II. Courts, Confrontation and Videotapes

Allowing videotaped testimony to be presented as the functional equivalent of live testimony raises important constitutional issues. Specifically, some claim that presenting a videotape of the witness' testimony in lieu of the actual appearance of the child infringes the defendant's right to confront his accusers.[67] This section will

63. Admittedly, some may object that no one interviewer can adequately interrogate the child for both sides. However, the alternative of using two skilled interviewers merely substitutes interviewers for attorneys; the same dangers of intimidation of the child by the defendant's interviewer will be inevitable.

64. In State v. Tafoya, the court approved the use of a head set and a microphone for the same purpose as that advocated here. 729 P.2d 1371, 1373 (N.M. 1986).

65. Ordway explains that "[u]nder the proposed reform, the child's only contact with the legal system would be through a specially trained social services worker . . . . At trial, relevant portions of the recordings would be played in lieu of the victim's personal testimony." Note, *Parent-Child Incest: Proof at Trial Without Testimony in Court by the Victim,* 15 U. Mich. J. L. Ref. 133, 139-40 (1981) (footnotes omitted).

66. Ordway details expert requirements as follows: "This expert must have dual qualifications: first he or she must be qualified to deal with victims of child sexual abuse; and second, he or she must be familiar enough with legal standards and practices to assist the trier of fact in assessing the victim's credibility." Note, *supra* note 65, at 139-40.

67. The confrontation clause comes to us, some argue, as a result of the infamous trial by affidavit of Sir Walter Raleigh. An integral element of the evidence against Raleigh consisted of statements of one Cobham, who later recanted his tale. Raleigh was not allowed to call Cobham, nor did the state call him as a witness, and Raleigh was convicted. *See generally* Heller, The Sixth Amendment 104 (1961).

To remedy this type of conviction by affidavit, our Founding Fathers created the confrontation clause of the sixth amendment: "[T]he accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI.

demonstrate that the defendant's confrontation right is preserved under the suggested reforms.[68]

A review of the United States Supreme Court decisions interpreting the confrontation clause reveals that "confrontation" is a combination of three factors. Generally, in order to find adequate confrontation, the Court requires that (1) the defendant have face-to-face meetings with the witness, (2) the defendant have the opportunity to cross-examine the witness, and (3) the factfinder have the ability to view the demeanor of the witness.[69] Thus, to be admitted into evidence, videotaped testimony must satisfy each of these elements. Alternatively, it must fall within the scope of an exception to the confrontation clause.

There are a plethora of circumstances in which the court permits "nonconfrontation." The confrontation right can be waived,[70] its denial can be harmless error,[71] it can be subject to balancing against other interests,[72] and subject to exception.[73] The Supreme Court recognized early on that confrontation issues must be handled flexibly,

---

68. Because children were deemed incompetent to testify they were probably not considered when the confrontation clause was drafted. *See* Goodman, *Children's Testimony in Historical Perspective,* 40, No.2 J. SOC. ISSUES 9, 12 (1984).

One could plausibly argue that the draftsmen of the confrontation clause wanted to ensure that anyone accusing another would face that person in court, under oath. The exact motivation of the authors of the clause is, however, uncertain. One commentator explains that:

> [T]he right of an accused "to be confronted by the witnesses against him" is seldom mentioned in early historical documents. The precise source of this use of the word "confront" is obscure, and the remembered harms or injuries suffered or feared by the colonists which impelled them to add this right to the panoply of guarantees of the sixth amendment cumulate at best to only a sketchy relevant historical background. It is not too surprising, therefore, to discover that the exact import of the federal right to be "confronted" by witnesses has been varyingly conceived over the years.

Larkin, *The Right of Confrontation: What Next?,* 1 TEX. TECH L. REV. 67 (1969); *see also* Comment, *Confrontation and the Hearsay Rule,* 75 YALE L.J. 1434, 1436 n.10 (1966); Note, *Preserving the Right to Confrontation — A New Approach to Hearsay Evidence in Criminal Trials,* 113 U. PA. L. REV. 741, 742 (1965); Note, *Confrontation, Cross-Examination, and the Right to Prepare a Defense,* 56 GEO. L.J. 939, 953 (1968).

Since children did not testify in the eighteenth century in the United States, the draftsmen may have envisioned two men facing one another in court. In this scenario the intuitive belief that facing the accused would make the accuser more honest may have had some truth to it. However, psychological pressures are different when the witness is a child who does not understand why she must again face her attacker. By requiring a child to testify in court as to incidents surrounding sexual abuse or another traumatizing event, the criminal justice system treats children like adult men.

69. *See* California v. Green, 399 U.S. 149 (1970); Douglas v. Alabama, 380 U.S. 415 (1965).

70. United States v. Carlson, 547 F.2d 1346, 1357-59 (8th Cir. 1976), *cert. denied,* 431 U.S. 914 (1977) (discussing express waiver, waiver by stipulation as to admission of evidence, waiver by guilty plea, waiver by absence from the jurisdiction, and waiver by misconduct).

71. Parker v. Randolph, 442 U.S. 62, 74-75 (1979); Schneble v. Florida, 405 U.S. 427, 430-32 (1972).

72. Ohio v. Roberts, 448 U.S. 56, 64 (1980) (citing Chambers v. Mississippi, 410 U.S. 284, 295 (1973)); Mattox v. United States, 156 U.S. 237, 243 (1895).

73. *See, e.g.,* Pointer v. Texas, 380 U.S. 400, 407 (1965) (dying declarations and former testimony of deceased witnesses admissible without violating confrontation clause).

noting that the right of confrontation "must occasionally give way to considerations of public policy and the necessities of the case."[74] This Note argues that this language applies to child participants in the criminal justice system.

A. *Physical Confrontation*

Because of psychological differences between children and adults, children should not be compelled to face the defendant in court. The Supreme Court has ruled that there is no absolute requirement of physical confrontation at trial; there exist exceptions to the need for physical presence as an element of confrontation. In *Mattox v. United States,*[75] the Court admitted the testimony of two witnesses who died before the defendant's second trial occurred. It noted 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."[76] Similarly, in *Ohio v. Roberts,*[77] the Court "recognized that competing interests, if 'closely examined' . . . may warrant dispensing with confrontation at trial."[78] The goals of protecting child victims and securing their best testimony present such interests.

If a child is compelled to be physically present in court, the psychological cost can be quite severe.[79] This cost may ultimately be passed on to society if, as a result of the child's inability to testify, a guilty perpetrator is improperly released.[80] Trauma that children may suffer during litigation often either prevents prosecutors from bringing sexual abuse or molestation cases, or causes them to be abandoned prematurely.[81] After enduring the trauma of sexual abuse, children asked to testify in court can "become so further traumatized by the prospect of testifying in front of their abusers that they cannot speak

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

75. 156 U.S. 237 (1895).

76. 156 U.S. at 243.

77. 448 U.S. 56 (1980).

78. 448 U.S. at 64.

79. Studies indicate that child sexual assault victims who participate in judicial proceedings suffer more psychological harm than children not appearing in court. *See* S. KATZ & M. MAZUR, UNDERSTANDING THE RAPE VICTIM, 199-200 (1979), (citing Wells, 1961; Reifen, 1958; Gibbens and Prince, 1963; DeFrancis, 1969; and Henriques, 1961). *See also* note 91 *infra.*

80. *See* Note, *supra* note 65, at 148 n.79 (the current procedures requiring child in-court testimony result in useless prosecutions which waste court resources, prevent treatment of true sex offenders, and hurt the integrity of the judicial system).

81. "One attorney, who had handled thirty to forty of these cases . . . was able to complete a trial in only one [instance]." State v. Sheppard, 197 N.J. Super. 411, 417, 484 A.2d 1330, 1333 (1984). Another attorney working for a prosecutor's office reports that "[n]early 90% of the child abuse cases were dismissed as a result of problems attending the testimony of children who could not deal with the prospect of facing fathers, stepfathers, relatives and strangers in a courtroom setting." 197 N.J. Super. at 417, 484 A.2d at 1333.

about the central happenings" of the incident or incidents.[82] These special circumstances require flexibility in the application of confrontation clause requirements — especially the requirement of face-to-face meeting of the victim and the alleged abuser — to the use of videotaped child testimony.

Several state courts have ruled that the use of videotaped testimony of sexually abused children can satisfy the confrontation clause without physical meeting. For example, in *Jolly v. State*[83] and *Alexander v. State*[84] two Texas appellate courts upheld the convictions of defendants charged with aggravated sexual assault. Each court found that, as long as the child was available for in-court testimony, the videotaping statute did not violate the confrontation rights of the defendants, even if the victim did not meet the defendant face-to-face.[85]

While some courts rely on United States Supreme Court precedent for authorizing exceptions to the requirement of physical meeting, other courts read the same cases more narrowly. They argue that the use of videotapes violates the defendant's right to confrontation.[86] The Court, however, has not heard a case involving the admissibility of videotapes. Therefore these early cases may be weak precedent

82. *Sheppard*, 197 N.J. Super. at 419, 484 A.2d at 1333.

83. 681 S.W.2d 689 (Tex. 1984).

84. 692 S.W.2d 563 (Tex. 1985).

85. Other state courts have reached the same conclusion as the *Jolly* court. In *Sheppard*, the New Jersey Superior Court held that despite a lack of eye contact between the child witness and the defendant, where the defendant, judge, jury, and spectators could see and hear the child clearly on videotape, and where adequate opportunity for cross-examination was provided, the defendant was not denied his confrontation guarantee under the sixth amendment. In State v. Melendez, 135 Ariz. 390, 661 P.2d 654 (1982), an Arizona appellate court upheld the defendant's conviction for child molestation where the victim's testimony was videotaped. After hearing testimony from a clinical psychologist that the child would become uncommunicative if called to testify, the court found that the "circumstances justified the trial court's invocation of modern technology to meet the special needs of a witness and to afford the defendant his constitutional right of confrontation." 135 Ariz. at 393, 661 P.2d at 657. The Montana Supreme Court, while not mentioning the confrontation clause specifically, found that videotaped testimony of the defendant's five-year-old daughter about her sexual activities with the defendant, together with testimony by a psychologist that the daughter was capable of providing reliable testimony, was sufficient to convict the defendant. State v. A.D.M., 701 P.2d 999 (Mont. 1985). For a similar holding, see State v. Sullivan, 360 N.W.2d 418 (Minn. 1985) (defendant, charged with sexually abusing his four-year-old son, was not denied a fair trial by introducing a videotaped interview of the victim by a police officer into evidence).

86. Some courts have ruled that videotaped testimony may not be presented at trial. Courts which disallow the use of children's videotaped testimony do so generally on the premise that the defendant's right to confrontation cannot be limited by trauma suffered by the child witness. *See, e.g.*, Vasquez v. State, 145 Tex. Crim. 376, 380, 167 S.W.2d 1030, 1032 (1942).

Many of the opinions decrying the use of videotapes begin by noting that physical confrontation as an element of the defendant's sixth amendment right was explained as early as 1899 in Kirby v. United States, 174 U.S. 47 (1899). Soon afterwards, the court reiterated this requirement in Dowdell v. United States, 221 U.S. 325 (1911), in which confrontation was said to "secure the right of the accused to meet the witness face-to-face." 221 U.S. at 330. The United States Supreme Court's most recent statement regarding the right to confrontation, Ohio v. Roberts, 448 U.S. 56 (1980), holds that "the Confrontation Clause reflects a preference for face-to-face confrontation at trial." 448 U.S. at 63.

against the use of videotapes, especially given the "inability of nineteenth-century judges to foresee technological developments permitting cross-examination and confrontation without physical presence."[87]

Courts that narrowly construe Supreme Court precedent in forbidding videotapes frequently rely on *United States v. Benfield.*[88] The Eighth Circuit found that an adult witness' inability to see the adult defendant during her videotaped testimony abridged the defendant's confrontation right. The witness' deposition had been taken while the defendant observed by monitor. The defendant could communicate with his attorney by sounding a buzzer which halted the deposition, enabling counsel to leave the room and confer with the client. The court concluded that "in some undefined but real way recollection, veracity, and communication are influenced by face-to-face challenge."[89]

Benfield should not control, however, when the videotaped deponent is a child rather than an adult woman. Given the discussed differences in the ways adults and children process information,[90] it is apparent that the woman in *Benfield* may well have been able to withstand direct confrontation that a child could not.[91]

B. *Cross-Examination*

In *Douglas v. Alabama,* the Supreme Court noted that "[o]ur cases construing the [confrontation] clause hold that a primary interest secured by it is the right of cross-examination; an adequate opportunity for cross-examination may satisfy the clause even in the absence of physical confrontation."[92] This language suggests that cross-examina-

87. CHILD SEXUAL ABUSE AND THE LAW, *supra* note 46, at 188.

88. 593 F.2d 815 (8th Cir. 1979).

89. 593 F.2d at 821. Following *Benfield,* some state courts have held that preventing the defendant and the child victim-witness from seeing each other during the child's testimony denies the defendant the right of confrontation and forecloses "an effective method of determining veracity." Herbert v. Super. Ct., 117 Cal. App. 3d 661, 668, 172 Cal. Rptr. 850, 854 (1981). A Texas appellate court recently held unconstitutional the state's statute permitting videotaping children's testimony (TEX. CODE CRIM. PROC. ANN. art. 38.071 §§ (4)-(5) (Vernon Supp. 1987)) because it denied the defendant his right to a face-to-face meeting with the witnesses against him at trial. Powell v. State, 694 S.W.2d 416 (Tex. 1985). In *Powell,* the court opined that "the witnesses on the part of the State shall be personally present when the accused is on trial." 694 S.W.2d at 420, *citing* Kemper v. State, 63 Tex. Crim. 1, 138 S.W. 1025, 1038 (1911), *overruled on other grounds,* Robertson v. State, 63 Tex. Crim. 216, 142 S.W. 533, 546 (1911). The *Powell* court interpreted the statute to prevent the defendant from calling the child, whereas the *Jolly* and *Alexander* opinions interpreted the statute to mean that videotaping testimony may be permitted as long as the witness is available.

90. *See* subsection I.A.1. *supra.*

91. The New Mexico Court of Appeals in *Tafoya* explained that the young victims of sexual attacks could not perform in court: "If required to testify in court in front of defendant, each child would have to undergo therapeutic intervention to repair the damage brought by simply testifying in that setting." 729 P.2d at 1375.

92. 380 U.S. 415, 418 (1965). The major purpose of cross-examination is to test the percep-

tion is the crucial element of adequate confrontation.[93]

Since cross-examination is an essential element of confrontation, any restriction on its use should not be accepted without close scrutiny. However, cross-examination, like the defendant's right to a face-to-face meeting, is not absolute. The essence of cross-examination is that it tests the veracity of the witness' testimony. If that can be done reliably through other means, then traditional cross-examination is not essential.[94]

---

tion, memory, and credibility of witnesses. It also serves to test the witness' communication skills. 5 J. WIGMORE, EVIDENCE § 1395 (1974). Professor Wigmore has referred to cross-examination as the "greatest legal engine ever invented for the discovery of truth." *Id.* at § 1367.

93. Even when a witness is available to testify, the right of confrontation may be violated if the defendant cannot cross-examine the witness. *See generally* Ohio v. Roberts, 448 U.S. 56 (1980). In California v. Green, 399 U.S. 149 (1970), Justice White explained that an opportunity to effectively cross-examine was required to protect confrontation values. 399 U.S. at 165. *See also* Kentucky v. Stincer, 55 U.S.L.W. 4901, 4903 (U.S. June 16, 1987) ("the Confrontation Clause's functional purpose [is to ensure] a defendant an opportunity for cross-examination").

In *Roberts,* the Supreme Court formulated a test to determine the constitutional admissibility of uncross-examined out-of-court statements which would probably include videotaped testimony. Finding that a transcript of a preliminary hearing was admissible, the Court held that the prosecution must "demonstrate the unavailability of the declarant whose statement it wishes to use against the defendant." 448 U.S. at 65. Nevertheless, the Court most recently elaborated on this holding, explaining that "*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." United States v. Inadi, 106 S. Ct. 1121, 1126 (1986). In addition, the Court in Kentucky v. Stincer, 107 S. Ct. 2658, 2663 (1987), wrote that *Roberts* "held that an out-of-court statement by an unavailable witness was sufficiently reliable to be admitted at trial, consistent with the Confrontation Clause, because defense counsel had engaged in full cross-examination of the witness at the preliminary hearing where the statement was made."

A child may be declared unavailable because psychological trauma likely to be suffered while testifying will impair her ability to communicate. The District of Columbia Court of Appeals, though not referring to children, has suggested:

> [T]he following matters are relevant to the question of psychological unavailability: (1) the probability of psychological injury as a result of testifying, (2) the degree of anticipated injury, (3) the expected duration of the injury, and (4) whether the expected psychological injury is substantially greater than the reaction of the average victim of a rape, kidnapping or terrorist act. Just as in the case of physical infirmity, it is difficult to state the precise quantum of evidence required to meet the standard of unavailability. The factors should be weighed in the context of each other, as well as in the context of the nature of the crime and the pre-existing psychological history of the witness.

Warren v. United States, 436 A.2d 821, 830 n.18 (D.C. 1981).

In Washington v. State, 452 So. 2d 82 (Fla. 1984), a Florida appellate court would not require expert testimony to establish unavailability of a child witness:

> We do not accept Washington's argument that expert testimony must establish the necessity of videotaping testimony of a victim under the age of eleven. Section 918.17, Florida Statutes, gives the trial judge discretion to allow videotaping of a sexual battery victim eleven years of age or under when "[t]here is a substantial likelihood that such child will suffer severe emotional or mental strain if required to testify in open court." Here there is evidence that the victim was under a severe emotional strain, reacting physically and emotionally when informed of having to testify in court. It was within the trial judge's permissible discretion to have his testimony videotaped and presented.

452 So. 2d at 83.

94. *See* California v. Green, 399 U.S. 149, 166. While *Green* requires an opportunity to effectively cross-examine, such examination need not necessarily occur at trial. In fact, it could occur at the preliminary hearing. Justice White explains:

> If Porter had died or was otherwise unavailable, the confrontation clause would not have been violated by admitting his testimony given at the preliminary hearing — the right of

Because of the difficulty of cross-examining children, some courts have permitted the use of video technology.[95] For example, in *State v. Sheppard,* the court explained that using videotapes in such situations does not infringe the defendant's confrontation right because "there is, in fact, no curtailment of cross-examination, only a restriction upon the means of transmitting questions and answers."[96]

When used with children, traditional cross-examination results in unreliable testimony.[97] Another means should thus be employed to test the veracity of the child witness' testimony. As previously noted, a trained expert asking questions of the child, in a small environment, can elicit more reliable answers than would be delivered in court.[98] Such a procedure satisfies the truth-seeking function of cross-examination. The defendant and his attorney have the ability to ask questions of the child (through the expert), further preserving this vital element of confrontation. Because the defense counsel is able to pursue examination in whatever direction the court deems appropriate, the defendant's right to cross-examine the victim-witness is not violated.

C. *Demeanor*

The Supreme Court has also deemed it important that the factfinder view the witness' demeanor.[99] In *California v. Green,* for example, the Court suggested that viewing the witness aids "the jury

---

cross-examination then afforded provides substantial compliance with the purposes behind the confrontation requirement, as long as the declarant's inability to give live testimony is in no way the fault of the state.

399 U.S. at 166.

95. In Jolly v. State, 681 S.W.2d 689 (Tex. 1984), the court admitted a videotaped statement of the six-year-old witness over the defendant's cross-examination objections. The court noted that the "trial court has broad discretionary powers regarding admissibility of recordings." 681 S.W.2d at 696. *See also* Alexander v. State, 692 S.W.2d 563 (Tex. 1985) (court ruled against defendant's objections that the admission of videotape into evidence denied him the right to "effective and contemporaneous cross-examination" of the witness and thus denied him confrontation right); Tolbert v. State, 697 S.W.2d 795 (Tex. 1985) (intermediate appellate court ruled that the sixth amendment does not require that defendant be provided an opportunity to conduct cross-examination simultaneously with the taking of the child's videotaped statement); State v. Rogers, 692 P.2d 2 (Mont. 1984) (Montana Supreme Court dismissed the defendant's objections, characterizing videotape of child witness interview as the "best evidence" of a transcript of the interview already admitted into evidence); State v. Reid, 114 Ariz. 16, 559 P.2d 136 (1976) (videotaped testimony is less offensive to the defendant's right of confrontation than testimony from a preliminary hearing), *cert. denied,* 431 U.S. 921 (1977); State v. Melendez, 135 Ariz. 390, 392, 661 P.2d 654, 656 (1983) (where a six-year-old victim would have become uncommunicative if called to testify, the court ruled that videotape procedure "can, when properly used, satisfy the confrontation clause of the Sixth Amendment"). *But see* Herbert v. Super. Ct., 117 Cal. App. 3d 661, 172 Cal. Rptr. 850 (1981), where the court found that "the right [of confrontation] is not limited to the trial stage of criminal proceedings, but extends to any phase in which witnesses are called for questioning." 117 Cal. App. 3d at 661, 172 Cal. Rptr. at 850.

96. 197 N.J. Super. at 435, 484 A.2d at 1344.

97. *See* notes 44-47 *supra* and accompanying text.

98. *See* section I.C. *supra. See also* Note, *supra* note 65, at 141.

99. *See Green,* 399 U.S. at 158; Barber v. Page, 390 U.S. 719, 721, 725 (1968); *Herbert,* 117 Cal. App. 3d at 665, 172 Cal. Rptr. at 855. *See generally* FED. R. EVID. 801 advisory commit-

in assessing his credibility."[100] Yet, while demeanor evidence is important, the Court in *Green* indicated that a defendant's confrontation rights are not necessarily violated if some demeanor evidence is "forever lost" to the jury.[101]

Additionally, the presentation of videotaped testimony easily allows the factfinder to see the demeanor of the witness. In fact, this is the element of confrontation best met by videotaped testimony. Several state and federal courts have found that videotaped evidence captures enough demeanor to satisfy the requirements of the confrontation clause. For example, in *People v. Moran*[102] the court ruled that the process of presenting preliminary hearing testimony by videotape "does not significantly affect the flow of information to the jury," thus the videotape satisfied the "broad purposes" of the confrontation clause.[103] Accordingly, the *Moran* court ruled that videotapes were a fair and reliable medium for the presentation of evidence at trial.[104]

The Court of Appeals for the Ninth Circuit also recognized the impact of videotaped testimony when it reversed the conviction of an alleged child molester because the replaying of a videotape during jury deliberation placed prejudicial emphasis on the complaining witness' testimony. Judge Skopil, writing for the court, argued that:

> Videotaped testimony is unique. It enables the jury to observe the demeanor and to hear the testimony of the witness. It serves as the functional equivalent of a live witness. . . .
>
> . . . .
>
> Permitting the replay of the videotaped testimony in the jury room during deliberation was equivalent to allowing a live witness to testify a

tee's introductory note; J. COOK, CONSTITUTIONAL RIGHTS OF THE ACCUSED, §§ 18:7-:18 (2d ed. 1986); Read, *The New Confrontation-Hearsay Dilemma*, 45 S. CAL. L. REV. 1 (1972).

100. 399 U.S. at 158. In *Herbert*, 117 Cal. App. 3d at 671, 172 Cal. Rptr. at 863, the court noted the corollary benefit of requiring face-to-face confrontation was that the jury could watch the witness testify. Professor Wigmore explains that a witness should testify in the presence of the fact finder because "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." 5 J. WIGMORE, *supra* note 92, at § 1395 (emphasis in original).

101. 399 U.S. at 160. Wigmore explains that the advantage of seeing the witness testify is not regarded as essential, *i.e.*, it may be dispensed with when not feasible. 5 J. WIGMORE, *supra* note 92, at § 1395.

102. 39 Cal. App. 3d 398, 114 Cal. Rptr. 413 (1974).

103. 39 Cal. App. 3d at 410-11, 114 Cal. Rptr. at 420.

104. The court explained: "[T]he advantages and disadvantages of the 'filtering' effect of the medium fall equally on both sides. Therefore, its use is 'fair' and there is no inherent unfairness . . . . Video tape is sufficiently similar to live testimony to permit the jury to properly perform its function." 39 Cal. App. 3d at 410, 114 Cal. Rptr. at 420. *See also* Kansas City v. McCoy, 525 S.W.2d 336 (Mo. 1975) (closed-circuit television arrangement did not significantly affect the defendant's ability to question and the jury's opportunity to observe the witness); State v. Sheppard, 197 N.J. Super. 411, 484 A.2d 1330 (1984) (videotape will present adequate demeanor evidence). *See generally* Bermant, Chappell, Crockett, Jacoubovitch & McGuire, *Juror Responses to Prerecorded Videotape Trial Presentations in California and Ohio*, 26 HASTINGS L.J. 975 (1975).

second time in the jury room.[105]

The majority noted that replaying the videotape in the jury room was not analogous to replaying an audiotape because the ability to see the witness was particularly prejudicial.[106] The court thus recognized that the ability of the factfinder to view the demeanor of the witness is not curtailed by using videotapes to present the child witness' testimony.

CONCLUSION

The elements of confrontation — face-to-face meeting, cross-examination, and the opportunity of the factfinder to view the demeanor of the witness — are geared toward the two goals of ensuring reliable testimony and preventing anonymous trials. These elements should be satisfied in the usual case. However, when a child is the victim of, or the witness to, a traumatizing event, references to the "usual case" no longer apply.

Psychological literature, coupled with the empirical work undertaken by the authors, indicate that videotaped testimony of children best serves children and the judicial process. Children who must confront the accused in court are prone to give less accurate testimony or no testimony at all because of their trauma. The videotaping procedures suggested for taking a child's testimony minimize her psychological trauma and concurrently maximize the completeness and the accuracy of her testimony. These procedures also afford the defendant the opportunity to test the veracity of the witness, while permitting the factfinder to view the witness' demeanor. Although face-to-face meeting is forfeited, so is the intimidation that is inherent in such a meeting. By using videotapes, both children and society benefit, and the defendant is afforded a fair trial.[107]

— Paula E. and Samuel M. Hill

105. United States v. Binder, 769 F.2d 595, 600, 601 n.1 (9th Cir. 1985). Federal appellate court decisions concerning the use of videotapes to present child testimony are rare.

106. 769 F.2d at 601, n.1. The replaying of audiotapes for the jury has been permitted by the Ninth Circuit. *See* United States v. Puchi, 441 F.2d 697, 702 (9th Cir.), *cert. denied,* 404 U.S. 853 (1971); *see also* United States v. Sims, 719 F.2d 375, 379 (11th Cir. 1983), *cert. denied,* 465 U.S. 1304 (1984).

107. Whitcomb, Shapiro and Stellwagen explain that attempts to make the child more comfortable, either physically or psychologically, can only serve to facilitate due process and a fair trial. WHITCOMB, *supra* note 11, at 18-20.