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THE USE OF VIDEOTAPED CHILD TESTIMONY: PUBLIC POLICY IMPLICATIONS†

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Routinely videotaping investigative interviews with children suspected of being victims of sexual abuse does not promote an accurate determination of guilt, is not in the best interests of the child, is counterproductive to prosecution, and is unnecessary. That is the reality.[1]

A multiagency approach to videotaping evidentiary interviews of suspected child abuse victims enhances prosecution efforts and serves the best interests of the child by reducing the number of interviews and the number of interviewers to which a child is subjected. That can be the reality.[2]

How should legal policy resolve the dispute posed by these two commentaries? That question is the subject of this review. This article evaluates one technique designed to reduce the traumatization of child witnesses and to improve the reliability of their testimony — the use of videotaped statements as evidence at trial. The article (a) describes the current status of the technique in the United States and abroad, (b) outlines opponents' arguments against use of videotaped testimony and proponents' reasons for supporting the technique, and (c) provides a context for understanding the videotape controversy and the issues that must be addressed when deciding whether and how to use the technique. The article reviews relevant empirical evidence, statutes, and case law, and concludes with policy recommendations regarding the use of videotaped testimony in cases involving child victim-witnesses.

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1. Paul Stern, *Videotaping Child Interviews: A Detriment To An Accurate Determination of Guilt*, 7 J. OF INTERPERSONAL VIOLENCE 278, 278 (1992).

2. Catherine Stephenson, *Videotaping and How it Works Well in San Diego*, 7 J. OF INTERPERSONAL VIOLENCE 284, 284 (1992).

CURRENT STATUS OF THE USE OF VIDEOTAPED CHILD TESTIMONY

Countries Other Than the United States

In order for the courts to use videotaped child testimony, two basic criteria must be met: (a) tape technology must be generally available, and (b) children must be permitted to testify at trial. Many countries cannot consider using the technique because at least one of these criteria cannot be met. Generally speaking, only highly industrialized nations confront the issue of whether to use videotaped testimony of children.

The criminal justice systems of Sweden, Norway, and Denmark are accusatorial, and so prefer the use of oral evidence and adversarial examination.[3] The Scandinavians have been using tape technology since the 1960s. The Swedish Code of Procedure permits the introduction of a videotaped police interview as evidence at trial in lieu of the child's live testimony. The Norwegian system is more formal, providing more safeguards for the defense. The examination of the child is judicially controlled; however, the defendant does not have the right to be represented and to question the child during the examination. In Denmark, videorecorded testimony has been used increasingly in recent years. Typically, a qualified police officer examines the child while the judge, the prosecution, the accused and the defense counsel follow the interrogation on a television monitor in another room. Afterwards, defense counsel may ask additional questions.[4]

In Germany, offenses against children are tried before special courts that also are designed to deal with juvenile offenses; therefore, these tribunals are experienced in communicating with children. In the German inquisitorial system, the judge questions the child witness, so the adversarial process of direct and cross-examination is avoided. When hearing witnesses younger than age sixteen, the court is empowered to exclude the defendant if the accused's presence is deemed likely to be harmful to the child; thus, this system avoids the need for protective screens, live links, and the like. The Japanese approach is similar.[5]

Israel, whose justice system is based upon the Anglo-American tradition, "has made the most radical innovations to

3. *See* JOHN R. SPENCER & RHONA H. FLIN, THE EVIDENCE OF CHILDREN: THE LAW AND THE PSYCHOLOGY (1990).

4. *Id.* at 140-66, 306-16.

5. *Id.*

cope with the evidence of children."[6] Child examiners (either police officers or social workers) interview children privately, often in their own homes, at which time a recording is made. After the interview,

> the child examiner makes a decision about whether the child shall be called to give live evidence at any subsequent trial. If not — and it is usually not — the child examiner goes to court and gives evidence in place of the child. In giving evidence, the child examiner provides the court with a factual account of what the child said at the interview, and is also permitted to give his or her opinion on the credibility of the child.[7]

Although some would argue that the Israeli system allows defendants to be convicted on the basis of hearsay evidence alone, it is important to note that corroboration is required for conviction whenever the child examiner gives evidence in place of the child. Moreover, the child examiner approach "operates only in trials for sexual offenses, and is limited to cases where the child is under the age of 14."[8]

In 1987, Canadian law was changed to permit videotaped evidence in criminal proceedings. The Criminal Code became effective in 1988, and states:

> In any proceeding relating to [a range of sexual offenses] in which the complainant was under the age of 18 years at the time the offence is alleged to have been committed, a videotape made within a reasonable time after the alleged offence, in which the complainant describes the acts complained of, is admissible in evidence if the complainant adopts the contents of the videotape while testifying.[9]

In Canada, videotapes of early interviews are admissible, but only when the child is available for cross-examination at trial.

Videotaping laws in Australia are in a state of flux. Some states and territories permit the use of recorded testimony, whereas others do not. In New Zealand as well, the law is unsettled with regard to the use of videorecorded testimony.[10]

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6. *Id.* at 314.
7. *Id.* at 315.
8. *Id.*
9. CRIMINAL CODE OF CANADA § 643.1 (Supp. I 1988), *reprinted in* SPENCER & FLIN, *supra* note 3, at 312.
10. SPENCER & FLIN, *supra* note 3, at 312.

England, Wales and Scotland have instituted wide-spread use of videotape procedures when children testify.[11] The British Criminal Justice Act of 1991 provided national guidelines for the use of previously recorded and "Live link" (i.e., closed circuit televising of *in camera*) testimony.[12] Bull explains:

> The Criminal Justice Act of 1991 allows the judge to order that the child not be examined-in-chief on any matter, which in the opinion of the court, has been adequately dealt with in the video-recorded interview. In this way the recording can take the place of the child's evidence-in-chief *if* the interview is deemed worthwhile by the court. Cross examination (and any re-examination) will be conducted live (probably using a video link).[13]

Little systematic research is available regarding reactions to the use of tape technology. In the most comprehensive study to date, Davies and Noon note that more than two years after its inception in the United Kingdom,

> the Live link enjoys widespread acceptance among all parties who have experience of its use in the courtroom. A total of 74% of the 50 judges who completed questionnaires had formed a 'favorable' or 'very favorable' impression. This view was also endorsed by 83% of the sample of 78 barristers who had experience of the system with little difference in attitude depending upon whether they represented prosecution or defence. Likewise, 12 of the 13 Chief Clerks had formed a favorable impression of the innovation and an equally positive attitude existed among the sample of 15 police officers and social workers who were directly involved in preparing the child for, or accompanying the child at, Court.[14]

The experience of countries other than the United States clearly makes the point that the videotaping of children's testimony constitutes a viable legal approach. Both inquisitorial and adversarial systems have implemented the approach successfully.

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11. *See* GRAHAM M. DAVIES & ELIZABETH NOON, AN EVALUATION OF THE LIVE LINK FOR CHILD WITNESSES (1991).

12. *See* Ray Bull, *Obtaining Evidence Expertly: The Reliability of Interviews With Child Witnesses*, 1 EXPERT EVIDENCE 5 (1992).

13. *Id.* at 6.

14. DAVIES & NOON, *supra* note 11, at 131.

The United States

Compared with countries in Europe, the United States has been relatively slow to make use of videotaped child testimony. Although the statutes of most states permit the technique, only a few prosecutors within the United States have chosen to use videotape technology. Swim, Borgida, and McCoy note:

> In a study that tracked child sexual abuse cases in eight counties across the nation, for example, Gray (1990) found that only one of 27 cases brought to court used videotaped depositions or statements. Similarly, Lipovsky, Tidwell, Kilpatrick, Saunders, Crisp, & Dawson (1991) found that in three states only 4 of 47 cases used a videotape deposition of a child witness.[15]

In 1977 Montana became the first state to enact a law making a videotape of an interview with a child admissible in a criminal case.[16] Several other states quickly followed suit. In 1982, the American Bar Association pronounced itself in favor of limited use of videotapes in court proceedings involving children.[17] During the mid-1980s both the National Conference of the Judiciary[18] and the Attorney General's Task Force on Family Violence[19] recommended the use of videotapes in place of live testimony in child abuse cases. In 1985, the Criminal Justice Section of the American Bar Association approved the following recommendation:

> 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.[20]

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15. Janet Swim et al., Videotaped Versus In-Court Witness Testimony: Is Protecting the Child Witness Jeopardizing Due Process?, Paper Presented to the Annual Meeting of the American Psychological Association 4 (1991).

16. *See* DAVIES & NOON, *supra* note 11.

17. Michael H. Graham, *Difficult Times for the Constitution: Child Testimony Absent Face to Face Confrontation*, THE CHAMPION, Aug. 1985, at 18.

18. NATIONAL INST. OF JUST., U.S. DEPT. OF JUST., STATEMENT OF RECOMMENDED JUD. PRACTICES (adopted by the National Conference of the Judiciary on the Rights of Victims of Crimes) (1983).

19. ATTORNEY GEN.'S TASK FORCE ON FAMILY VIOLENCE, FINAL REPORT (1984).

20. SECTION ON CRIMINAL JUST., AMERICAN BAR ASS'N, GUIDELINES FOR

Currently, at least forty-eight states have enacted legislation permitting some form of videotaped procedures in child witness cases. State statutes typically authorize videotaped depositions as substitutes for live trial testimony, "provided that a special showing is made that the child would suffer emotional trauma, mental or physical harm if forced to testify as an ordinary courtroom witness."[21] As Table 1 indicates, however, age requirements for use of videotape procedures with child witnesses and the specificity of statutory language vary considerably. For example, the South Carolina statute[22] on videotaped depositions of children comprises only 72 words. In contrast, the statutes of California[23] and Idaho[24] fill approximately three pages each.

TABLE 1
SOME CHARACTERISTICS OF STATE STATUTES
REGARDING VIDEOTAPED CHILD TESTIMONY

State	Relevant section(s) of state statutes	Permissible age for use of procedure	Permits closed circuit recording (CCTV) at trial	Permits videorecorded deposition (VR)	Is child required to be available at trial?	Notes
Alabama	15-25-2 15-25-3 30-3-94	<16	X	X		
Alaska	12.45.046	<13	X			Also permits one-way mirrors
Arizona	13-4252 13-4253	<15	X	X	Yes	
Arkansas	16-44-203	<17		X		
California	1346 1347	<11	X	X	Yes (if ruled "available")	Very detailed
Colorado	18-3-413	<15 at time of act	(pending)	X		
Connecticut	54-86g	<13	X	X	No	
Delaware	11.3511 11.3514	<12	X	X	No	
Florida	92.53 92.54	<16	X	X		
Georgia	17-8-55	<11	X			

THE FAIR TREATMENT OF CHILD WITNESSES IN CASES WHERE CHILD ABUSE IS ALLEGED 30 (1985).

21. Lucy McGough, *Videotaping Children's Accounts*, *in* FRAGILE VOICES: CHILD WITNESSES IN THE AMERICAN LEGAL SYSTEM 12 (forthcoming).

22. S.C. CODE ANN. § 15:28-30 (1988).

23. CAL. PENAL CODE § 1346 (West 1991).

24. IDAHO CODE § 19:3024A (1991).

TABLE 1 (CONTINUED)

State	Relevant section(s) of state statutes	Permissible age for use of procedure	Permits closed circuit recording (CCTV) at trial	Permits videorecorded deposition (VR)	Is child required to be available at trial?	Notes
Hawaii	587-43	<16 (at time of offense)	X	X	Yes (VR)	*No* attorney of either party may be present
Idaho	19-3024A	<16	X	X	Yes (in order to identify alleged perpetrator)	Very detailed
Illinois	38.106B-1	<18	X		Yes (in order to identify alleged perpetrator)	
Indiana	31-6-15-2 through 31-6-15-7; 31-6-16-1 through 31-6-16-7; and 35-23-4-8	<10	X	X		
Iowa	910A.14	<14	X	X		
Kansas	22.3434 38.1557 through 38.1563	<13	X	X	No	
Kentucky	421.350 421.355	<13	X	X	Yes (CCTV) No (VR)	
Louisiana	15.283; 15.440; 15.440.1; Art. 326-329 (Children's Code)	<14	X	X	Yes (VR)	
Maine	1205	<16				Statement may be recorded by "any means approved by the court"
Maryland	9-102 9-103.1	<18	X			
Massachusetts	278.16D	<15	X	X		
Michigan	600.2163a	<15		X (may be admitted at pretrial proceeding, but not in lieu of live testimony)		Older if developmentally disabled
Minnesota	595.02 Subd.3 595.02 Subd.4	<10	X	X		Older if mentally impaired
Mississippi	13-1-405 13-1-407	<16	X	X		

TABLE 1 (CONTINUED)

State	Relevant section(s) of state statutes	Permissible age for use of procedure	Permits closed circuit recording (CCTV) at trial	Permits videorecorded deposition (VR)	Is child required to be available at trial?	Notes
Missouri	455.516 491.680, 685, 687, 696, 699, 702, 705 Art. 71.1 (Code of Juvenile Procedure)	<17		X		
Montana	46-15-402 46-15-403	<16				"videotape proceedings" are allowed, but not specified
Nebraska	29-1926	<12		X		
Nevada	174.227 174.229	<14		X		
New Hampshire	517:13-a	<17 at time of alleged offense		X		
New Jersey	2A:84A-32.4	<17	X			
New Mexico	10-217 (Children's Court Rules)	<13		X		
New York	65.00 65.10 65.20 65.30	<13	X	X		
North Carolina						No statute found
North Dakota	31-04-04.1	<15		X		
Ohio	2907.41	<11 at time of complaint	X	X		
Oklahoma	10.1147 10.1148 22.752 22.753	<13	X	X	No	
Oregon	40.460 Rule 803	<12	X			
Pennsylvania	42.5984 42.5985	<14	X	X	No	In special cases the procedure applies to children 14-17
Rhode Island	11-37-13.2 14-1-68 40-11-7.2	<18 at time of trial	X	X	No	
South Carolina	15-28-30	<12 at time of court proceeding	X	X		Applies to family court proceedings

TABLE 1 (CONTINUED)

State	Relevant section(s) of state statutes	Permissible age for use of procedure	Permits closed circuit recording (CCTV) at trial	Permits videorecorded deposition (VR)	Is child required to be available at trial?	Notes
South Dakota	19-16-39	<10		X		Older if developmentally disabled
Tennessee	24-7-116 37-1-609	<13		X		
Texas	11.21	<13	X	X	No	
Utah	Rule 15.5 (Utah Court Rules)	<14	X	X	No	
Vermont	Rule 807	<13	X	X	No	
Virginia	18.2-67.9 63.1-248.13:1 through 63.1-248:13:3	<13	X	X		
Washington	9A.44.150	<10	X			
West Virginia						No statute found
Wisconsin	908.08 967.04	<12 or <16 if "interests of justice warrant"		X		
Wyoming	7-11-408	<12		X		

The statutes of some states (for example, Colorado and California) treat videotapes as former testimony of the child.[25] The language in Section 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."[26]

Other states (such as New Mexico, Arkansas, and Wisconsin) provide for videotaped testimony to be received into evidence in lieu of the victim's direct testimony. All that is required is that the child be made available to the accused to call and cross-examine if he so chooses. Such statutes are based upon the idea that as long as the declarant of a hearsay statement is available to be called by the accused and examined at trial, the right to confrontation is satisfied.[27] The Arkansas statute is illustrative:

25. *See* CAL. PENAL CODE § 1346; COLO. REV. STAT. ANN. § 18:3-413 (1992).

26. CAL. PENAL CODE § 1346.

27. Graham, *supra* note 17.

> Any videotaped deposition taken under the provisions of this section shall be admissible at trial and received into evidence in lieu of the direct testimony of the alleged victim. However, neither the presentation nor the preparation of such videotaped deposition shall preclude the prosecutor's calling the alleged victim to testify at trial if that is necessary to serve the interests of justice.[28]

However, because such statutes provide that the defendant be present with the child during the recording of the videotape and then again during the in-court cross-examination, the defendant in effect has *two* opportunities to cross-examine the child witness. Hill and Hill suggest that such statutes overemphasize the defendant's right of confrontation and underemphasize the psychological trauma for the child witness.[29] In this regard, Spencer and Flin note:

> [A] number of the US laws about video depositions permit the suspect to be present with the child in the room where the video deposition is being taken — which puts the child in even closer proximity to the defendant than he or she would be in an ordinary courtroom, and makes the video deposition as much or more of an ordeal than giving evidence in open court.[30]

The Kentucky statute eliminates that problem. In Kentucky, a videotaped statement of the child is admissible even when no cross-examination occurs at the recording session. However, the opposing party is permitted to cross-examine the child on the stand.[31]

However, the appellate courts of at least three states (Texas, Illinois, and Tennessee) have held that such statutes are unconstitutional.[32] The courts offer two grounds for their rulings. First, when the state offers a videotape in lieu of the child's live testimony, the defendant is "forced to call the child as its 'own' witness."[33] The second objection is that the child is not subject to cross-examination at the time the videorecording is made, a situation that may infringe upon the defendant's

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28. ARK. CODE ANN. § 16:44-203(c) (Michie 1987).

29. Paula E. Hill & Samuel M. Hill, *Videotaping Children's Testimony: An Empirical View*, 85 MICH. L. REV. 809, 819 (1987).

30. SPENCER & FLIN, *supra* note 3, at 143.

31. KY. REV. STAT. ANN. § 421.350 (Baldwin 1991).

32. *See* People v. Bastien, 541 N.E.2d 670 (Ill. 1989); State v. Pilkey, 776 S.W.2d 943 (Tenn. 1989), *cert. denied*, 494 U.S. 1032 (1990); Long v. State, 742 S.W.2d 302 (Tex. 1987).

33. McGough, *supra* note 21, at 60.

constitutional right to confront the witnesses against him or her.

Texas offers a better alternative.[34] In that state, if the child's direct testimony is videotaped outside the courtroom, the defendant has an opportunity to cross-examine during the recording session. However, the child then cannot be compelled to testify in court. Texas' approach preserves the defendant's right to confrontation while simultaneously protecting the child from the trauma associated with testifying at trial.

The variability of state statutes regarding videotaped child testimony suggests that, in the United States, use of tape technology raises some thorny constitutional issues, not the least of which is how to handle the Sixth Amendment confrontation requirement. The defendant's right of confrontation generally excludes as "hearsay" statements that are made out of court, not under oath, and without opportunity for cross-examination. Certainly, video statements may fall under these exclusions. However, because such "hearsay" statements may be crucial in cases involving child witnesses, Landwirth notes that "the law has developed a number of specific exceptions and criteria by which they may be admitted into evidence."[35] State statutes outline relevant rules in this regard, most of which follow guidelines articulated by the U.S. Supreme Court. Landwirth summarizes these guidelines as follows:

> As applied to child sexual abuse cases, they are generally interpreted to provide that, if the child will appear in court and be available for cross-examination, prior interview statements may be admitted on the theory that the child's courtroom presence will meet the confrontation requirement. However, if the child's earlier statements are being offered in lieu of court appearance to spare the child that experience, additional criteria must be met. The child must be "unavailable" for a court appearance and the nature of the statement in question must either correspond to one of the reconized [sic] exceptions to the rule against hearsay or be accompanied by particular indicators of trustworthiness. Compelling public policy interests and special necessities of the case may on occa-

34. TEX. CODE CRIM. PROC. ANN. art. 38.071(2) (West 1992).

35. Julius Landwirth, *Children As Witnesses in Child Sexual Abuse Trials*, 80 PEDIATRICS 585, 587 (1987).

sion justify admission of out of court statements even if the child is available to appear.[36]

Recognizing such "compelling public policy interests," the Supreme Court unanimously affirmed the use of hearsay evidence in *White v. Illinois*,[37] a case involving aggravated sexual assault of a four-year-old girl. Commenting on the case, Wisconsin Court of Appeals Judge Charles B. Schudson notes:

> Emphatically, the Supreme Court concluded:
>
> 1. that the child's "unavailability" had no bearing on whether the hearsay should be allowed; the hearsay was admissible whether or not the child testified;
> 2. that *Ohio v. Roberts* "unavailability" analysis is required "only" when the hearsay statements come from a prior judicial proceeding;
> 3. that although the statements in this case were admitted under the "spontaneous declaration" and "medical diagnosis/treatment" exceptions, the decision is not limited to those, but includes all hearsay evidence "embraced within such exceptions as those;"
> 4. that to exclude such evidence "would be the height of wrongheadedness."[38]

In short, the current state of affairs may be summarized as follows:

1. In some cases the court may determine that a given child is "unavailable" to provide testimony at trial because the procedure would induce excessive trauma in the child. In such a case, videotaped testimony may be presented during the trial via simultaneous broadcasting of the child's testimony from a room outside the courtroom.[39]
2. Even when a child is available to testify, relevant hearsay statements may be admissible.
3. The United States Supreme Court has yet to rule on a case that involves admitting into evidence a child's testimony videotaped prior to the trial. Although this procedure has not been widely tested by the states, at least three appellate courts have frowned

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36. *Id.*

37. 112 S. Ct. 736 (1992).

38. Charles B. Schudson, *Escape from Wonderland: The United States Supreme Court Decision in White v. Illinois, January 15, 1992*, FAM. VIOLENCE & SEXUAL ASSAULT BULL., Spring 1992, at 16.

39. *See* Maryland v. Craig, 497 U.S. 836 (1990).

upon the procedure.[40] In making such determinations, the courts must distinguish between videotaped depositions (which may or may not be considered admissible) and videotaped investigative interviews (which are unlikely to be admitted).

4. The Supreme Court also has not ruled on the admissibility of investigative interviews conducted by law enforcement personnel (for example, the Israeli approach); most likely, however, such interviews will be excluded from evidence at U.S. trials. Because child witnesses often are reluctant accusers, police officers and child protection workers tend to ask leading questions in order to elicit information.[41] Leading questions generally are inadmissible at trial; therefore, it is unlikely that such interviews will pass judicial muster in America.

Thus, use of videotaped child testimony is far from being a settled matter in U.S. law. As two scholars from the United Kingdom note:

> When [the] rush of statutes was being enacted in the USA, many people seem to have thought that videotapes were the technological panacea by which all problems concerning child witnesses could be cured. Five or six years later, everyone is much more cautious. If it has solved some problems it has not solved all of them, and it has brought some new ones of its own.[42]

The problems to which Spencer and Flin allude are outlined below.

Arguments Against Using Videotaped Testimony

As Stern's comments at the beginning of this article make clear, some professionals are adamantly opposed to the use of videotaped child testimony.[43] Interestingly, professionals working for both the prosecution and the defense have voiced their objections. The central arguments against use of the technique may be summarized as follows:

1. *Use of videotaped testimony raises serious constitutional issues.*

40. *See* cases cited *supra* note 32.

41. *See* Helen R. Dent, *The Effect of Interviewing Strategies on the Results of Interviews With Child Witnesses*, *in* Reconstructing the Past 279 (Arne Trankell ed., 1982).

42. Spencer & Flin, *supra* note 3, at 142.

43. Stern, *supra* note 1.

The Sixth Amendment states in part, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."[44] Traditionally the Court has "relied on confrontation of the accusers by the accused as some assurance of reliability."[45] Perhaps for this reason, confrontation generally has been construed as meaning a *face-to-face* encounter between defendant and accuser.

2. *Videotaping one interview is inadequate.*

Psychotherapists commonly believe that child sexual abuse victims often deny that the abuse occurred when initially interviewed and report that repeated interviews often are necessary to elicit information relevant to a criminal prosecution.[46] For example, Stern notes, "[f]or many children, disclosure of sexual abuse is a gradual process that can take weeks or months or years."[47] In a similar vein, research by Thomson suggests that more information ultimately may be obtained with repeated interviews.[48] Moreover, Stern suggests that "[t]he knowledge that a particular interview is being videotaped can increase the pressure on the child and decrease the fluidity of disclosure."[49]

3. *Videotapes provide inadequate opportunity to observe the child's demeanor and interactions with others.*

In *Commonwealth v. Bergstrom*,[50] the court held that in child witness cases (which provide great latitude in the use of leading questions), "jurors must be able to choose their own focus in looking for any direct or indirect influences on a child's testimony."[51] In that case, the court commented:

> A video machine does not simply transport evidence from the scene to the monitor. . . . [T]he camera unintentionally becomes the juror's eyes, necessarily selecting and commenting upon what is seen. . . . Composition, camera angle, light direction, colour renderings, will all affect the viewer's impressions and attitudes to what he sees in the picture. . . . [T]he picture conveyed may influence a juror's feelings about guilt or believability. For

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44. U.S. CONST. amend. VI.

45. Graham, *supra* note 17, at 18.

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

47. Stern, *supra* note 1, at 279.

48. Don Thomson, Lies, Lies and More Damn Lies: Children's Appreciation for Motivations for Lying, Paper Presented to the NATO Advanced Study Institute: The Child Witness in Context: Cognitive, Social, and Legal Perspectives, Lucca, Italy (May 1992).

49. Stern, *supra* note 1, at 281.

50. 524 N.E.2d 366 (Mass. 1988).

51. *Id.* at 376.

> example, the lens or camera angle chosen can make a witness look small and weak or large and strong.[52]

The court concluded:

> Absent compelling circumstances, a jury ought to be able to view the interaction between a witness and others who are present. The subtle nuances of eye contact, expressions, and gestures between a witness and others in the room are for the jury to evaluate.[53]

4. *The medium of videotape may reduce the impact of the child's testimony; consequently, videorecorded testimony may be viewed as less credible.*

Indeed, the results of a laboratory study reported by Goodman[54] indicate that mock jurors rated a child's videotaped testimony as less credible than the child's live account. However, a study of actual cases in the United Kingdom concluded that the use of televised testimony does not appear to affect the verdicts obtained.[55]

5. *Recorded testimony may unduly influence the jury.*

Swim, Borgida, and McCoy suggest that jurors may assume that the child who testifies via a videotaped deposition requires special protection because the defendant is dangerous; consequently, jurors may be more likely to perceive the defendant as guilty.[56] Their empirical study concluded, however, that use of videotaped testimony did not result in more guilty verdicts:

> [I]n the end, medium of presentation did not prejudice the jurors against the defendant. The general lack of impact on the verdicts, particularly post-deliberation, suggests that the few effects that medium of presentation had on thoughts and perceptions may not warrant concern about the prejudicial effects of videotaped depositions. For instance, any negative effects that may occur may be eliminated by the jury deliberation process.[57]

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52. *Id.* at 375-76 (quoting James J. Armstrong, Comment, *The Criminal Videotape Trial: Serious Constitutional Questions*, 55 Or. L. Rev. 567, 574-75 (1976)).

53. *Id.* at 376.

54. Gail S. Goodman, The Reliability of Children's Testimony, Paper Presented to the NATO Advanced Study Institute: The Child Witness in Context: Cognitive, Social, and Legal Perspectives, Lucca, Italy (May 1992).

55. Graham M. Davies, Children Can Be Seen and Heard: The Video Link in Action, Paper Presented to the NATO Advanced Study Institute: The Child Witness in Context: Cognitive, Social, and Legal Perspectives, Lucca, Italy (May 1992).

56. Swim et al., *supra* note 15.

57. *Id.* at 35.

6. *The use of videotaped depositions may be prejudicial.*

Inconsistencies in the child's testimony may be especially salient when videotapes are played and replayed. Alternatively, undue emphasis may be placed on the child's videotaped testimony, especially if the jury listens to it more than once. Stern opines, "To have one isolated interview reproducible before a jury is to encourage the jury to place exaggerated and unwarranted importance on that one piece of evidence."[58] As a case on point, in *United States v. Binder*,[59] the Court of Appeals for the Ninth Circuit reversed the conviction of an alleged child molester, ruling that the replaying of a videotape during jury deliberation placed prejudicial emphasis on the complaining witness's testimony. Writing for the court, Judge Skopil argued: "Permitting the replay of the videotaped testimony in the jury room during deliberation was equivalent to allowing a live witness to testify a second time in the jury room."[60]

7. *Videotape security cannot be assured.*

Some professionals argue that the confidentiality of the child victim-witness's identity cannot be protected adequately when videotape recordings are made.[61] On this point, Stern raises a host of provocative questions:

> Where are the videotapes stored? For how long? Where does the money come from to support the enormous cost of supplying cameras, tapes, storage, and so forth? Who gets access to the tapes? Are defendants entitled to review them as evidence against them? If so, is it appropriate to endorse a procedure where pedophiles can watch (and savor?) their victims recounting their abuse? How do we justify invading the child's right of privacy when we make these videotapes available to the child's abuser, the abuser's attorney, and the abuser's attorney's "experts?" What remedy is there if they are not returned or are given to unauthorized persons?[62]

8. *Use of tape technology is expensive.*

Special equipment for recording and playing videotapes is a necessity. In most jurisdictions, courtrooms also must be altered to accommodate the use of videotapes. In the United

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58. Stern, *supra* note 1, at 279.

59. 769 F.2d 595 (9th Cir. 1985).

60. *Id.* at 601 n.1.

61. *See* Gail S. Goodman & Vicki S. Helgeson, *Child Sexual Assault: Children's Memory and the Law*, 40 U. MIAMI L. REV. 181 (1985); McFarlane, *supra* note 46.

62. Stern, *supra* note 1, at 281-82.

Kingdom, for example, where the "Live link" procedure is used, special monitors are built into the judge's bench and the jury box, with wiring connecting these units to the room where the child gives testimony. The child also has a monitor for viewing the courtroom.[63] Moreover, videotaping requires hiring technicians to assemble, run, and maintain the equipment.

REASONS FOR USING VIDEOTAPED TESTIMONY

A videotaped interview, especially when obtained soon after the alleged incident, has the potential for serving several important functions. The advantages of the technique may be summarized as follows:

1. *Videotaping may reduce the number of pretrial interviews required of the child.*

In jurisdictions that encourage the multi-disciplinary team approach to prosecuting cases of child sexual abuse, the number of pre-trial interviews typically is reduced.[64] In such jurisdictions, it is more likely that only one videotape will be made. The approach used in San Diego County is illustrative:

> The San Diego approach, like those in other parts of the country, is successful because it focuses on the needs of the child. In 1991, the San Diego Regional Child Victim-Witness Task Force developed a protocol for the investigation of child abuse crimes. Central to the protocol was the use of videotaped evidentiary interviews as a means by which we could reduce the number of times that a child is interviewed. Looked at another way, it is clear that to meet this goal, someone has to give up his or her "turf" in the investigation. Detectives, social workers, and prosecutors all want to interview this child, and the same questions are asked over and over again by different people in different settings. This is a destructive process for children. . . . Law enforcement and prosecutors in San Diego are able to avoid redundant interviewing when the nature and scope of the previous interview has been well documented on videotape. It is also much easier to curtail defense requests for victim interviews when the defendant has had an opportunity to see and hear the victim on tape.[65]

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63. Davies, *supra* note 55.

64. *See* DEBRA WHITCOMB ET AL., WHEN THE VICTIM IS A CHILD: ISSUES FOR JUDGES AND PROSECUTORS (1985) (available from the National Inst. of Justice, Contract #J-LEAA-011-81).

65. Stephenson, *supra* note 2, at 285-86.

2. *Videotaping lessens the chance of revictimizing the child.*

At the least, videotaping offers insulation from the alien atmosphere of the courtroom. Children understand precious little about the courtroom, its personnel, and its proceedings.[66] Often children are quite intimidated by appearing in court, and tend to believe that if they say something the judge does not like, then they (rather than the defendant) may be jailed.[67] Moreover, international research evidence suggests that the possibility of seeing the accused is the single most stressful element when children give testimony.[68] Although little empirical evidence currently is available that tests the relative stressfulness of testifying via videotape as opposed to live, one comprehensive study has been conducted in the United Kingdom.[69] In that study, Davies and Noon found that the level of stress experienced by British children who gave testimony by means of "Live link" indeed was considerably lower than that experienced by Scottish children who gave live testimony at trial.[70]

3. *Videotaping may increase the accuracy of testimony.*

The British study conducted by Davies and Noon concluded that when the "Live link" is used at trial, "children are more forthcoming in their evidence."[71] Similarly, in the U.S. case, *State v. Sheppard*,[72] the court relied upon the testimony of forensic psychiatrist Robert L. Sadoff, who noted:

> [For the child who testifies] there is guilt as well as satisfaction in the prospect of sending the abuser to prison.

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66. *See* Nancy W. Perry, *Children's Comprehension of Court*, FAIRSHARE (forthcoming); Karen J. Saywitz, *Children's Conceptions of the Legal System: "Court is a Place to Play Basketball"*, *in* PERSPECTIVES ON CHILDREN'S TESTIMONY 131 (Stephen J. Ceci et al. eds., 1989); Amye Warren-Leubecker et al., *What Do Children Know About the Legal System and When Do They Know It? First Steps Down A Less Traveled Path in Child Witness Research*, *in* PERSPECTIVES ON CHILDREN'S TESTIMONY, *supra*, at 158.

67. *See* Wendy Harvey, National Differences Regarding Child Witness Laws: A look at Practice, Reform, and the Use of Science, Paper Presented to the NATO Advanced Study Institute: The Child Witness in Context: Cognitive, Social, and Legal Perspectives, Lucca, Italy (May 1992).

68. *See, e.g.* GAIL S. GOODMAN ET AL., EMOTIONAL EFFECTS OF CRIMINAL COURT TESTIMONY ON CHILD SEXUAL ASSAULT VICTIMS (1990) (manuscript submitted for publication) [hereinafter EMOTIONAL EFFECTS]; Nancy W. Perry et. al., Factors Affecting Children's Ability to Provide Accurate Testimony, Paper Presented to the NATO Advanced Study Institute: The Child Witness in Context, Cognitive, Social, and Legal Perspectives, Lucca, Italy (May 1992).

69. DAVIES & NOON, *supra* note 11.

70. *Id.*

71. *Id.* at 133.

72. 484 A.2d 1330 (N.J. 1984).

> These mixed feelings, accompanied by the fear, guilt, and anxiety, mitigate the truth, producing inaccurate testimony. The video arrangement, because it avoids courtroom stress, relieves these feelings, thereby improving the accuracy of the testimony.[73]

4. *A videotaped interview ruled admissible at trial may prompt a guilty plea by the defendant.*

A guilty plea eliminates the need for the child to appear as a witness in court, so traumatization is reduced.[74] In a study of Minnesota child abuse prosecutions, Lawscope reported that 60 of 75 defendants pleaded guilty after having viewed videotaped interviews of the child victims.[75]

5. *Videotaping offers the opportunity to observe the gestures and facial expressions accompanying the child's initial statement of allegation.*

Some professionals contend that gestures and facial expressions may signal the veracity of the child's account,[76] a view echoed in the court's opinion in *United States v. Binder*[77] discussed earlier. In this regard, videotaping certainly is superior to written or audiotaped testimony, but may not be as beneficial as seeing the child live.

As these summaries indicate, arguments on both sides of the videotape controversy have merit. In order to understand the relative strengths and weaknesses of each side's position, it is helpful to become familiar with some background information.

A Context for Understanding the Videotaped Testimony Controversy

The criminal justice system was designed for adults. It is a system that expects victims to undergo multiple interviews and court appearances, that expects testimony to be detailed and articulate, and that provides opportunity for a cross-examination that may confuse even the most sophisticated of witnesses. It is not surprising, therefore, that introducing children into the criminal justice system as key witnesses in criminal and civil procedures has been fraught with difficulties. In that process, courts have been required to tackle a number of questions: Who has the right to be present at the proceedings, to observe the witnesses, and to hear the testimony offered? How should

73. *Id.* at 1332.
74. *See* Landwirth, *supra* note 35; McGough, *supra* note 21.
75. *Videotaping: Device for Fighting Child Abuse*, A.B.A. J., Apr. 1984, at 36.
76. Hill & Hill, *supra* note 29.
77. 769 F.2d 595 (9th Cir. 1985).

child witnesses be questioned under both direct and cross-examination? What are the parameters of confrontation in cases involving children as witnesses? What forms of confrontation are legally acceptable, and how vigorous may the confrontation be? What specific procedures should the courts allow to protect those most likely to be harmed by the experience of testifying — the child witnesses?

The judicial system has responded to these dilemmas by instituting several innovative procedures (in addition to videorecording of statements):

> In Massachusetts, judges bring in pint-size witness chairs so youngsters' feet won't dangle. In Maryland, children who have trouble speaking may draw what happened. In Minnesota, a child frozen with fear was permitted to testify from under the prosecutor's table. And from Manhattan Beach, Calif., to Brooklyn, N.Y., children in court use dolls to describe crimes whose names they don't know. . . . In Texas, victims' statements are videotaped early in investigations and can even be introduced at trial — so long as the child is available for cross-examination. In Colorado, courts are experimenting with funneling lawyers' questions through a friendly therapist. In Washington and Colorado, state laws permit a counselor to tell the jury what a young child told him, even though it's hearsay that can't be cross-examined.[78]

It is common for social scientists, particularly those trained as clinicians, to favor the liberal use of unconventional procedures designed to elicit testimony from reluctant child witnesses — for example, use of screens, videotaped testimony, exceptions to the hearsay rule, leading questions, and demonstrative evidence such as anatomical dolls.[79] Child advocates often hail such reforms, noting that they make the courtroom experience more humane for children. Moreover, some researchers claim that interventions designed to reduce ambiguity about the experience (e.g., visiting the courtroom prior to giving testimony) and the scariness of testifying (e.g., a friendly word from the judge) actually may improve the quality of children's testimony.[80]

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78. Aric Press, *Children and the Courts*, NEWSWEEK, May 14, 1989, at 32.

79. *See* William H. Wehrspann, *Criteria and Methodology for Assessing Credibility of Sexual Abuse Allegation*, 32 CAN. J. OF PSYCHIATRY 615 (1987).

80. *See* Hill & Hill, *supra* note 29; *Child Sexual Abuse Victims in the Courts: Hearings on Child Sexual Abuse Victims in the Courtroom Before the Subcomm. on Juvenile Justice of the Senate Judiciary Comm.*, 97th Cong., 1st Sess 116 (1984) (testimony of Gary B. Melton) [hereinafter Melton Testimony].

While clinicians tend to favor the expansion of alternatives for obtaining testimony from child witnesses, legal opinion on that issue is divided. One legal scholar suggests, for example, that such procedures are "but one of a number of disturbing signals that courts are inclined to bend the usual rules of evidence in cases involving child sexual abuse, often beyond their breaking points."[81] For example, a Denver judge's practices — stepping down from the bench to greet young witnesses at the courtroom door and walking them to a special seat with its back to the defendant — were struck down when challenged. A Colorado appeals court ruled that the judge's methods breached her duty to maintain an impartial posture toward all witnesses.[82] According to Melton:

> These proposals all raise serious constitutional issues. Each arguably invades one or more of the following fundamental rights: the defendant's [S]ixth [A]mendment rights to a public trial and to confrontation of witnesses and the public's [F]irst [A]mendment right, through the press, to access to the trial process.[83]

Judicial interpretation of the Confrontation Clause has been troublesome in child witness cases, however. Under what specific circumstances is the defendant's right to face-to-face confrontation abused? For example, must the child physically face the defendant in open court during formal proceedings? Or is it permissible for the child to confront the defendant at a preliminary hearing instead? May the child provide testimony *in camera* rather than in open court? Is previously videotaped testimony, introduced as evidence at trial in lieu of *viva voce* testimony, violative of the defendant's Sixth Amendment right to confrontation? Is simultaneous broadcasting of the child's testimony that is being videotaped outside the presence of the defendant permissible?

In 1981 Melton noted that the scope of the First and Sixth Amendment rights of the defendant (whose liberty is at stake in criminal proceedings) and their implications for special procedures in cases involving child witnesses were not yet settled in American law.[84] Good progress has been made in the past dec-

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81. Letter from Lucy McGough to Nancy W. Perry (July 15, 1990) (on file with the author) [hereinafter McGough Letter].

82. Lis Wiehl, *National Rules for Child Witnesses?*, N.Y. TIMES, Jan. 12, 1990, at B6.

83. Melton Testimony, *supra* note 80, at 6.

84. Gary B. Melton, *Procedural Reforms to Protect Child Victim/Witnesses in Sex Offense Proceedings*, *in* SEXUAL ABUSE AND THE LAW (Josephine Bulkley ed., 1981).

ade, although the picture still is not crystal clear. Moreover, sometimes the means used to protect the defendant's constitutional rights (for example, vigorous cross-examination in settings designed for adults) serve to traumatize child witnesses who, interestingly, have no constitutional rights to protection during the investigation of a crime or during the trial.[85]

In child witness cases, therefore, courts often are caught on the horns of a dilemma. On the one hand, they must ensure that justice is served by using every legal and ethical means available to discover the truth of the matter and to protect the rights of the accused. On the other hand, it is incumbent upon courts to protect victims from further traumatization, badgering, and harassment. "In short," comments Melton, "society's interest in punishing child molesters may come into conflict with its obligation as *parens patriae* to protect dependent minors."[86]

That conflict is reflected in three recent Supreme Court decisions: *Coy v. Iowa*,[87] *Maryland v. Craig*,[88] and *White v. Illinois*.[89] *Coy v. Iowa*, decided by the Supreme Court in 1988, involved two thirteen-year-old girls who had been sexually assaulted while sleeping in a backyard tent. John Avery Coy, a neighbor, was arrested, tried, and convicted of the assault, even though the victims could not positively identify him because the assailant had worn a stocking over his head during the attack. Although the girls' testimony did not include an identification of the defendant as their attacker, the court authorities assumed that merely seeing the defendant in court would retraumatize the children. (An Iowa state law presumed that children under age fourteen would be so affected.) Thus, the presiding judge approved the placement of a large, semitransparent screen around the defendant; he could see the witnesses dimly, but they could not see him. Use of the screen required darkening the room and turning bright lights onto the screen.

After his conviction, Coy appealed on two grounds. First, he asserted that the screen's presence denied him due process because it led the jury to infer that he was guilty. The Supreme Court rejected this claim. Second, he contended that the use of

85. *See* Gail S. Goodman, *The Child Witness: An Introduction*, 40 J. Soc. Issues 1 (1984); Jacqueline Parker, *The Rights of Child Witnesses: Is the Court a Protector or Perpetrator?*, 17 New Eng. L. Rev. 643 (1982).

86. Melton, *supra* note 80, at 184.

87. 487 U.S. 1012 (1988).

88. 497 U.S. 836 (1990).

89. 112 S. Ct. 736 (1992).

the screen deprived him of his Sixth Amendment right to be confronted with the witnesses against him. The majority of the Supreme Court agreed with Coy on this point. A 6-2 vote overturned his conviction and sent the case back to Iowa for retrial.[90]

Maryland v. Craig,[91] decided by the Supreme Court during its 1989-1990 term, concerned defendant Sandra Craig, who owned a child-care facility in Howard County, Maryland. She was convicted of sexually abusing children under her care. The trial judge, invoking a 1985 state law, permitted four young children (ages four to seven) to give their testimony over closed-circuit television, a procedure allowed by statute in thirty-two states.

A Maryland state appeals court dismissed the abuse conviction, stating that the trial judge, before allowing the closed-circuit testimony, first should have questioned the witnesses about their ability to testify. Thus, just five weeks after the *Coy* decision was announced, that state court interpreted that Supreme Court ruling as requiring a face-to-face confrontation at some point, either at the preliminary hearing or at the trial. But the U.S. Supreme Court (by a 5-4 vote) reversed the Maryland court's action, and upheld the conviction of Craig. The Court ruled that although the confrontation between defendant and accusers was not "face-to-face," the constitutionally protected rights of the defendant had not been abridged using the disputed procedure.[92]

Although *White v. Illinois*[93] does not speak directly to the issue of defendant-witness confrontation, the case recognizes the critical importance of hearsay evidence when child sexual assault is alleged. In *White*, the jury convicted the defendant of aggravated sexual assault of a four-year-old girl. Although the child did not take the stand, others offered testimony on her behalf: her babysitter, her mother, a police officer, an emergency room nurse, and a doctor. All of these witnesses told the jury what the child had told them during the four hours after her alleged assault. The Supreme Court held that the child's "unavailability" had no bearing on whether the hearsay should be allowed. Instead, the Court concluded, excluding such hearsay "would be the height of wrongheadedness." In other words, the Court recognized that the prosecution of child sex-

90. 487 U.S. at 1022.
91. 497 U.S. 836.
92. *Id.* at 860.
93. 112 S. Ct. 736.

ual assault cases should not be jeopardized by the children's "unavailability" to testify when the court rules that they are likely to be unduly traumatized by giving evidence at trial.

Thus, in any decision regarding the possible use of videotaped child testimony, the court must attempt to balance two competing interests: (a) the defendant's constitutionally guaranteed right to confront the accuser, and (b) the traumatization associated with children testifying at trial, an issue that impacts upon the state's obligation as *parens patriae* to protect dependent minors. In conducting the analysis, the court must address several important questions: Will testifying at trial or by means of videotape produce the more reliable testimony? At what point does the traumatization associated with *viva voce* testimony impair the communicative abilities of the child witness? Can testifying at trial ever be beneficial for the child witness? Are adequate measures in place to safeguard the defendant's constitutional rights? Answers to those questions should guide the trial court's decision.

The Issue of the Defendant's Right to Confrontation

In American law, the right to confrontation is practically sacred. The right stems from the trial of Sir Walter Raleigh, in which the defendant was convicted of treason after a trial by affidavit. Raleigh never was able to confront his accusers nor to summon witnesses on his own behalf. The Framers of the Constitution responded to this type of abuse with the Confrontation and the Compulsory Process Clauses of the Sixth Amendment.[94]

But the right to confrontation predates American law; indeed, it is a tradition with ancient roots. Justice Scalia, writing the majority opinion in *Coy v. Iowa*,[95] traced the history of the face-to-face confrontation requirement.[96] Quoting the Bible,[97] he noted that such a requirement existed even under Roman law:

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94. *See* Graham, *supra* note 17.

95. 487 U.S. 1012 (1988).

96. Interestingly, this opinion has been criticized for being literary rather than scholarly in the legal sense. As one commentator notes, "Coy has been subjected to excoriating criticism for its failure to analyze legal sources and its literalism, with only passing reference to the impact of confrontation upon *reliability*. Citing the Bible, Shakespeare and especially President Eisenhower to a lawyer is the act of a desperate analyst." *See* McGough Letter, *supra* note 81.

97. *Acts* 25:16.

> The Roman Governor Festus, discussing the proper treatment of his prisoner, Paul, stated: "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 has been given a chance to defend himself against the charges.[98]

Scalia also quoted Shakespearean verse to emphasize the English common law tradition of face-to-face confrontation: "Then call them to our presence — face to face, and frowning brow to brow, ourselves will hear the accuser and the accused freely speak . . . ."[99] He then cited turn-of-the-century American legal precedent from *Kirby v. United States*:[100]

> [A] fact which can be primarily established only by witnesses cannot be proved against an accused . . . except by witnesses who confront him at the trial, upon whom he can look while being tried, whom he is entitled to cross-examine, and whose testimony he may impeach in every mode authorized by the established rules governing the trial or conduct of criminal cases.[101]

Scalia continued, "[m]ore recently, we have described the 'literal right to 'confront' the witness at the time of trial' as forming the 'core of the values furthered by the Confrontation Clause.' "[102] Justice Scalia concluded, "[w]e have never doubted, therefore, that the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact."[103]

However, in *Maryland v. Craig*,[104] the Supreme Court ruled that people charged with child abuse are *not* always entitled to a face-to-face confrontation with their young accusers. The Court held that the Constitution allows for exceptions to such potentially traumatic confrontations when competing interests of the state are overriding. In *Craig*, the Court ruled that *in camera* testimony, broadcast via videotape to the courtroom where the trial is occurring, is permissible when it has been demonstrated to the court that the child witness would be unduly traumatized by giving testimony publicly. In the majority opinion, Justice O'Connor noted:

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98. 487 U.S. at 1015-16.
99. *Id.* at 1016 (quoting WILLIAM SHAKESPEARE, RICHARD II act 1, sc. 1).
100. 174 U.S. 47 (1899).
101. 487 U.S. at 1017 (quoting *Kirby*, 174 U.S. at 55).
102. *Id.* (citing California v. Green, 399 U.S. 149, 157 (1970)).
103. 487 U.S. at 1016.
104. 497 U.S. 836 (1990).

> We have never held, however, that the Confrontation Clause guarantees criminal defendants an *absolute* right to a face-to-face meeting with the witnesses against them at trial. . . .
>
> The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a defendant by subjecting it to rigorous testing in an adversary proceeding before the trier of fact . . . .
>
> The combined effects of the elements of confrontation — physical presence, oath, cross-examination, and observation of demeanor by the trier of fact — serves the purposes of the Confrontation Clause by ensuring that evidence admitted against an accused is reliable . . . .
>
> Although face-to-face confrontation forms "the core of the values furthered by the Confrontation Clause," . . . [it is not] an indispensable element of the Sixth Amendment's guarantee of the right to confront one's accusers . . . .
>
> . . . [A] literal reading of the Confrontation Clause would "abrogate virtually every hearsay exception, a result long rejected as unintended and too extreme." . . .
>
> . . . We have accordingly interpreted the Confrontation Clause in a manner sensitive to its purposes and sensitive to the necessities of trial and the adversary process. . . .
>
> . . . [Nonetheless,] a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the testimony's reliability is otherwise assured.[105]

Justice O'Connor's view mirrors the Court's opinion in *Ohio v. Roberts*.[106] In that case, the Court "recognized that competing interests, if 'closely examined' . . . may warrant dispensing with confrontation at trial."[107] In *Craig*, the Court held that the goals of securing reliable testimony from children while protecting them from revictimization present such interests.[108] Similarly, in *Douglas v. Alabama*,[109] the Supreme Court commented: "Our cases construing the [confrontation] clause hold

105. *Id.* at 844-50 (citations omitted).
106. 448 U.S. 56 (1980).
107. *Id.* at 64 (citations omitted).
108. *Craig*, 497 U.S. at 860.
109. 380 U.S. 415 (1965).

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."[110]

In the *Craig* case, the testimony's reliability was assured by maintaining the essential elements of physical presence of the child in the courthouse, administration of the oath to the child witness, cross-examination of the child by defense counsel, and observation of the child witness' demeanor by the trier of fact. Specifically, the child, the prosecutor, and defense counsel withdrew to another room where the child was examined and cross-examined. The judge, jury, and defendant remained in the courtroom where the testimony was displayed on a monitor. Although the child could not see the defendant, the accused, Sandra Craig, could see the child and remained in electronic communication with her attorney. Objections could be made and ruled on as if the witness were in the courtroom.

There are two important elements of the *Craig* case. First, using the procedures outlined above, the defendant retained the essence of the right to confrontation.[111] Second, based upon expert testimony, the court found that the alleged victim (and other allegedly abused children who were witnesses) would suffer serious emotional distress if they were required to testify in the courtroom, distress so severe that each would be unable to communicate.[112] Thus, unlike the situation in *Coy*, in *Craig* there was an *individualized* finding that the particular witnesses needed special protection. These two elements appear to be essential to withstanding judicial scrutiny in child witness cases that involve non-standard procedures.

However, *Craig* raises another issue as well, one that can be summarized in two relevant questions: Should special procedures be permissible only when the child's ability to communicate is crippled? Or, alternatively, should such procedures be invoked when the child is capable of communicating at some level, but the trial judge determines that use of the procedure may be more likely to produce reliable testimony, that is, testimony that leads to the truth?

Legal experts are divided on that issue. The Supreme Court decision in *Craig* suggests that courts should take a conservative stand. If the child is incapacitated by the prospect of testifying in court — that is, if the emotional distress suffered is

110. *Id.* at 418.
111. 497 U.S. at 857.
112. *Id.* at 860.

so serious that the child "cannot reasonably communicate" at trial — then a special procedure such as use of videotaped testimony is permissible. In discussing the impact of that decision, Lucy McGough, Louisiana State University Vinson & Elkins Professor of Law, notes: "The constitutional equation is not that trauma to the child *per se* justifies a special procedure but that trauma must have some projected effect upon the child's ability to give reliable testimony."[113]

At this point in time, however, the legal standard for permitting alternative procedures is unclear. Exactly how much trauma must a child be expected to endure before the court will permit the use of an alternative procedure such as videotaped testimony? For example, are grounds sufficient for the court to introduce a child's videotaped testimony if it is demonstrated that the child "would suffer at least *moderate* emotional or mental harm" if required to testify in person, as a Florida statute[114] allows? Or, must the court wait to use such a procedure until it can be demonstrated that the child "cannot reasonably communicate," the situation outlined in *Craig*? Currently, the answer to this dilemma rests with the trial judge, who must exercise discretion within the bounds of relevant state statutes.

In any case, the judge first must consider the competence of the child as a witness. In 39 states the competence of the child witness is presumed. In the remaining jurisdictions, the judge can ask a potential witness relatively direct questions designed to assess competence. Generally, such questions test intelligence, memory abilities, understanding of truth, appreciation of the obligation to speak truthfully, and capacity to observe the event in question. But questions regarding another component of competence, the ability to communicate at trial, are not so straightforward, especially where children are concerned. Children do not understand much about the court, its personnel, and its procedures.[115] Therefore, asking them to imagine how they might feel about testifying in court in the presence of the defendant — and, more importantly, how this feeling might affect their ability to communicate at trial — may be a fruitless endeavor.

How, then, should courts assess the impact of potential traumatization of the child witness in determining competence vis-a-vis the ability to communicate? This question is important, for if the child "clams up" in court, the criterion of ability

113. McGough Letter, *supra* note 81.

114. FLA. STAT. ch. 92.53 (1990) (emphasis added).

115. *See* Perry, *supra* note 66; Warren-Leubecker et al., *supra* note 66.

to communicate is not met, and the witness is *de facto* incompetent. Of course, the same witness' competence may be restored. For example, if, after a recess, the witness regains the ability to communicate, he or she may be ruled competent. But what if the child still is unable to communicate? In such cases, the court could use alternative procedures, including closed circuit broadcast. The important point is that, in resolving the communication difficulty dilemma, it is important that jurists understand both the potential for traumatization associated with children testifying at trial and the likely benefits of receiving testimony by alternative means.

The Issue of Traumatization When Children Testify

It is widely held that children experience emotional trauma as a result of repeated questioning by police and attorneys and of repeated court appearances.[116] Berliner and Barbieri note:

> One major barrier to prosecution of child sexual-assault cases is the fear that the child will be further traumatized by involvement in the legal process. . . . [T]he victims and their families may be reluctant to report the crime to authorities because of the fear that the child will be subjected to further trauma by the criminal-justice process. It can be lengthy and requires the child to repeatedly face traumatic memories: The victims and their families can have no guarantee that the child will not encounter untrained or insensitive personnel.[117]

Even defense attorneys acknowledge that involvement in legal proceedings can be devastating to children.[118] That view was shared by U.S. Supreme Court Justices Burger and Rehnquist, who commented that the traumatic impact of trial procedures on children certainly must be greater than the impact on adults in similar kinds of proceedings.[119] Furthermore, Melton notes: "[c]hildren are less likely than adults to have the cognitive and emotional resources for understanding the experience,

116. *See* DAVIES & NOON, *supra* note 11; GOODMAN ET AL., *supra* note 68; SEDELLE KATZ & MARY A. MAZUR, UNDERSTANDING THE RAPE VICTIM (1979); Gail S. Goodman, *Children's Testimony in Historical Perspective*, 40 J. OF SOC. ISSUES 9 (1984); Parker, *supra* note 85.

117. Lucy Berliner & Mary K. Barbieri, *The Testimony of the Child Victim of Sexual Assault*, 40 J. OF SOC. ISSUES 125, 128 (1984).

118. *See* Thomas L. Heeney, *Coping With the "Abuse of Child Abuse Prosecutions": The Criminal Defense Lawyers Viewpoint*, THE CHAMPION, Aug. 1985, at 12.

119. *See* Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 618 n.7 (1982).

and legal authorities not used to communicating with children may find it difficult to allay their concerns."[120]

The emotional trauma experienced by children who are involved in giving legal evidence takes many forms. Fear is a common symptom. In a comprehensive study of the emotional reactions of child sexual assault victims, sixty-five percent of the children observed were rated as experiencing "some distress" or as being "very distressed."[121] The researchers note:

> Even though the experience of testifying was less aversive than initially feared by the children we interviewed, many children still found the event upsetting. One child told us that it was "worse than I thought — like a nightmare." Another stated, "[I felt] scared, really upset, and I just couldn't remember that many things."[122]

The most striking finding, according to Goodman and colleagues, concerned the children's negative attitudes toward facing the defendant. Several children stated that they could not look at the defendant because they were so frightened (typically because they or their family had been threatened); other witnesses avoided eye contact with the defendant because they were angry.[123]

Other researchers have studied children's symptoms outside the courtroom setting. They note that children may experience nightmares; unconscious reenactments (i.e., unknowing, sometimes dangerous performance of acts similar to the original traumatic occurrence); repetitive, unsatisfying play around traumatic themes; pessimistic expectations for the future, including the prospect of dying; and pronounced, perhaps fixed, personality alterations.[124]

The case of eight-year-old "Jeanette"[125] is illustrative. The child was sexually assaulted on repeated occasions by her neighbor. In agreeing to testify against her assailant, "Jeanette" said, "I want (him) to go to jail so he won't do what he did to me to anybody else." But "Jeanette's" bravery belies her traumatization. It took the installation of a security system,

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120. Gary B. Melton, *Procedural Reforms to Protect Child Victim/Witnesses in Sex Offense Proceedings*, *in* CHILD SEXUAL ABUSE AND THE LAW 184 (Josephine Bulkley ed., 1981).

121. GOODMAN ET AL., *supra* note 68, at 83.

122. *Id.* at 71.

123. *Id.*

124. *See* Robert S. Pynoos & Spencer Eth, *The Child As Witness to Homicide*, 40 J. OF SOC. ISSUES 87 (1984).

125. Margo Harakas, *Return of the Bad Man*, FT. LAUDERDALE NEWS & SUN-SENTINEL, Oct. 8, 1989, at E1.

participation in karate lessons, and the purchase of a Doberman watchdog to vanquish Jeanette's nightmares and to make her feel secure again in her own home.[126]

While the specific symptoms vary on a case-by-case basis, Pynoos and Eth discuss some typical emotional patterns for children who testify in court:

> Previous clinical reports . . . have neglected to consider correlations between children's symptoms and the ongoing criminal proceedings. For instance, prompt arrest can alleviate the initial fear, while trial postponement may result in prolonged anxiety. We have observed several cases in which specific symptoms, such as unconscious reenactment behavior or traumatic dreams, have reappeared at critical junctures during the proceedings.[127]

Goodman and Michelli[128] asked Judge Orrelle Weeks of Denver Juvenile Court how children fared in the courtroom. She replied:

> The only time that children seem to be traumatized by serving as witnesses is when they have to recount in detail foul events to which they themselves have been the victim. This is most pronounced for cases involving sexual molestation. Often the law requires that the specifics of the sexual act must be stated. We try to be as gentle and understanding as possible. If the child is testifying about an event that is not so personal, the child does not seem to be adversely affected by the experience.[129]

While ample anecdotal evidence exists to suggest that children are traumatized by giving testimony in court, good empirical research on this topic is sparse.[130] In 1963, Gibbens and Prince reported that child sex victims who were involved in court proceedings experienced greater distress than those who did not appear in court.[131] The researchers cautioned, however, that it was likely that only the more severe cases of abuse resulted in court appearances for child victims, so the research

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126. *Id.*

127. Pynoos & Eth, *supra* note 124, at 96 (citation omitted).

128. Gail S. Goodman & Joseph A. Michelli, *Would You Believe a Child Witness?*, PSYCHOL. TODAY, Nov. 1981, at 82-4, 86, 90-91.

129. *Id.* at 90.

130. *See* GOODMAN ET AL., *supra* note 68; Goodman, *supra* note 116.

131. T.C.N. GIBBENS & JOYCE PRINCE, CHILD VICTIMS OF SEX CRIMES (1963).

sample was biased.[132] DeFrancis's study of nearly 200 child sexual assault cases in the New York courts led to the conclusion that involvement in the legal process was stressful for children and families.[133] However, DeFrancis did not study a comparison group of sexually assaulted children whose cases were *not* brought to trial, so there is no way of knowing whether the trauma reported by the children resulted from the experience of testifying or from the assaults they had endured.[134]

The recent British study conducted by Davies & Noon offers some of the best data currently available supporting the contention that testifying at trial is traumatic.[135] In that study, Davies and Noon found that the level of stress experienced by British children who gave testimony by means of "Live link" indeed was considerably lower than that experienced by Scottish children who gave live testimony at trial.[136]

Another relevant study was reported by Hill and Hill:

> The authors . . . 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 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. 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. 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

132. *Id.*

133. VINCENT DEFRANCIS, PROTECTING THE CHILD VICTIM OF SEX CRIMES COMMITTED BY ADULTS (1969).

134. *See id.*

135. DAVIES & NOON, *supra* note 11.

136. *Id.*

> to these questions were scored as "correct," "incorrect," and "do not know."[137]

The results of their study indicated that, compared with children in a courtroom setting, children in the simulated videotape setting tended to "(1) relate more central items in free recall, (2) answer specific questions correctly more often, and (3) say 'I don't know' or give no answer when asked specific questions significantly less often."[138]

These studies suggest that use of the videotape procedure not only reduces traumatization of child witnesses but also improves the quality of their testimony. However, some experts have suggested that the experience of testifying in court actually may be beneficial for some children. Melton states the case as follows:

> [P]articularly for young children, it is equally plausible that children's responses are *less* severe on average than those of adults. Provided that parents and others do not overreact and that they are supportive of the child during the legal process, it may well be that the trial experience will cause little trauma. At least for some child victims, the experience may be cathartic; it provides an opportunity for taking control of the situation, achieving vindication, and symbolically putting an end to the episode.[139]

Pynoos and Eth echo Melton's view, suggesting that involvement in legal activities can, in itself, be a coping strategy.[140] In the case of a parent being killed in front of a child, for example, the opportunity afforded the child witness to speak on behalf of the deceased parent often is of paramount importance. Pynoos and Eth report that "[o]lder children not called to the witness stand have described feeling they had again failed to come to the aid of their slain relative."[141] Similarly, victimized children may feel that providing testimony in court helps to bring the defendant to justice, a sentiment voiced by "Jeanette" above.[142] Of course, providing testimony via videotape can produce the same cathartic effect. Moreover, using tape technology eliminates the most traumatic aspect of testifying at trial: facing the defendant in court.

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137. Hill & Hill, *supra* note 29, at 813-15.

138. *Id.* at 815.

139. Melton Testimony, *supra* note 82, at 8.

140. Pynoos & Eth, *supra* note 124.

141. *Id.* at 101.

142. *See supra* notes 125-26 and accompanying text.

Even when the end result is satisfying, the experience of testifying at trial usually is emotionally distressing for children. To be sure, the specific reactions of a particular child witness depend in large measure on the personality of the child, the nature of the trial, the way in which the child witness and courtroom personnel have been prepared, and the procedures allowed by the trial court. Therefore, the court's requirement that an *individualized* finding of undue traumatization be secured before allowing the use of videotaped testimony is a reasonable one.

Policy Recommendations

The standard courtroom setting is particularly likely to induce trauma among child witnesses; it also is likely to impair their communicative abilities. Under such circumstances, the truth-seeking function of the court may be vitiated if videotaped testimony is not allowed in cases involving child witnesses. Therefore, when particularized findings of trauma exist for a child witness, the courtroom and its standard procedures should be altered to accommodate the child, so long as the elements of the defendant's right to confrontation are preserved in the process.

If the child meets the other criteria for competence, and if he or she is able to communicate effectively about the incidents in question in some appropriate setting (for example, judge's chambers, neutral office, on videotape), then the truth-seeking function of the court is enhanced by using alternative procedures to obtain the child's testimony. The degree to which the child can communicate effectively in the presence of the accused should not speak to the child's competence as a witness, but rather should relate to the child's credibility. The child should be judged competent to give evidence, and the jury should decide what weight to give to the child's videotaped testimony.

When the court agrees to use tape technology, it must address several procedural questions: Who should conduct the videotaped interview? Who should supply the questions? Who should be in the room at the time of the taping? When should the videotaping occur — during the investigation of the case, at deposition, or at trial (via "live link")?

Of course, answers to these questions must be guided by relevant state statutes and Supreme Court decisions. In general, however, we recommend the following:

1. Video-record the interview as soon as possible after a child discloses victimization. Citing empirical evidence,[143] McGough recommends that videotaping occur within 48 hours of disclosure.[144]
2. Representatives from the various agencies that will be involved in the prosecution of a case — or better yet, a multidisciplinary team — should discuss the case and gather relevant background information. As Bull notes, "In this way the question of how best to conduct the interview can always be addressed."[145]
3. During the videorecording of the interview, the child should be on camera at all times. Also, it is a good idea to film the interviewer, either using the same or a second camera.
4. Keep full written notes of who was present at the interview, why they were present, and whether they interfered with the interview (for example, a parent miming to a child to "keep quiet").[146]
5. Only one person should conduct the interview, and that person should have received special training in conducting video-recorded interviews with child witnesses for use in criminal proceedings.[147]
6. Preserve the essential elements of the defendant's right to confrontation: Administer the oath to the child witness, allow defense counsel (or a neutral questioner) to cross-examine the child, and permit the trier of fact to observe the child witness' demeanor. A good technique is to employ a neutral questioner who is in electronic communication with judge and attorneys during the taping of the interview.[148]

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143. Charles J. Brainerd et al., *The Development of Forgetting and Reminiscence and Forgetting*, 55 MONOGRAPHS OF THE SOC'Y FOR RES. IN CHILD DEV. Serial No. 222 (1990).

144. McGough, *supra* note 21.

145. Bull, *supra* note 12, at 7.

146. *Id.*

147. For reviews of good interviewing techniques, see DAVID P.H. JONES & MARY G. MCQUISTON, INTERVIEWING THE SEXUALLY ABUSED CHILD (1988); NANCY W. PERRY & LAWRENCE S. WRIGHTSMAN, THE CHILD WITNESS: LEGAL ISSUES AND DILEMMAS (1991).

148. *See* David P.H. Jones & Richard D. Krugman, *Can a Three-Year-Old Child Bear Witness to Her Sexual Assault and Attempted Murder?*, 10 CHILD ABUSE & NEGLECT 253 (1986).

7. Any challenges that the videotape demonstrates a child witness' untrustworthiness should be resolved at a preliminary hearing. The prosecutor offering the tape should bear the burden of proving that all the requirements of the relevant statute had been met.[149] The jury should not hear such disputes.

Perhaps the most basic recommendation is offered by Stephenson:

> When evaluating how to use videotaping in your community, please be advised not to save videotaping for the *big* case — the multivictim, multiperpetrator media attraction. That is a little like saying "I'll start practicing the piano after I get invited to Carnegie Hall." Those jurisdictions that are successful with videotaping are successful because it is done every day — on little cases, on big cases, and on cases that eventually go nowhere. It is experience and consistency that will give credibility to your program.[150]

As this article has demonstrated, the use of tape technology is unsettled in American law, and the procedure is fraught with dilemmas and challenges. Still, videotaped child testimony has been successfully introduced at trial on at least five continents. As Hill and Hill comment, "By using videotapes, both children and society benefit, and the defendant is afforded a fair trial."[151] Several countries have developed means for implementing tape technology that pass judicial scrutiny. It is time that jurisdictions in the United States follow suit.

149. McGough, *supra* note 21.
150. Stephenson, *supra* note 2, at 288.
151. Hill & Hill, *supra* note 29, at 833.