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Criminal Procedure - Presumed Guilty: The Use of Videotaped and Closed-Circuit Televised Testimony in Child Sex Abuse Prosecutions and the Defendant's Right to Confrontation - Coy v. Iowa

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CRIMINAL PROCEDURE—PRESUMED GUILTY: THE USE OF VIDEOTAPED AND CLOSED—CIRCUIT TELEVISED TESTIMONY IN CHILD SEX ABUSE PROSECUTIONS AND THE DEFENDANT'S RIGHT TO CONFRONTATION—*Coy v. Iowa*

INTRODUCTION

A young California physician struggles to avoid bankruptcy and pay over $48,000 in legal fees after he is indicted for the sexual abuse of seventeen teenaged girls following his routine physical examination of the girls. The teenagers would later admit they made up their stories.[1] In Atlanta, a well-respected television meteorologist was forced off the air after he is indicted for allegedly soliciting sodomy from three young boys in a neighboring town. A jury would acquit the weathercaster, dismissing the boys' allegations as nothing more than a prank. Nevertheless, the weathercaster's long career in Atlanta would be over. He would soon leave the city in search of new employment.[2]

Few will argue that child sexual abuse in this country is a growing problem. Estimates of "child mistreatment" vary greatly, ranging from 500,000 to as much as 4.5 million cases each year.[3] While an actual number may be impossible to determine, studies agree that the number of reported cases of child sexual abuse is increasing at an alarming rate.[4] Some authorities maintain that the number of unreported cases is more than triple the number of the cases reported.[5] Regardless of the statistics, the problem of child sexual abuse has captured the attention of politicians, the media,

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1. Renshaw, *When Sex Abuse is Falsely Charged*, 10 The Champion 8 (1986). The physician had administered routine chest and inguinal hernia examinations of the girls for school sports. Even though the girls later admitted their stories were maliciously made, the prosecution kept the physician's name in the headlines for almost two years.

2. Atlanta Constitution, Dec. 10, 1986, at B-11, col. 2, and Dec. 18, 1986, at C-1, col. 5.

3. ABA Guidelines for the Fair Treatment of Child Witnesses in Cases Where Child Abuse is Alleged, at 7, (1985).

4. S. Rep. No. 123, 99th Cong., 2nd Sess., at 1971 (1986).

5. *Id.* at 1970. Reasons for this underreporting range from the variations within state statutes defining "child abuse" to the fact that child sexual abuse often involves family members.

and the public.

Unfortunately, this barrage of media and political attention has led to a sort of "child abuse hysteria."[6] In response to this problem, federal, and state lawmakers have enacted various programs funding research in the area of child abuse, and establishing treatments centers and shelters for sex abuse victims.[7] Many of these programs also call for improved reporting of all suspected incidents of child sexual abuse.[8] This, in turn, has led many to "rush to accuse, search, arrest and condemn" the suspected child abuser.[9]

Although many cases are dismissed as unfounded,[10] more and more cases involving child sexual abuse are coming to trial.[11] Prosecutors and defense counsel agree that child sex abuse cases are among the most difficult to try.[12] Often the abused child is the state's only key witness to the crime. Without this testimony, the prosecution often fails.[13] Advocates of children's rights push for legislation to bring about hasty, more successful prosecutions of the child sexual offender, while they call at the same time for added protection for the child from the trauma of repeated testimony as they go through the criminal justice system.[14]

In recent years, many states have passed legislation designed to make it easier to convict those accused of child sexual abuse, while simultaneously attempting to shield the child witness from numerous courtroom appearances. Almost forty states now have statutes allowing children to testify in sex abuse prosecutions via

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6. Renshaw, *supra* note 1, at 9. The author describes the "evolution of a sex abuse industry" with millions of dollars being spent annually on everything from television documentaries to the manufacture of anatomically correct dolls. Even many "Saturday morning" cartoon programs now carry sex abuse story lines.

7. S. Rep. No. 123.

8. *Id.*

9. Renshaw, *supra* note 1, at 8-10. The author describes the rash of reportings as a modern day "witch hunt."

10. Besharov, *Child Abuse and Neglect Reporting and Investigation: Policy Guidelines for Decision Making*, 22 FAM. L. Q. 1 (1980). Nationwide, approximately sixty percent of all reported incidents of child sexual abuse are unsubstantiated.

11. Upshaw, *Children on the Witness Stand*, D. Mag., June 1988, 44, 46. *See also* 1984 (3) JUDGES JOURNAL 1, 55. (over half of the sexual assault cases actually go to trial).

12. Upshaw, *supra* note 11, at 46.

13. Avery, *The Child Abuse Witness: Potential for Secondary Victimization*, 7 CRIM. JUST. J. 1 (1983). *See also infra* note 109, at 472.

14. *See supra* note 3, at 13.

closed circuit television,[15] by the admission of videotaped testimony taken prior to trial,[16] or both.[17] While successful at protecting the child witness, these statutes present serious obstacles for the criminal defendant in a child sexual abuse case.

This Note proposes that those statutes which permit admission of videotaped testimony and most uses of closed-circuit televised testimony violate a criminal defendant's sixth amendment right to "confront his accusers."[18] In *Coy v. Iowa*,[19] the United States Supreme Court recently held that one state's practice of shielding the defendant from the view of the child witness during the child's testimony violated the defendant's right to confrontation.[20] Following the Court's analysis, this Note discusses the various problems arising from the use of videotaped or closed-circuit televised testimony. Concluding that the admission of such testimony is not a constitutionally permissable substitute for face to

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15. *See* GA. CODE ANN. § 17-8-55 (Supp. 1987); HAW. R. EVID. 616 (d) (1985); MD. CTS. & JUD. PROC. CODE ANN. § 9-102 (Supp. 1986); N.J. STAT. ANN. § 2A: 84-A-32.4 (West Supp. 1987); N.Y. CRIM. PROC. LAW § 65.00 - .30 (McKinney Supp. 1987).

16. *See* ALASKA STAT. § 12.45.047 (1984); ARK. STAT. ANN. §§ 43-2035 to 2037 (1985); COLO. REV. STAT. § 18-3-413 (1986); DEL. CODE ANN. tit. 11 § 3511 (Supp. 1986); ME. REV. STAT. ANN. tit. 15, § 1205 (West Supp. 1987); MO. REV. STAT. §§ 491.675-93 (Vernon Supp. 1987); MONT. CODE ANN. §§ 46-15-401, 402 (1987); NEV. REV. STAT. §§ 174.227-31 (1985); N.H. REV. STAT. ANN. § 517.13 (a) (Supp. 1987); N. MEX. STAT. ANN. § 30-9-17 (Supp. 1987); OHIO REV. CODE ANN. § 2907.41(c) (Anderson 1987); R.I. GEN. LAWS § 11-37-13.2 (Supp. 1986); S.C. STAT. § 16-3-1530(G) (Law Co-op 1986); S.D. CODIFIED LAWS § 23A-12-9 (Supp. 1987); TENN. CODE ANN. §§ 24-7-116 & 37-1-609 (c) (Supp. 1987); WIS. STAT. § 967.04 (West Supp. 1987).

17. *See* Ala. Code §§ 15-25-2 & 3 (1985); ARIZ. REV. STAT. ANN. §§ 13-4251-53 (Supp. 1986); CAL. PENAL CODE §§ 1346-7 (West Supp. 1988); CONN. GEN. STAT. ANN. § 54-86 (g) (West Supp. 1988); FLA. STAT. §§ 92.53-54 (West Supp. 1987); IND. CODE ANN. § 35-37-4-8 (b) (Burns Supp. 1988); KAN. STAT. ANN. §§ 22-3433-34 (Supp. 1988); KY. REV. STAT. ANN. § 421.350 (Bobbs-Merrill Supp. 1986); LA. REV. STAT. ANN. §§ 15:440.01-440.6 (West Supp. 1988); MASS. ANN. LAWS ch. 278 § 16D (Michie/Law Co-op Supp. 1987); MINN. STAT. ANN. § 595.02 (West Supp. 1987); MISS. CODE ANN. §§ 13-1-401 to 415 (Supp. 1986); OKLA. STAT. ANN. tit. 22 § 753 (West Supp. 1987); PA. CONS. STAT. ANN. tit. 42 §§ 5981-88 (Purdon Supp. 1987); TEX. CRIM. PROC. CODE ANN. § 38.071 (Vernon Supp. 1987); Utah Code Ann. § 77-35-15.5 (Supp. 1987); VT. R. EVID. 807 (Supp. 1986).

18. U.S. Const. Amend. VI The sixth amendment guarantees "In all criminal prosecutions the accused shall enjoy the right to . . . be confronted with the witnesses against him."

19. 108 S. Ct. 2798 (1988).

20. *Id.* at 2803.

face, physical confrontation, this Note will offer alternative solutions to the problem of protecting the child witness without infringing the constitutional rights of the criminal defendant.

ANALYSIS

"The Sixth Amendment gives a criminal defendant the right to be confronted with the witnesses against him. This language comes to us on faded parchment."[21] The right to confront one's accuser is well founded in both English and American common law, and can be traced back to early Roman law.[22] Most states which allow the use of closed-circuit or videotaped testimony do so with the express purpose of avoiding confrontation between the child witness and the criminal defendant.[23] Under the guise of public policy, these states have tipped the scales of justice in favor of protecting the child witness from the trauma of a courtroom appearance. In doing so, those jurisdictions have sacrificed the defendant's constitutional right to confront his accuser. Most challenges to such statutes center around interpretation and application of the "confrontation clause" of the sixth amendment.[24]

A. The Confrontation Clause

The right to confrontation is essential in "promoting reliability in a criminal trial."[25] Until recently, Supreme Court opinions dealing with the confrontation clause addressed only the issue of

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21. *Id.* at 2800, (quoting California v. Green, 399 U.S. 149, 174 (1970) (Harlan, J., concurring)).

22. *Id.*

23. At least twenty-one states stipulate that the defendant must not be seen by the child during the child's testimony: Arizona, California, Connecticut, Delaware, Florida, Illinois, Indiana, Kansas, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, New Mexico, Nevada, Oklahoma, Pennsylvania, Rhode Island, Tennessee, Texas, and Utah. *See supra* notes 15-17.

24. *See generally* State v. Jones, 367 S.E.2d 139 (N.C. App. 1988); Commonwealth v. Ludwig, 366 Pa. Super. 361, 531 A.2d 459 (1987); Miller v. State, 517 N.E.2d 64 (Ind. 1987); Wildermuth v. State, 310 Md. 496, 530 A.2d 275 (1987); State v. Johnson, 240 Kan. 326, 729 P.2d 1169 (1986); State v. Shepard, 197 N.J. Super. 411, 484 A.2d 1330 (1984).

25. Kentucky v. Stincer, 107 S. Ct. 2658 (1987). The Court upheld conviction of the defendant for the sexual abuse of two minor girls, rejecting defendant's argument that his right to confrontation was violated by his exclusion from a competency hearing for the young witnesses.

cross-examination or the admissibility of hearsay statements.[26] In *California v. Green*,[27] the Court listed three reasons for the sixth's amendment's confrontation clause: first, to ensure the defendant an opportunity to effectively cross-examine and impeach the witnesses against him; second, the right to face-to-face confrontation with the witnesses against him; and third, the importance of allowing the trier of fact to observe the witness' demeanor while testifying under oath.[28] The *Green* analysis raises serious questions as to whether any statute intended to avoid actual, physical confrontation between the criminal defendant and the accuser can be constitutional.[29]

B. The Right to Cross-Examination

Cross-examination is the "greatest legal engine ever invented for the discovery of truth."[30] Cross-examination, the "functional" portion of the confrontation clause, provides the criminal defendant with the opportunity to question and impeach the testimony of every witness against him.[31] The emphasis placed on cross-examination prevents conviction by *ex parte affidavits* and forces the state to present at trial all witnesses against the defendant.[32] Most states uphold the constitutionality of their videotape or closed-circuit testimony statutes as long as cross-examination of the child witness is permitted.[33]

Even though many states restrict or prohibit the defendant's presence during examination of the witness,[34] the courts uphold

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26. *Coy*, 108 S. Ct. at 2808, citing Ohio v. Roberts, 448 U.S. 56 (1980); Davis v. Alaska, 415 U.S. 308 (1974); Dutton v. Evans, 400 U.S. 74 (1970); Delaware v. Van Arsdall, 475 U.S. 673 (1963). The Court explains the reason is because of the room for doubt created by these areas, while the language concerning face to face confrontation is clear.

27. 399 U.S. 149 (1970).

28. *Id.* at 157, 158.

29. *See supra* notes 22 and 23 and accompanying text.

30. *California*, 399 U.S. at 158, quoting 5 J. WIGMORE ON EVIDENCE § 1367, p. 29 (1940).

31. *See* Mattox v. United States, 156 U.S. 237, (1895).

32. *See* Graham, *Child Sexual Abuse Prosecutions: The Current State of the Art*, 40 U. MIAMI L. REV. 1, 64 (1985). The Framers intended to protect the accused from the then common practice of convicting a defendant solely on the basis of *affidavits* and depositions taken from unknown or unseen accusers. Reference is often made to the trial and conviction of Sir Walter Raliegh.

33. *See infra* note 35.

34. *See supra* notes 15-17.

the statutes as long as the particular statute allows defense counsel to question the child.[35] Several states allow at least some form of communication between the defendant and his attorney during cross-examination.[36] These states uphold the constitutionality of these statutes, in spite of the fact that it is the "traumatic" experience of cross-examination the state seeks to protect the child from.[37]

Even though these statutes may meet the minimum requirements of confrontation established by *Green*,[38] they seriously impair a defendant's right to be an active participant in his defense.[39] Communication between the defendant and his counsel is impeded, thus impeding the defendant's right to an effective cross-examination. Even where some form of audio communication between counsel and the defendant is established[40] the defendant is prevented from any non-verbal or written conference with counsel as would normally take place in an open courtroom.[41] This limitation of communication prevents the defendant from confronting the witness even through counsel.[42]

C. *Face-to-Face Confrontation*

"We have never doubted . . . that the Confrontation Clause guarantees the defendant a face to face meeting with witnesses ap-

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35. *See supra* note 24. *See also* State v. Cooper, 291 S.C. 351, 353 S.E.2d 451 (1987); State v. Tafoya, 105 N.M. 117, 729 P.2d 1371 (Ct. App. 1986); State v. Jeffries, 55 N.C. App. 269, 285 S.E.2d 307 (1982). *But cf.* Long v. State, 694 S.W.2d 185 (Tex. Ct. App. 1985), *cert. denied* 108 S. Ct. 1301 (1988).

36. *See* LA. REV. STAT. ANN. § 15:283 (B) (West Supp. 1987); State v. Daniels, 484 So.2d 941 (La. Ct. App. 1986); People v. Algarin, 129 Misc.2d 1016, 498 N.Y.S. 977 (N.Y. Sup. Ct. 1986).

37. Arizona, Oklahoma, and Utah take this problem a step further. Videotaped testimony of the child witness is admissable only if taken outside the presence of the defendant or counsel. *See supra* note 23.

38. *See supra* note 28 and accompanying text.

39. United States v. Benfield, 593 F.2d 815, 821 (8th Cir. 1979). The court suggested that the confrontation clause "contemplates the active participation of the accused at all stages of the trial. . ." The court also noted that exclusion of the defendant may infringe upon his right to *pro se* representation.

40. *See supra* note 36.

41. Comment, *"Face-to Television Screen- to Face": Testimony by Closed-Circuit Television in Cases of Alleged Child Abuse and the Confrontation Right*, 76 KEN. L.J. 273, 290 (1987).

42. *See* State v. Warford, 389 N.W.2d 575, 582 (Neb. 1986).

pearing before the trier of fact."[43] The Supreme Court therefore reversed the conviction of an Iowa man charged with sexually molesting two thirteen-year old girls.[44] At trial, a large screen was placed between the defendant and the girls while testifying, in accordance with Iowa law.[45] The screen was brought into the courtroom in full view of the jury. Once in place, the courtroom lights were dimmed as four bright spotlights were focused on the screen, providing the only light in the courtroom. The defendant, as a result, had only a dim view of the witnesses, while the girls view of the defendant was completely blocked.[46]

Previous court opinions which addressed the confrontation clause requirement of "face to face confrontation," have limited their scope to the importance of allowing the defendant to view, or face the witnesses against him.[47] Many states avoid this problem by allowing the defendant to view the child witness from behind a two-way mirror, or by watching the one-way closed-circuit broadcast of the child's testimony.[48]

The majority in *Coy* did not specifically rule on these statutes permitting videotaped or closed-circuit televised testimony.[49] Justice Scalia, writing for the majority, also stressed the importance not only of the defendant facing the witnesses against him, but the necessity of the witnesses facing the accused while testifying:

> The State can hardly gainsay the profound effect upon a witness of standing in the presence of the person the witness accuses, since that is the very phenomenon it relies upon to establish the potential "trauma" that allegedly justified the extraordinary pro-

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43. *Coy*, 108 S. Ct. at 2800, citing Kentucky v. Stincer, 107 S. Ct. at 26 (1987) (Marshall, J., dissenting). *See also* Pennsylvania v. Ritchie, 480 U.S. 39, 51 (1987). The court described the right to face to face confrontation as the "core of values" furthered by the sixth amendment.

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

45. *See* IOWA CODE ANN. § 910A.3 (1) (West Supp. 1985).

46. 42 CRIM. LAW REP. 4121 (1988) (description provided by Paul Papak, representing the defendant in oral arguments before the Supreme Court, Jan. 13, 1988. According to Mr. Papak, the entire procedure created an"eerie effect" in the courtroom).

47. *See* Kirby v. United States, 174 U.S. 47 (1899) (". . . witnesses . . . upon whom he [the defendant] can look while being tried . . . .").

48. *See supra* notes 15-17. Iowa, *supra* note 45 for example, requires that the child be told the defendant is watching and can hear the testimony.

49. *Coy*, 108 S. Ct. at 2804 (O'Connor, J. concurring) "Nothing in today's decision necessarily dooms such efforts by state legislatures to protect child witnesses."

> cedure in the present case. That face to face presence may, unfortunately, upset the truthful rape victim or abuse child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult. It is a truism that constitutional protections have costs.[50]

The Court elaborated on the meaning of face to face confrontation within our criminal justice system. Justice Scolia argued that it is always more difficult to "lie about a person to his face," and that a statement made "behind a man's back" is less believable.[51] Thus, face to face confrontation serves to promote increased reliability in the testimony presented.[52]

Advocates of the videotape and closed-circuit testimony laws contend true face to face confrontation is unnecessary to insure truthfulness among child witnesses. The most common argument is that "children do not lie about such things as sexual abuse."[53] The fact remains, however, that over sixty percent of all reported cases of child abuse in 1986 were dismissed as unfounded.[54] While children may not intentionally lie, they do often enjoy fantasy, and may at times confuse the facts with those fantasies.[55] Children, who are placed in a stressful situation or a new environment, may suffer from short-term memory loss or become confused by the questioning.[56] The child may therefore be lead into answering questions one way or another.[57] Children are highly susceptible to suggestion and may often respond to a question in a manner they

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50. *Id.* at 2802.

51. *Id.* at 2800 quoting Acts 25:16 "it is not the manner of the Romans to deliver any man up to die before the accused has met his accusers face to face . . ."; and Shakespeare, Richard II, act 1, sc. 1 "Then call them to our presence- face to face, and frowning brow to brow, ourselves will hear the accuser and the accused freely speak. . . ."

52. *See* Benfield, 593 F.2d at 821. *See also* Lee v. Illinois, 476 U.S. 530, 540 (1986) (physical confrontation between parties promotes a sense of fairness).

53. Renshaw, *supra* note 1, at 9.

54. *See supra* note 10.

55. Frost, *"Weird Science" and Child Sexual Abuse Cases*, 10 The Champion 17, 18 (1986). Some specialists point to the high number of "copy cat" reports of sexual abuse among friends and playmates of alleged sexual abuse victims. The author also points to studies which indicate children are sexually aware at much earlier ages, due to exposure to movies, television and music videos. *See also* 1984(3) JUDGE'S JOURNAL 1, 55.

56. Goodman, *Child Sexual Assault: Children's Memory and the Law*, 40 U. MIAMI L.R. 181, 203-204 (1985).

57. *Id.*

believe pleases the adult.[58] A smile from the adult may be perceived by the child as the "right" answer, a frown or serious look as "wrong."[59] It is therefore important that the jury be allowed to view the child witness as well as counsel during the testimony.[60]

D. Observation of Witness Demeanor

The Supreme Court has emphasized the importance of the jury and judges' ability to observe the demeanor of the witness faced against the accused, under the pressure of cross-examination.[61] Observation of the witness means more than simply hearing the words spoken. It involves the perception of all verbal and non-verbal communication of the witness.[62] Testimony delivered via closed-circuit television or videotape interferes with the "relationship between the attorneys, the witness and the trier of fact."[63] The very nature of viewing a witness through a television monitor limits the jury's observation of the witness.[64]

Videotaped testimony is often taken in the presence of only two or three persons: a court-appointed interviewer posing questions presented by both attorneys; a support person, such as a parent or guardian; and the camera operator.[65] Therefore, those present in the room at the time the testimony is recorded shape the jury's view of the witness' demeanor.[66] The camera operator controls the jury's observation of the witness' body movements, facial expressions, or other non-verbal communications.[67] Where the child witness' testimony may be so influenced by other persons present during the questioning, a restriction of the jury's observa-

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58. Lees-Haley, *Innocent Lies, Tragic Consequences: The Manipulation of Child Testimony*, 1987(3) TRIAL DIPLOMACY J. 23, 24 (1987).

59. *Id.*

60. Yengich, *Child Sexual Abuse Cases*, 1986 UTAH L. REV. 443.

61. *Coy*, 108 S. Ct. at 2800 citing Kentucky v. Stincer, 107 S. Ct. at 2668 (Marshall, J., dissenting).

62. Yengich, *supra* note 46, at 445. *See also* Herbert v. Superior Court, 117 Cal. App.3d 661, 19 A.L.R.4th 1276, 1282 (1981).

63. *Id.*

64. *See* Hocheiser v. Superior Court, 208 Cal. Rptr. 273, 279 (1984).

65. *See* TEX. CODE CRIM. PRO. ANN. § 38.071 (Vernon Supp. 1987). *See generally supra* notes 23, and 15-17.

66. *Hocheiser*, 208 Cal. Rptr. at 279. The jury's perception of the witness may be affected by the focus or angle of the camera. The camera operator has control over when to "fade in" for a close up, or provide a full view of the witness.

67. *See* State v. Vess, 157 Ariz 236, 756 P.2d 333 (Ariz. App. 1988). *See also* Yengich, *supra* note 58, at 445.

tion to only the face of the child denies the defendant his right to confrontation.[68]

E. Other Problems with Videotaped or Closed-Circuit Testimony
Presumption of Innocence

This country's criminal justice system rests on the principle that the defendant is presumed innocent until proven guilty and that the state must prove the defendant's guilt beyond a reasonable doubt. The notion that a defendant has done "something so wrong" such that the court must protect his accuser by keeping the witness out of the courtroom, away from the defendant, undercuts the presumption of innocence.[69]

In *Coy*, counsel for the defendant argued in oral argument the "subconscious effect" of the screening device could not be erased merely by a judge's instruction to the jury to disregard any inference of the defendant's guilt from use of the screen.[70] The Court elected not to address the issue of prejudicial inference and remanded the case to the state court for consideration of whether the error was harmless.[71]

Critics of the videotape and closed-circuit testimony laws argue that the use of video technology in this manner shifts the burden of proof to the defendant.[72] The jury may give extra weight to the child testimony delivered via closed-circuit or videotape television.[73] The credibility of the witness may be "enhanced by [a] phenomenom called status-conferral."[74] Studies indicate that some viewers tend to perceive what they see on television as accurate.[75]

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68. *Hocheiser*, 208 Cal. Rptr. at 279.

69. Yengich, *supra* note 51, at 444, citing *In re* Winship, 397 U.S. 358, 361-364 (1970).

70. *See supra* note 46. *See also* Bruton v. United States, 391 U.S. 123, 135 (1968) (discussing the effectiveness of jury instructions against human nature).

71. 108 S. Ct. at 2803.

72. Upshaw, *supra* note 11, at 46. Defense attorney Tom Hill, speaking at a panel discussion sponsored by the Psychiatric Institute of Fort Worth (Texas), testified that the prosecution in a child sexual abuse case has an "automatic edge" because of public concern for the child "victim." Introduction of videotaped testimony strengthens that edge.

73. *See Hocheiser*, 208 Cal. Rptr. at 279.

74. *Id. See also* Graham, *supra* note 26, at 75. "It is recognized that the media bestows prestige and enhances the authority of an individual by legitimizing his status." *Id.*

75. *See* Potter, *Perceived Reality and the Cultivation Hypothesis*, 30 J. BROADCASTING AND ELECTRONIC MEDIA 159, 162 (1986). The author explains the

Enhancement of witness credibility in this manner detrimentally affects the may be as harmful to the defendant's presumption of innocence the same as the use of physical restraints during trial.[76]

Courts traditionally have held that the use of physical restraints on a criminal defendant during trial affects the jury's impression of the defendant's guilt or innocence.[77] Seeing a defendant in handcuffs, leg irons or other restraints suggests to the jury that the defendant is "dangerous" or is "not to be trusted."[78] The use of such restraints, absent a showing of necessity, has been held violative of a defendant's right to a fair trial.[79] The same is true with the use of video-taped or closed-circuit televised testimony. Separating the defendant from his accusers, without a showing of necessity, denies the defendant his right to a fair and impartial trial.[80]

F. Admission under Hearsay Exception

The defendant's rights to a fair trial and to confrontation guaranteed under the sixth amendment are not "absolute" and may occasionally give way to other compelling state interests.[81] The "hearsay exception" to the confrontation clause was created to permit *ex parte* testimony in cases where an essential witness was unavailable to testify at trial. Admission of video-taped or closed-circuit televised testimony is typically allowed under the hearsay exception rule.[82] This rationale fails for two reasons.

First, many states permit admission of the videotaped deposition of the child witness only if the child remains available to testify in open court.[83] These states, in effect, defeat their own pur-

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"Magic Window" theory by which many viewers believe that what they see on television as an "accurate, unbiased, complete and objective picture of the way it is."

76. *Hocheiser*, 208 Cal Rptr. at 279.

77. *See generally* Annotation, *Propriety and Prejudicial Effect of Gagging, Shackling or Otherwise Physically Restraining Accused During Course of State Criminal Trial*, 90 A.L.R.3d 17, § 4, at 33 (1979).

78. *Id.*

79. *Id* at 36. The "showing of necessity" usually refers to situations where the defendant has acted violently or has in some way threatened the witness or disrupted the court. Typically, no action is taken to restrain the defendant until after the disruptive behavior has occured.

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

81. *See Mattox*, 156 U.S. 237 (1895); Douglas v. Alabama, 380 U.S. 415 (1965), Ohio v. Roberts, 448 U.S. 56 (1980).

82. *See generally supra* notes 15-17.

83. *See* ARIZ. REV. STAT. ANN. §§ 13-4251-53(A) (Supp 1986); LA. REV. STAT.

pose of protecting the child witness from the "trauma" of a courtroom appearance. In fact, they may add to this trauma by subjecting the child to the additional stress of having to recant their previously recorded testimony.[84]

Other states attempt to avoid this problem by admitting videotaped or closed-circuit testimony only if the child has been declared "unavailable." under the hearsay exception rule.[85] This presents a second problem. These states allow the witness to be declared unavailable by a statutorily created "presumption of trauma" for child witnesses under a specified age.[86] No specific showing of necessity is required by these states before a court may admit the child's out-of-court testimony.[87]

The Supreme Court in *Coy* rejected this "presumption of trauma," stating that any exception to the confrontation clause must be "firmly . . . rooted in our jurisprudence."[88] A statute "passed in 1985, [can] hardly be viewed as firmly rooted."[89] At present, no conclusive studies exist indicating that courtroom testimony will be traumatic to a child, at least no more traumatic or stressful than for any other witness.[90] A child's mere reluctance or fear of testifying in front of the defendant should never be suffi-

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ANN. §§ 15:440.01-.06 (West Supp 1988); OKLA. STAT. ANN. TITLE 22 § 752 (West Supp 1987); UTAH CODE ANN. § 77-35.15.5(2) (Supp 1987).

84. Yengich, *supra* note 60. The objective of defense counsel in situations such as this would be to impeach the child's testimony by getting a different answer from the child on the stand than that on the tape.

85. *See* R.I. GEN. LAWS §§ 13-37-13.1 7 13.2 (Supp 1986); S.C. STAT. § 16-3-1530(G) (Lawyer Co-op 1986); WIS. STAT. § 967.04 (West Supp 1987).

86. Thirty-two states specify an age at which a child witness may be declared unavilable. The majority of these states define "child" as between the ages of 10 and 17. *See generally supra* notes 15-17. *See also infra* note 90 and accompanying text.

87. *Id.*

88. 108 S. Ct. at 2803.

89. *Id.* (citing Bourjaily v. United States, 107 S. Ct. 2775 (1987)).

90. Melton, *Procedural Reforms to Protect Child Victim/Witnesses in Sex Offense Proceedings*, Child Sexual Abuse and the Law, A Report of the ABA Natinal Legal Resource Center for Child Advocacy and Protection, at 194 (1984). *See also* Selkin, THE CHILD SEXUAL ABUSE CASE IN THE COURTROOM: A SOURCE BOOK, at 61, (1987). *But cf.* Bross, *Protecting Child Witnesses*, Foundations of Child Advocacy: Legal Representation of the Maltreated Child, at 117 (1987). *See also* S. Rep. No. 123, *supra* note 4, at 1973. Children's rights advocates refer to treatment of the child witness by the criminal justice process as "secondary victimization."

cient to establish the child witness as "unavailable."[91] The defendant's right to confrontation should not give way to exceptions based solely on a statutorily created presumption without a specific showing of need.[92]

G. *Alternatives to Videotaped or Closed-Circuit Testimony*

Assuming *arguendo* that courtroom appearances may be traumatic to the child witness, there are other means of protecting the child, without removing either the witness or the defendant from the courtroom. The most practical solution is to ensure a speedy trial in child sexual abuse cases.[93] Priority docketing of cases involving child victims allows the child to "get through" the experience without having to live with the fear of testifying for a long period of time.[94] This anxiety may, in fact, be more harmful to the child than the actual testimony.[95] This alternative also fulfills the defendant's sixth amendment right to a speedy trial.[96]

In addition, emphasis should be placed on the pre-trial treatment of the child. Much of the commentary in support of videotaped testimony stresses the trauma of the child repeating his or her story over and over.[97] Videotape of the child's initial interview with a trained sex abuse therapist can serve as an effective investigatory tool, to be used by prosecuting and defense counsel, as well as the police.[98]

Another method of reducing the number of pre-trial interviews with the child witness is the formation of a multi-disciplinary task force, combining members of law enforcement, children's services and the legal community.[99] This "team approach" avoids the duplication of efforts of the various agencies, and streamlines the investigative and judicial processes which tend to drag the

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91. *See* People v. Johnson, 118 Ill. 2d 501, ____, 517 N.E. 2d 1070, 1073 (1987).

92. 108 S. Ct. at 2803.

93. ABA Guidelines, *supra* note 3, at 1.

94. *Id.* at 13.

95. Bross, *supra* note 90, at 117.

96. ABA Guidelines, *supra* note 3, at 16.

97. *Id.* at 13. A child may be required to repeat his story four or five times before ever going to trial. *See also supra* note 4, at 1973.

98. S. Rep. No. 123, *supra* note 4, at 1977. The Children's Justice Act of 1986 was designed in part to provide federal funding to states for the training of law enforcement officers in interviewing techniques for child sexual abuse victims.

99. *Id.*

child through repetitive and unnecessary sessions.[100]

Once the child is called to the witness stand, certain considerations can be afforded the witness without compromising the rights of the defendant. A trial judge maintains the discretion and authority to control direct and cross-examination of the witness to prevent repetitive or intimidating questioning.[101] A common criticism from both prosecuting and defense counsel, as well as children's rights advocates, is the treatment of the child on the stand. Defense counsel complain of the state's leading questions.[102] Prosecutors and children's advocates in turn object to defense's "badgering" the child in attempt to impeach the child's testimony.[103] One solution to this problem is the use of a special "child interpretor," such as one which would be allowed for a non-English speaking or a deaf-mute witness.[104] Once appointed, the interpretor poses questions submitted by both counsel, in a "language" understood by the child, and in a less threatening manner.[105]

Some commentators suggest the creation of special "child courtrooms" designed to be less inhibiting to the child, such as those that may be used in adoption or custody cases.[106] Some states attempt to reduce the trauma to the child witness by barring the public or the media from the courtroom during the child's testimony.[107] This practice may, however, violate the defendant's

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100. ABA Guidelines, *supra* note 3, at 13-14. This method of investigation may also provide a more reliable account of the child's assault. A child may feel the need to change his or her answers upon repeated questioning, perceiving the repitition as an indication he or she is "saying the wrong thing." *See supra* notes 52-54 and accompanying text.

101. ABA Guidelines, *supra* note 3, at 22. The trial judge may also limit the number of appearances required of the child, or the length of time on the stand. *See* 1984 Judges Journal, *supra* note 53. A child may make an average of seven courtroom appearances during a typical sex offense prosecution. Some children may be required to remain on the stand for several hours, often for several days.

102. *See* Goodman, *supra* note 56, at 187-89.

103. Lambert, *Victims Have Rights Too*, 1986 UTAH L. REV. 449. The author discusses the "victimization" of the child victim on the witness stand.

104. Myers, *The Testimonial Competence of Children*, 25 J. FAM. L. 287, 324 (1986-87). The author suggests that this interpretor may be a relative, teacher, babysitter or even a parent, as long as the court determines the interpretor to be capable and wholly disinterested. *See* State *ex rel.* R.R., 79 N.J. 97, 398 A.2d 76 (1979).

105. *Id.*

106. Selkin, *supra* note 90, at 61. *See also* Melton, *supra* note 90, at 188.

107. *See* ALASKA STAT. § 12.45.047 (1984).

right to an open trial.[108]

One final solution to the problem of protecting the child witness from the trauma of a courtroom appearance is simply to present the case without introducing the child as a witness. Under most state laws, a child may be declared unavailable because of age or incompetency.[109] If so, then the child's statements to parents, physicians or other persons may then be admissable under the hearsay exception rule.[110] A well-planned prosecution may alleviate the need for putting the child witness on the stand.[111]

CONCLUSION

Effective prosecution is important in this country's war against child abuse. However, in this war, constitutional protection of the criminal defendant must remain intact.[112] Although the Supreme Court in *Coy* did not specifically speak to those statutes permitting admission of videotaped or closed-circuit testimony in child sexual abuse cases,[113] its decision raises many serious questions as to their validity under the Confrontation Clause of the sixth amendment. Such laws hinder the defendant's right to effective cross-examination, and the jury's ability to observe the demeanor of the witness on the stand. Most importantly, these statutes prohibit the face to face confrontation between the defendant and his accusers as guaranteed by the sixth amendment.[114]

Justice O'Connor, in her concurring opinion, states that these rights are "not absolute," and may give way to "compelling public interests" such as the protection of children.[115] The states, in their efforts to address this problem, have ignored the importance of protecting the rights of the accused.[116] The Court in *Coy* emphasizes that any infringement of these rights must be "firmly

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108. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980). Burger, C.J. held that the open trial was a necessary means of monitoring the judicial process.

109. *See supra* note 86.

110. Bross, *supra* note 95, at 118.

111. Comment, *Preserving the Child Sexual Abuse Victims Testimony: Videotaping Is Not the Answer*, 1987 DET. C. L. REC. 469, 502 note 190.

112. State v. *In re* R.C. Jr., 494 So.2d 1350, 1356 (La. App. 2d Cir. 1986).

113. 108 S. Ct. at 2804 (O'Connor, J., concurring).

114. 108 S. Ct. 2798.

115. *Id.* at 2803.

116. Commonwealth v. Willis, 716 S.W.2d 224 (1986).

rooted."[117] This Note has illustrated that the exceptions created by the various states allowing the introduction of videotaped and closed-circuit televised testimony do not adquately justify overriding the defendant's right to confrontation of his accusers.

The trial of one accused of child molestation is perhaps one of the most emotional and traumatic of any criminal prosecution -not only for the alleged victim, but for the accused as well. Even if acquitted, the defendant may suffer irreparable damage to his reputation, career and family life. "It remains a sobering example of the lack of concern for the criminal defendant that we would rule out a probing and thorough examination of the alleged victim/witness in such a case . . . where the stakes are [so] immeasurably high."[118]

Charles E. Wilson, Jr.

117. 108 S. Ct. at 2803.
118. Yengich, *supra* note 60, at 447.