

Spring 1989

"Lights, Camera, Action": Videotaping and Closed-Circuit Television Procedures Coyly Confront the Sixth Amendment

Stephanie A. Holmes

Follow this and additional works at: <https://scholarcommons.sc.edu/sclr>



Part of the [Law Commons](#)

Recommended Citation

Stephanie Anne Holmes, "Lights, Camera, Action": Videotaping and Closed-Circuit Television Procedures Coyly Confront the Sixth Amendment, 40 S. C. L. Rev. 693 (1989).

This Note is brought to you by the Law Reviews and Journals at Scholar Commons. It has been accepted for inclusion in South Carolina Law Review by an authorized editor of Scholar Commons. For more information, please contact digres@mailbox.sc.edu.

NOTES

"LIGHTS, CAMERA, ACTION": VIDEOTAPING AND CLOSED-CIRCUIT TELEVISION PROCEDURES COYLY CONFRONT THE SIXTH AMENDMENT*

I. INTRODUCTION

A case that began with a two-year-old child's accusation that he had been molested by teachers at the McMartin preschool brought sexual molestation of children into the forefront of debate. The McMartin preschool case triggered an outcry by society against sexual abuse of children and in fact "helped fuel an overhaul of state laws."¹ Actual reports of sexual child abuse are on the rise.² Although the number of children who are victims of sexual abuse is impossible to estimate precisely, the number of confirmed cases has skyrocketed. In 1976 there were 6,000 confirmed cases of sexual abuse of children. That number jumped to 113,000 by 1985, just nine years later.³ In a 1985 poll taken by the *Los Angeles Times*, researchers found that 22% of those questioned had been sexually abused as children.⁴ The

* The author wishes to express her appreciation to Professor Vance L. Cowden, Clinical Professor at the University of South Carolina School of Law, for his invaluable assistance in the preparation of this Note.

1. Gest & Fisher, *Can the 'abused' kids be believed?*, U.S. NEWS AND WORLD REPORT, July 27, 1987, at 10.

2. See Note, *The Use of Videotaped Testimony of Victims in Cases Involving Child Sexual Abuse: A Constitutional Dilemma*, 14 HOFSTRA L. REV. 261 (1985) (citing Galante, *New War on Child Abuse: Reforms are Making Prosecutions Easier*, NAT'L L.J., June 25, 1984, at 26, col. 1).

3. See Lacayo, *Sexual Abuse or Abuse of Justice?*, TIME, May 11, 1987, at 49.

4. See L.A. Times, Aug. 25, 1985, § 1, at 1, col. 3 ("Sexual intercourse was involved in 55% of the molestations, while 36% of the victims said they had been fondled, 7% confronted by exhibitionists and 1% sodomized.").

Times poll showed that the majority of abusers are people whom the children know,⁵ that the victims are just as likely to be white and middle class as they are to be black and poor,⁶ and also that only 3% of the cases ever were reported to the police or other agency.⁷

A recent South Carolina study conducted by the Medical University of South Carolina Crime Victims Center revealed that sexual abuse is equally prevalent in this state.⁸ In this study, funded by the National Institute of Justice (NIJ), a sample was taken of 391 women living in Charleston County, South Carolina.⁹ The NIJ researchers found that 33.5% of the women surveyed had experienced some type of sexual assault before their eighteenth birthday.¹⁰ Nearly 10% “had been the victim of a completed child rape.”¹¹ This study also showed that the

The Sexual Assault Center in Seattle, Washington categorized the nature of abuse into the following categories: genital fondling, 57 percent; vaginal intercourse, 33 percent; oral-genital contact, 27 percent; attempted intercourse, 19 percent; forced masturbation, 12 percent; digital penetration, 10 percent; anal intercourse, 8 percent. D. WHITCOMB, *ASSISTING CHILD VICTIMS OF SEXUAL ABUSE* 33 (1982).

5. See *L.A. Times*, Aug. 25, 1985, § 1, at 1, col. 4 (“Abusers include friends and acquaintances (41%), strangers (27%) and relatives (23%).”).

6. See *id.* at 34, col. 1. (“Contrary to popular opinion, victims are not more likely to come from lower socioeconomic groups or particular ethnic groups, nor are they any more susceptible to other kinds of crime.”).

Characteristics of child victims reported by the Sexual Assault Center in Seattle, Washington also support this contention. In 1980 the Center reported that of sexual child abuse victims, 76% were caucasian, 8% were black, 1% was Spanish-American, 2% were Native American, 1% was Asian, 2% were classified as “other,” and the race of 10% was unknown. See D. WHITCOMB, *supra* note 4, at 32. For an opposite viewpoint see L. PELTON, *THE SOCIAL CONTEXT OF CHILD ABUSE AND NEGLECT* 24 (1981) (“There is substantial evidence of a strong relationship between poverty and child abuse and neglect.”).

7. See *L.A. Times*, Aug. 25, 1985, § 1, at 34, col. 1.

8. See *Hearings on H.2395 Before the Judiciary Committee, South Carolina House of Representatives*, February 2, 1988 (statement of Benjamin E. Saunders, Ph.D.) [hereinafter *Hearings* (testimony)].

9. See *id.*

10. See *id.* Additionally the South Carolina Law Enforcement Division (SLED) reported that in South Carolina in 1986, 2 newborns, 167 children ages 1-4, 372 children ages 5-9, and 544 children ages 10-14 were victims of sexual abuse. See REPORT TO GENERAL LAWS SUB-COMMITTEE OF THE SOUTH CAROLINA HOUSE OF REPRESENTATIVES JUDICIARY COMMITTEE FROM THE SOUTH CAROLINA COMMISSION ON WOMEN 1 (Feb. 3, 1988).

11. *Hearings* (testimony), *supra* note 8. The NIJ researchers did not define “completed rape.” Generally, however, rape is defined as “unlawful sexual intercourse with a female person without her consent.” R. PERKINS & R. BOYCE, *CRIMINAL LAW* 197 (3d ed. 1982). One may assume that “completed rape” in the NIJ study falls within this general definition.

abuser was a stranger to the child in only 14% of the cases.¹² Only 5% of the cases were reported to the authorities.¹³

Several factors illustrate the probability not only that more cases of sexual abuse are reported every year but that the number of children who are victims of sexual abuse is increasing.¹⁴ More children have working mothers,¹⁵ and the number of divorces increases every year.¹⁶ More children, therefore, are exposed to day-care centers, babysitters, and nurseries. Additionally, one should note that as the number of divorces rises, so does the likelihood that mothers will remarry, thereby exposing more children to stepfathers.¹⁷ Finally, studies show that victims of child abuse have an increased risk that they themselves will become abusers.¹⁸ If abused children become abusers and an increasing number of children are victims of sexual abuse, the number of abusers likely will increase each year.

Although victims of sexual abuse undergo great mental and physical pain as a result of the abuse, they face perhaps even greater trauma in the hands of the judicial system.¹⁹ Sexual abuse victims may be interviewed dozens of times before they ever appear in court.²⁰ They tell their stories to parents, doctors, police officers, social workers, therapists, and also finally to prosecutors.²¹ One specialist, in fact, believes that these child victims relive their abuse each time they tell their stories.²²

Prosecution of sexual abusers is extremely difficult. First, there typically are only two witnesses to the alleged abuse — the child and the abuser.²³ Second, the child often has been threatened that if he discloses the abuse he will be injured, a pet will be hurt, or his family will no longer love him.²⁴ Third, in

12. *Hearings* (testimony), *supra* note 8.

13. *See id.*

14. *See* J. CREWDSON, *BY SILENCE BETRAYED* 31 (1988).

15. *See id.*

16. *See id.*

17. Stepfathers are more likely to abuse their stepdaughters than are biological fathers. *See id.*

18. *See id.* at 32.

19. *See id.* at 187.

20. *See id.*

21. *See id.* at 186-87.

22. *See* Letter from Sara E. Schuh to South Carolina Representative Tom Huff (Feb. 11, 1988).

23. *See* J. CREWDSON, *supra* note 14, at 162.

24. *See id.* at 175.

most instances little or no corroborating evidence exists, and generally, the only evidence available consists of medical evidence.²⁵ Although medical evidence may be available, for example when the child has contracted a sexually transmitted disease, there is no way to link that evidence to a particular perpetrator. Finally, since children often are afraid to testify, the efficacy of their testimony is greatly reduced.²⁶

While no rule excludes the testimony of children under a specific age, young children's competency is often questionable. Traditionally, courts have examined the child witness's intelligence to determine whether he or she "feels a duty to tell the truth."²⁷ Nevertheless, children usually are credible witnesses in abuse cases. Several studies indicate that children rarely fabricate stories of abuse,²⁸ and commentators also note that a child's recall is as accurate as an adult's.²⁹

In response to growing awareness and concern about child sexual abuse victims, many states have enacted legislation designed both to protect abused children and to increase prosecutions and convictions of sex offenders.³⁰ These methods include use of anatomically correct dolls,³¹ exclusion of the public from trial during the victim's testimony,³² use of one-way mirrors during the abused child's trial testimony,³³ as well as creation of special hearsay exceptions for children's statements of sexual abuse.³⁴

25. *See id.* at 161.

26. *See* Marcotte, *Coping With Child Abuse Testimony*, 73 A.B.A. J. 20 (Dec. 1, 1987).

27. MCCORMICK ON EVIDENCE § 62, at 156 (E. Cleary 3d ed. 1984).

28. In a Michigan study, 147 children alleging abuse were given polygraph tests, and only one child was believed to be lying. Likewise, a Denver, Colorado survey found only 1% of reported claims to be unsubstantiated. *See* Snyder, *Who Tells the Truth About Sexual Abuse?*, 8 CAL. LAWYER 10, 10 (April 1988). Suggestibility, however, may be related to age. *See* Saywitz, *The Credibility of Child Witnesses*, 10 FAMILY ADVOCATE 38, 40 (Winter 1988) ("Children over ten to eleven years old are no more suggestible than their elders.").

29. *See* Snyder, *supra* note 28, at 10. *See also* Saywitz, *supra* note 28, at 40 ("[C]hildren's memories are not necessarily inferior to adults'").

30. *See* Bukley, *Evidentiary and Procedural Trends in State Legislation and Other Emerging Legal Issues in Child Sexual Abuse Cases*, 89 DICK. L. REV. 645, 645 (1985).

31. *See* ALA. CODE § 15-25-5 (Supp. 1988).

32. *See* ALASKA STAT. § 12.45.046 (Supp. 1988).

33. *See id.* § 12.45.046(2).

34. *See, e.g.,* ARIZ. REV. STAT. ANN. § 13-1416 (Supp. 1988); KAN. STAT. ANN. § 60-

It is arguable that other victims of crime, for example adult rape victims and relatives witnessing brutal crimes, are in need of similar protection. This Note, however, will examine only those statutes that allow for a sexually abused child's testimony to be introduced at trial either through videotape or closed-circuit television. Particular attention will be given to South Carolina law and to recent amendments to the South Carolina Code. These procedures will be analyzed with regard to the United States Supreme Court's decisions concerning the defendant's right of confrontation, specifically in light of the Court's recent decision in *Coy v. Iowa*.³⁵

II. CHILD PROTECTION PROCEDURES

A. Testimony Through Videotape

Thirty-five states have enacted provisions that permit introduction of a child abuse victim's videotaped testimony at trial.³⁶ The majority of these statutes limit the procedure's application to children up to a certain age.³⁷ Also, most statutes equate videotaped testimony with testimony given in court. The child victim, therefore, is not required to testify in the trial of his alleged

460(dd) (Vernon Supp. 1989); UTAH CODE ANN. § 76-5-411 (Supp. 1989).

35. 108 S. Ct. 2798 (1988).

36. See ALA. CODE § 15-25-2 (Supp. 1988); ALASKA STAT. § 12.45.046 (Supp. 1988); ARIZ. REV. STAT. ANN. § 13-4252 (Supp. 1988); ARK. STAT. ANN. § 16-44-203 (1987); CAL. PENAL CODE § 1346 (West Supp. 1989); COLO. REV. STAT. § 18-3-413 (1986); CONN. GEN. STAT. § 54-86g (Supp. 1989); DEL. CODE ANN. tit. 11, § 3511 (1987); FLA. STAT. ANN. § 92.53 (Harrison Supp. 1988); IND. CODE ANN. § 35-37-4-6 (Burns Supp. 1988); IOWA CODE ANN. § 910A.14 (West Supp. 1988); KAN. CRIM. PROC. CODE ANN. § 22-3433 (Vernon Supp. 1989); KY. REV. STAT. ANN. § 421.350 (Michie/Bobbs-Merrill Supp. 1986); LA. REV. STAT. ANN. § 15:440.3-5 (West Supp. 1989); ME. REV. STAT. ANN. tit. 15, § 1205 (West Supp. 1988); MASS. GEN. LAWS ANN. ch. 278, § 16D (West Supp. 1989); MINN. STAT. ANN. § 595.02(3) (West 1988); MISS. CODE ANN. § 13-1-405 (Supp. 1988); MO. REV. STAT. § 491.675-.693 (Vernon Supp. 1989); MONT. CODE ANN. § 46-15-401 (1987); NEV. REV. STAT. § 174.227 (1986); N.H. REV. STAT. ANN. § 517:13-a (Supp. 1988); N.M. STAT. ANN. § 30-9-17 (Supp. 1987); OHIO REV. CODE ANN. § 2907.41 (Anderson 1987); OKLA. STAT. ANN. tit. 10, § 1147 (West 1987); 42 PA. CONS. STAT. ANN. § 5984 (Purdon Supp. 1989); R.I. GEN. LAWS § 11-37-13.2 (Supp. 1988); S.C. CODE ANN. § 19-1-180 (Law. Co-op. Supp. 1988); S.D. CODIFIED LAWS ANN. § 23A-12-9 (Supp. 1988); TENN. CODE ANN. § 24-7-116 (Supp. 1987); TEX. CODE CRIM. PROC. ANN. art. 38.071, § 5 (Vernon Supp. 1989); UTAH CODE ANN. § 77-35-15.5 (Supp. 1989); WIS. STAT. ANN. § 967.04 (West Supp. 1988); WYO. STAT. § 7-11-408 (1987); VT. R. EVID. 804a (1987 Rules of Evidence).

37. See, e.g., ARIZ. REV. STAT. ANN. § 13-4251 (Supp. 1988); FLA. STAT. ANN. § 92.53(1) (Harrison Supp. 1988); ME. REV. STAT. ANN. tit. 15, § 1205 (West Supp. 1988).

abuser.³⁸ Although the videotape statutes share these provisions, they vary greatly in a number of other respects: (1) the requirement that the child be unavailable; (2) the findings that must be made prior to implementation of a procedure; (3) the requirement of face-to-face confrontation and cross-examination; (4) the procedures that must be utilized when videotaping the child's testimony.

Some states require that a trial judge deem a child witness unavailable before a videotaping procedure may be implemented. These jurisdictions include California,³⁹ Colorado,⁴⁰ Indiana,⁴¹ South Dakota,⁴² and Texas.⁴³ For example, the Texas child protection statute applies only "if the trial court finds that the child is unavailable to testify at the trial of the offense."⁴⁴ Conversely, Arizona,⁴⁵ Kansas,⁴⁶ Kentucky,⁴⁷ Louisiana,⁴⁸ Tennessee,⁴⁹ and Utah⁵⁰ require that the child must be available to testify at trial before videotaped testimony may be introduced. Louisiana's child shield statute states that "[t]he videotape of an oral statement of the child made before the proceeding begins may be admissible into evidence if . . . [t]he child is available to testify."⁵¹

The majority of states, however, make no mention of either availability or unavailability in their child protection statutes. These states require only that the trial judge find that the child somehow will be traumatized if required to testify either in open court or in the defendant's presence.⁵²

38. See, e.g., ALA. CODE § 15-25-2 (Supp. 1988); ALASKA STAT. § 12.45.046 (Supp. 1988); CAL. PENAL CODE § 1346 (West Supp. 1989).

39. See CAL. PENAL CODE § 1346 (West Supp. 1989).

40. See COLO. REV. STAT. § 18-3-413 (1986).

41. See IND. CODE ANN. § 35-37-4-6 (Burns Supp. 1988).

42. See S.D. CODIFIED LAWS ANN. § 23A-12-9 (Supp. 1988).

43. See TEX. CODE CRIM. PROC. ANN. art. 38.071, § 5 (Vernon Supp. 1989).

44. See *id.* art. 38.071, § 1.

45. See ARIZ. REV. STAT. ANN. § 13-4252 (Supp. 1988).

46. See KAN. CRIM. PROC. CODE ANN. § 22-3433 (Vernon Supp. 1989).

47. See KY. REV. STAT. ANN. § 421.350 (Michie/Bobbs-Merrill Supp. 1986).

48. See LA. REV. STAT. ANN. § 15:440.3-.5 (West Supp. 1989).

49. See TENN. CODE ANN. § 24-7-116 (Supp. 1987).

50. See UTAH CODE ANN. § 77-35-15.5 (Supp. 1989).

51. LA. REV. STAT. ANN. § 15:440.5(8) (West Supp. 1989).

52. See ALASKA STAT. § 12.45.046(a)(5) (Supp. 1988) (court must consider "the mental or emotional strain that will be caused by requiring the child to testify"); ME. REV. STAT. ANN. tit. 15, § 1205(1) (West. Supp. 1988) (hearsay admissible if "the court

The various pieces of state legislation also differ in a second respect — the findings that must be made prior to actual use of a videotaping procedure. Surprisingly, a number of states do not require the trial court to make any findings, either specific or general, that the child victim is in need of special protection.⁵³ In these jurisdictions videotaping procedures may be used if the prosecution and/or the child make such a request. Montana, for example, provides that videotaped testimony may be taken and introduced at trial "at the request of such victim and with the concurrence of the prosecuting attorney."⁵⁴ Similarly, California allows such a procedure to be implemented upon application by the prosecuting attorney.⁵⁵

On the other hand, a trial court's finding that a child is likely to be traumatized by testifying is required by some state statutes.⁵⁶ Most of these statutes, however, give little guidance to the trial court that is required to assess the child's mental and emotional well-being.⁵⁷ Colorado, one of the rare states to provide this direction, requires the judge to consider, at a minimum, testimony from a child therapist or other person.⁵⁸

Another variance among the statutes is the requirement of face-to-face confrontation and cross-examination. The statutes differ on whether they require the testifying child to come eye-to-eye with his alleged abuser. Most states require the defendant to be present when a child's testimony is taken by videotape.⁵⁹ Many of these states, however, do provide protection for the child while his testimony is given by shielding him from either

finds that the mental or physical well-being . . . will more likely than not be harmed").

53. See ARIZ. REV. STAT. ANN. § 13-4253 (Supp. 1988); ARK. STAT. ANN. § 16-44-203 (1987); CAL. PENAL CODE § 1346 (West Supp. 1989); IND. CODE ANN. § 35-37-4-6 (Burns Supp. 1988); KY. REV. STAT. ANN. § 421.350(4) (Michie/Bobbs-Merrill Supp. 1986); MONT. CODE ANN. § 46-15-401 (1987); S.D. CODIFIED LAWS ANN. § 23A-12-9 (1988); TEX. CODE CRIM. PROC. ANN. art. 38.071, § 4 (Vernon Supp. 1989).

54. MONT. CODE ANN. § 46-15-401 (1987).

55. See CAL. PENAL CODE § 1346 (West Supp. 1989).

56. See COLO. REV. STAT. § 18-3-413(3) (1986); FLA. STAT. ANN. § 92.53(1) (West Supp. 1986); ME. REV. STAT. ANN. tit. 15, § 1205(1) (West Supp. 1988); WIS. STAT. ANN. § 967.04(7)(b) (Supp. 1988).

57. See, e.g., ME. REV. STAT. ANN. tit. 15, § 1205(1) (West Supp. 1988).

58. See COLO. REV. STAT. § 18-3-413(3) (1986) ("[S]uch finding shall be based on, but not limited to, recommendations from the child's therapist or any other person having direct contact with the child.").

59. See, e.g., ALASKA STAT. § 12.45.046 (Supp. 1988); COLO. REV. STAT. § 18-3-413 (1986); N.H. REV. STAT. ANN. § 517:13-a (Supp. 1988).

seeing or hearing the defendant. Methods of shielding include use of two-way mirrors where the defendant can see and hear the child but the child cannot see or hear the defendant.⁶⁰ Another method is confinement of the defendant to another room that is linked electronically to the room where the child testifies.⁶¹ At least nine states require the child to come face-to-face with the defendant.⁶² The child is not protected during the actual videotaping from confronting his alleged attacker, but is spared the trauma of testifying in open court.

Most states provide for cross-examination at the time the videotape is made.⁶³ Of the handful of states that do not provide for cross-examination at this time, the majority of these jurisdictions require the child's availability at trial.⁶⁴

The methods that must be utilized when videotaping a child's testimony also vary greatly. Some state statutes are silent about the actual procedures to be implemented and provide only that the judge, child, prosecutor, defendant, and defense counsel be present at the taping.⁶⁵ Others specify that this taping should take place in the judge's chambers.⁶⁶ Still other statutes allow people such as parents and relatives to accompany the child when the testimony is recorded,⁶⁷ perhaps to bolster the child's confidence. Arizona, Kentucky, and Texas, in an even greater effort to protect the child victim, have enacted legislation that additionally requires equipment operators to be shielded from the

60. See FLA. STAT. ANN. § 92.53(4) (Harrison Supp. 1988).

61. See OHIO REV. CODE ANN. § 2907.41(A)(2) (Anderson 1987).

62. See ALA. CODE § 15-25-2 (Supp. 1988); ALASKA STAT. § 12.45.046 (Supp. 1988); ARK. CODE ANN. § 16-44-203 (1987); CAL. PENAL CODE § 1346 (West Supp. 1989); COLO. REV. STAT. § 18-3-413 (1986); MONT. CODE ANN. § 46-15-401 (1987); N.H. REV. STAT. ANN. § 417:13-a (Supp. 1988); N.M. STAT. ANN. § 30-9-17 (Supp. 1987); S.D. CODIFIED LAWS ANN. § 23A-12-9 (Supp. 1988).

63. See *supra* note 59.

64. See, e.g., LA. REV. STAT. ANN. § 15:440.5 (West Supp. 1989).

65. See, e.g., ARK. CODE ANN. § 16-44-203 (1987); COLO. REV. STAT. § 18-3-413 (1986).

66. See, e.g., ALA. CODE § 15-25-3(a) (Supp. 1988) ("[T]he testimony shall be taken outside the courtroom in the judge's chambers."); ARIZ. REV. STAT. ANN. § 12-2312 (Supp. 1988) ("[T]he court may order all questioning of a minor witness to be videotaped in the judge's chambers.").

67. See ARIZ. REV. STAT. ANN. § 13-4253 (Supp. 1988); KY. REV. STAT. ANN. § 421.350 (Michie/Bobbs-Merrill Supp. 1986); TEX. CODE CRIM. PROC. ANN. art. 38.071 (Vernon Supp. 1989).

child's view.⁶⁸

B. *Testimony Via Closed-Circuit Television*

Approximately twenty-two states have adopted protective legislation that permits closed-circuit television to be used to convey a child's testimony to the jury.⁶⁹ The statutes providing for this method of testimony are strikingly similar to those that allow a child victim's testimony to be videotaped. These statutes also place an age limit on their applicability.⁷⁰

Under many closed-circuit statutes, the defendant is confined to the courtroom while the child, the prosecution, and the judge retire to another room to take testimony.⁷¹ These statutes provide greater protection to children than do provisions for videotaped depositions. For example, the majority of these statutes require equipment operators to be confined to another area or behind a screen while the child testifies.⁷²

As under statutory videotaping provisions, the majority of statutes that provide for closed-circuit television require the trial judge to find that a child would be traumatized before the procedure may be implemented. The degree of harm to the child varies from state to state.⁷³ Again, a few states require that the

68. See *supra* note 67.

69. See ALA. CODE § 15-25-3 (Supp. 1988); ARIZ. REV. STAT. § 13-4253 (Supp. 1988); CONN. GEN. STAT. § 54-86g (Supp. 1989); FLA. STAT. ANN. § 92.54 (Harrison Supp. 1988); GA. CODE ANN. § 17-8-55 (Supp. 1988); IND. CODE ANN. § 35-37-4-8 (Burns Supp. 1988); IOWA CODE ANN. § 910A.14 (West Supp. 1988); KAN. CRIM. PROC. CODE ANN. § 22-3434 (Vernon Supp. 1989); KY. REV. STAT. ANN. § 41.350 (Michie/Bobbs-Merrill Supp. 1986); LA. REV. STAT. ANN. § 15:283 (West Supp. 1989); MD. CTS. & JUD. PROC. CODE ANN. § 9-102 (Supp. 1988); MASS. GEN. LAWS ANN. ch. 278, § 16D (West Supp. 1989); MINN. STAT. ANN. § 595.02(4) (West 1988); MISS. CODE ANN. § 13-1-405 (Supp. 1988); N.Y. CRIM. PROC. LAW § 65.10 (McKinney Supp. 1988); OKLA. STAT. ANN. tit. 10, § 1148 (West 1987); 42 PA. CONS. STAT. ANN. § 5985 (Purdon Supp. 1989); R.I. GEN. LAWS § 11-37-13.2 (Supp. 1988); TEX. CODE CRIM. PROC. ANN. art. 38.071, § 3 (Vernon Supp. 1989); UTAH CODE ANN. § 77-35-15.5 (Supp. 1989); VT. R. EVID. 804a (1987 Rules of Evidence).

70. See, e.g., ALA. CODE § 15-25-2 (Supp. 1988) ("[T]he court may . . . order the taking of a videotaped deposition of an alleged victim . . . who is under the age of 16."); FLA. STAT. ANN. § 92.54 (Harrison Supp. 1988) (court may order closed-circuit television to be used if victim is under 16).

71. See, e.g., FLA. STAT. ANN. § 92.54 (Harrison Supp. 1988).

72. See, e.g., ALA. CODE § 15-25-3 (Supp. 1988); R.I. GEN. LAWS § 11-37-13.2 (Supp. 1988); TEX. CODE CRIM. PROC. ANN. art. 38.071, § 3 (Vernon Supp. 1989).

73. See, e.g., ALA. CODE § 15-25-2(a) (Supp. 1988) ("[T]he court shall consider the age and maturity of the child, the nature of the offense, the nature of the testimony that may be expected, and the possible effect that such testimony in person at trial may have

trial judge find the child unavailable before the protections of the statute may be implemented.⁷⁴ Even so, these jurisdictions are less likely to require a finding of unavailability for the utilization of closed-circuit television than they are for the use of videotaped depositions because the child is present at the courthouse during pendency of the trial.

Finally, most of these statutes set forth detailed procedures for presenting a child abuse victim's testimony. As noted above, the majority list the individuals permitted to be present while the child testifies.⁷⁵ A few jurisdictions allow the presence of "any person [who] . . . would contribute to the welfare and well-being of the child."⁷⁶ Often, camera operators are removed from the child's view.⁷⁷

C. South Carolina's Effort

On June 3, 1988, South Carolina, by amending sections 19-1-180⁷⁸ and 19-11-25⁷⁹ of the South Carolina Code,⁸⁰ joined those states that have enacted legislation designed to protect the sexual child abuse victim. The South Carolina amendments re-

on the victim or witness, along with any other relevant matters."); R.I. GEN. LAWS § 11-37-13.2 (Supp. 1988) (child must be found "unable to testify before the court without suffering unreasonable and unnecessary mental or emotional harm").

74. See, e.g., TEX. CODE CRIM. PROC. ANN. art. 38.071, § 1 (Vernon Supp. 1989). This statute does not define unavailability but merely states that videotaping will be used "if the trial court finds that the child is unavailable." *Id.*

75. See, e.g., *id.* art. 38.071, § 3 (allowing only the judge, attorneys, equipment operators, and "any person whose presence would contribute to the welfare and well-being of the child").

76. *Id.*; see also R.I. GEN. LAWS § 11-37-13.2 (Supp. 1988).

77. See *supra* note 72 and accompanying text.

78. S.C. CODE ANN. § 19-1-180 (Law. Co-op. Supp. 1988).

79. *Id.* § 19-11-25.

80. South Carolina previously adopted the Victims and Witness's Bill of Rights, which provided:

VICTIMS AND WITNESSES WHO ARE VERY YOUNG, ELDERLY, WHO ARE HANDICAPPED OR WHO HAVE SPECIAL NEEDS, HAVE A RIGHT TO SPECIAL RECOGNITION AND ATTENTION BY ALL CRIMINAL JUSTICE, MEDICAL, AND SOCIAL SERVICE AGENCIES.

The court shall treat "special" witnesses sensitively, using closed or taped sessions when appropriate. The solicitor or defense shall notify the court when a victim or witness deserves special consideration.

S.C. CODE ANN. § 16-3-1530(G) (Law. Co-op. 1976). This section has been applied when videotaping the statement of a victim of sexual child abuse. See *State v. Cooper*, 291 S.C. 351, 353 S.E.2d 451 (1987).

sulted from both an increased awareness of the problems of sexual child abuse and an increased pressure from various South Carolina solicitors' offices.⁸¹ The South Carolina Supreme Court's opinion in *State v. Hudnall*⁸² also may have helped trigger this legislative enactment. In *Hudnall* the court, in reversing the defendant-father's conviction, held that a three-year-old child's testimony was inadmissible in her father's trial for criminal sexual misconduct. The court determined that the child was incompetent because she "could not be held morally accountable for telling a lie."⁸³

Sections two and three of South Carolina Code section 19-11-25⁸⁴ were amended on June 3, 1988. These amendments create a rebuttable presumption of a child's competency and provide for notice if a videotaped deposition is requested. These sections are beyond the scope of this Note and, therefore, will not be discussed.

Section 19-1-180⁸⁵ was amended to allow particular out-of-court statements made by a child victim to be admissible in certain family court proceedings.⁸⁶ Like the majority of statutes that have provided for either videotaping or closed-circuit television,⁸⁷ this new South Carolina amendment places an age limit on the provisions of section 19-1-180. The statute is available only to introduce statements made by children under age twelve.⁸⁸

Section 19-1-180(B)(1) provides that a child's statement is admissible in court in three instances: (1) if the child testifies in court; (2) if the child testifies through an out-of-court videotaped deposition; or (3) if the child testifies via closed-circuit

81. Various solicitor's offices supported House Bill 2395, which was later enacted as the amendment to South Carolina Code Sections 19-1-180 and 19-11-25, at a public hearing held by the South Carolina House Judiciary Committee on February 3, 1988.

82. 293 S.C. 97, 359 S.E.2d 59 (1987).

83. *Id.* at 99, 359 S.E.2d at 61.

84. S.C. CODE ANN. § 19-11-25 (Law. Co-op. Supp. 1988).

85. *Id.* § 19-1-180.

86. Section 19-1-180 states that it applies to "family court proceeding[s] brought pursuant to Section 20-7-610 or Section 20-7-736." *Id.* Section 20-7-610 applies to abuse and neglect proceedings. See S.C. CODE ANN. § 20-7-610 (Law. Co-op. 1976). Section 20-7-736 confers jurisdiction upon the family court in abuse proceedings. See *id.* § 20-7-736.

87. See *supra* notes 36 and 69.

88. Section 19-1-180(A) applies to "an out-of-court statement made by a child under twelve years of age." S.C. CODE ANN. § 19-1-180(A) (Law. Co-op. Supp. 1988) (emphasis added).

television.⁸⁹ The statute does not require the trial judge to find the child unavailable to testify prior to admitting these hearsay statements in court. Moreover, the court is not required to make any findings, either general or particular, that the child will be traumatized if required to take the stand at the proceeding. Section 19-1-180(B)(1)⁹⁰ does not specify the methods that must be applied during taping or presentation of the child's testimony. These new amendments also leave open questions regarding whether the defendant must be present or may be excluded. The only condition to admission of these statements is that the child be subject to cross-examination at the time that they are made.⁹¹

The remainder of section 19-1-180 provides that other hearsay statements may be admitted either if the child is found to be unavailable⁹² or if the child's statement is shown to "possess particularized guarantees of trustworthiness."⁹³ This section is replete with factors the trial judge may consider in determining both the child's unavailability⁹⁴ and whether a statement is, in fact, trustworthy. In determining the trustworthiness of a statement, the court may consider, *inter alia*, the child's knowledge, age, motive, and distress as well as the statement's verity and the credibility of the person relating the statement.⁹⁵ These factors, however, do not appear applicable to the previous provisions allowing the introduction of testimony through videotaped deposition or closed-circuit television.

III. THE CONFRONTATION

Although the numerous state statutes on videotaping and

89. The subsection reads:

(B) An out-of-court statement may be admitted as provided in subsection (A) if:

(1) the child testifies at the proceeding or testifies by means of videotaped deposition or closed-circuit television

Id. § 19-1-180(B)(1).

90. *See id.*

91. *See id.*

92. *See id.* § 19-1-80(B)(2)(a).

93. *Id.* § 19-1-180(B)(2)(b).

94. A child may be found unavailable if he is dead or disabled, if a privilege exists, if he cannot communicate because of fear, or if there is a substantial likelihood that he would be traumatized. *See id.* § 19-1-180(B)(2)(a)i-v.

95. *See id.* § 19-1-180(D)(1)-(10).

closed-circuit television may reduce trauma to child victims, these statutes could face constitutional challenge. The defendant's sixth amendment right of confrontation is a major stumbling block to implementation of these procedures.

A. *The Supreme Court Decisions*

As early as 1600, English common law provided that an accused had a right to confront and cross-examine his accusers.⁹⁶ This common-law rule was incorporated into the sixth amendment of the United States Constitution, which provides that "[i]n all criminal prosecutions, the accused shall . . . be confronted with the witnesses against him."⁹⁷ The right of confrontation long has been recognized as a fundamental right in the United States⁹⁸ and crucial to ensuring the veracity of witnesses.⁹⁹ This right, in fact, was an issue in one of the few United States Supreme Court decisions to hold a congressional act unconstitutional. In *Kirby v. United States*¹⁰⁰ the Court declared that an 1875 statute violated the sixth amendment. That statute provided that a previous conviction against a person for stealing property "shall be conclusive evidence in the prosecution against such receiver that the property . . . has been embezzled, stolen or purloined."¹⁰¹ The Court noted that a defendant would have no connection with the previous trial and, therefore, no opportunity to confront crucial witnesses.¹⁰²

96. See D. FELLMAN, *THE DEFENDANT'S RIGHTS TODAY* 94 (1976).

97. U.S. CONST. amend. VI.

98. The right of confrontation is "[o]ne of the fundamental guarantees of life and liberty . . . long deemed so essential for the due protection of life and liberty that it is guarded against legislative and judicial action by provisions in the constitution of the United States and in the constitutions of most if not all the states composing the Union." *Kirby v. United States*, 174 U.S. 47, 55 (1899).

99. A defendant's confrontation of his accusers

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

California v. Green, 399 U.S. 149, 158 (1970) (footnote omitted).

100. 174 U.S. 47 (1899).

101. *Id.* at 48.

102. See *id.* at 61.

The majority of Supreme Court decisions concerning the confrontation clause consider the question of which types of hearsay are admissible in a criminal proceeding without violating the defendant's right of confrontation. Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."¹⁰³ The Federal Rules of Evidence recognize twenty-nine exceptions to the rule that makes hearsay evidence inadmissible.¹⁰⁴ These exceptions are based on the notion that they are inherently reliable or that the declarant is unavailable.¹⁰⁵

Prior to 1965, the Supreme Court did little to delineate the line between hearsay and the right of confrontation. In early confrontation decisions, the Court held that testimony used in a preliminary hearing was admissible if the defendant was responsible for the witness's absence,¹⁰⁶ that dying declarations were admissible,¹⁰⁷ and that testimony from a prior trial was admissible if the testifying witness was deceased.¹⁰⁸

Although the Supreme Court has since stated that it would be error to assume that "the Confrontation Clause is nothing more or less than a codification of the rules of hearsay,"¹⁰⁹ its early decisions seemed to equate the values of the confrontation clause with those of the hearsay rules.

In 1965 the Supreme Court deliberately set out to delineate the boundaries of a criminal defendant's right of confrontation. *Pointer v. Texas*¹¹⁰ involved a trial judge's decision to admit damaging testimony taken at a preliminary hearing. Although Pointer had been present at the hearing, he did not cross-examine the witness who gave this controversial testimony because he did not have an attorney. In *Pointer* the Supreme Court first addressed the issue of whether the confrontation clause applied to the states through the fourteenth amendment and concluded

103. FED. R. EVID. 801(c).

104. See *id.* 803, 804.

105. See I. YOUNGER, HEARSAY AND CONFRONTATION (audio-cassette tape, Condyle/Trans-Media Distrib. Corp. 1978).

106. See *Reynolds v. United States*, 98 U.S. 145 (1878).

107. See *Kirby v. United States*, 174 U.S. 47 (1899).

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

109. *California v. Green*, 399 U.S. 149, 155 (1970).

110. 380 U.S. 400 (1965).

that it did.¹¹¹ After answering this threshold question, the Court further held that Pointer's right of confrontation had been violated.¹¹² Although the Court did not define a defendant's right of confrontation, it interestingly equated that right with the right of cross-examination: "As has been pointed out, a major reason underlying the constitutional confrontation rule is to give a defendant charged with crime an opportunity to cross-examine the witnesses against him."¹¹³

In *Douglas v. Alabama*,¹¹⁴ decided on the same day as *Pointer*, the Supreme Court again determined that the right of cross-examination is the essential element of the confrontation right. The Court stated that the "inability to cross examine . . . as to the alleged confession plainly denied [the defendant] the right of cross-examination secured by the Confrontation Clause."¹¹⁵

These two cases seem to stand for the proposition that what the confrontation clause guarantees is the right of cross-examination. Additional proof was supplied by the Court in *Bruton v. United States*.¹¹⁶ In *Bruton* the Court held that a confession by one defendant in a joint trial violated the confrontation clause because the other defendant was precluded from cross-examining the co-defendant who did not take the stand.¹¹⁷

The Supreme Court affirmatively stated this proposition in *California v. Green*.¹¹⁸ In *Green* the Court seemed to have abandoned the notion that the rules of hearsay and the rights conferred upon the defendant by the confrontation clause are designed to protect identical values.¹¹⁹ *Green* involved a witness's testimony at the defendant's preliminary hearing that indicated that the defendant was a drug supplier. Later at trial, the prosecution introduced this testimony to refresh the wit-

111. Resolution of this issue was a foregone conclusion since Justice Hugo Black had authored the opinion in *Pointer*. See *Adamson v. California*, 332 U.S. 46, 89 (1947) (Black, J., dissenting) (advocating the doctrine of total incorporation).

112. See *Pointer*, 380 U.S. at 406.

113. *Id.* at 406-07.

114. 380 U.S. 415 (1965).

115. *Id.* at 419.

116. 391 U.S. 123 (1968).

117. See *id.* at 126.

118. 399 U.S. 149 (1970).

119. See *id.* at 155.

ness's recollection.¹²⁰ In a convoluted opinion, the Supreme Court upheld the introduction of this previous testimony despite the defendant's contention that his right of confrontation had been violated. The Court noted that the witness had been cross-examined at length at the preliminary hearing.¹²¹ The Court reiterated its prior rule that the right of confrontation is essentially the right of cross-examination: "There is good reason to conclude that the Confrontation Clause is not violated by admitting a declarant's out-of-court statements, as long as the declarant is testifying as a witness and *subject to full and effective cross-examination*."¹²² *Green* suggests that this cross-examination is effective if implemented either at trial or when the statement is made.¹²³

Similarly, in *Dutton v. Evans*¹²⁴ the Supreme Court faced a right of confrontation issue. In *Dutton* the trial court admitted the testimony of a witness who stated that a co-conspirator, upon returning from his arraignment, had stated that "[i]f it hadn't been for that dirty son-of-a-bitch Alex Evans, we wouldn't be in this now."¹²⁵ Justice Stewart, writing for the Court, stated that "[i]t seems apparent that the Sixth Amendment's Confrontation Clause and the evidentiary hearsay rule stem from the same roots."¹²⁶ The Court focused on the defendant's ability to cross-examine this witness and the fact that nineteen other witnesses had testified for the prosecution. The Court ruled that Evans' right of confrontation had not been violated. The Court once again emphasized that the purpose of the confrontation clause is cross-examination.¹²⁷

120. The witness claimed at trial that he did not remember the events because he was on "acid" at the time the alleged drug exchange took place. *See id.* at 152. The witness's recollection was not refreshed and therefore he was technically unavailable.

121. *See id.* at 165.

122. *Id.* at 158 (emphasis added).

123. *See* I. YOUNGER, *supra* note 105.

124. 400 U.S. 74 (1970).

125. *Id.* at 77.

126. *Id.* at 86.

127. *See id.* at 88-89. *See also* *Davis v. Alaska*, 415 U.S. 308 (1974), in which the Supreme Court held that the defendant's confrontation right was violated because he was prohibited from cross-examining a key witness about his juvenile record. Chief Justice Burger, writing for the Court, stated that "[c]ross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested." *Id.* at 316.

Finally, *Ohio v. Roberts*,¹²⁸ one of the Supreme Court's later decisions on confrontation, involved the introduction at trial of testimony taken during a preliminary hearing. In *Roberts* the witness was unavailable to testify at trial. The Supreme Court, focusing on opportunity to cross-examine the witness, ruled that the defendant's right of confrontation had not been violated.¹²⁹ The Court, however, went beyond simply finding that the defendant, at some time, had cross-examined his accusers.

Justice Blackmun, speaking for the Court, stated that the confrontation clause restricts admissible hearsay in two ways. First, the court stated that the rule of necessity requires the prosecution to "produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant."¹³⁰ Second, once a witness is shown to be unavailable, the "[c]lause countenances only hearsay marked with such trustworthiness that 'there is no material departure from the reason of the general rule.'"¹³¹ In other words, if a showing is made that the witness is unavailable for cross-examination, the hearsay statement will be admissible "only if it bears adequate 'indicia of reliability.' Reliability can be inferred without more in a case when the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness."¹³²

B. The State Court Decisions

Although the Court has stated that the confrontation clause "reflects a preference for face-to-face confrontation at trial,"¹³³ the central thrust of pre-*Coy* Supreme Court decisions was that the confrontation clause primarily guaranteed the right to cross-examine witnesses. Some state court decisions prior to *Coy* applied this premise in addressing the introduction of testimony through videotaping or closed-circuit television. For example, in

128. 448 U.S. 56 (1980).

129. *See id.* at 70.

130. *Id.* at 65.

131. *Id.* (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 109 (1934)).

132. *Id.* at 66 (emphasis added).

133. *Id.* at 63.

*State v. Cooper*¹³⁴ the South Carolina Supreme Court held that introduction of videotaped testimony of a three-year-old child did not violate the defendant's right to confront witnesses against him. In *Cooper* the trial judge, after speaking to both the victim and her mother, determined that the child would be traumatized if required to testify in open court. The trial court allowed the use of a videotaping procedure from which the defendant was precluded. Subsequently, the solicitor recommended, and the trial court approved, introduction of the videotape at trial. Cooper appealed, claiming that his right of confrontation had been violated. The Supreme Court of South Carolina affirmed Cooper's conviction, holding that the face-to-face provision "does not require . . . direct physical confrontation between defendant and witness [but] . . . may be served by . . . cross-examination."¹³⁵ Other courts similarly have resolved such constitutional challenges.¹³⁶

Other pre-*Coy* tribunals have rejected this reasoning. These courts adhered to literal interpretation of the right of confrontation and concluded that the sixth amendment's confrontation provision requires face-to-face, eye-to-eye confrontation.¹³⁷

IV. *Coy v. Iowa*

The United States Supreme Court addressed this split of opinion and in so doing marked a drastic change from its previous decisions in the confrontation arena. In *Coy v. Iowa*¹³⁸ the Supreme Court held that the use at trial of a semi-opaque screen placed between child witnesses and a defendant accused

134. 291 S.C. 351, 353 S.E.2d 451 (1987).

135. *Id.* at 356, 353 S.E.2d at 454.

136. See *People v. Johnson*, 146 Ill. App. 3d 640, 497 N.E.2d 308 (1986) (upheld use of videotape to introduce five-year-old child's testimony); *Commonwealth v. Willis*, 716 S.W.2d 224 (Ky. 1986) (upheld use of television cameras to introduce testimony of child abuse victim); *State v. Sheppard*, 197 N.J. Super. 411, 484 A.2d 1330 (Ct. Law Div. 1984) (upheld use of a ten-year-old child's videotaped testimony); *Commonwealth v. Ludwig*, 366 Pa. Super. 361, 531 A.2d 459 (1987) (upheld introduction of six-year-old's testimony through closed-circuit television).

137. See *Herbert v. Superior Court*, 117 Cal. App. 3d 661, 172 Cal. Rptr. 850 (1981) (defendant and child witness were seated so that they could not look at each other); *Wildermuth v. State*, 310 Md. 496, 530 A.2d 275 (1987) (victim permitted to testify via closed-circuit television); *State v. Mannion*, 19 Utah 505, 57 P. 542 (1899) (defendant's right was violated because child rape victim was seated with back to defendant).

138. 108 S. Ct. 2798 (1988).

of abusing them violated the defendant's sixth amendment right of confrontation.

In August 1985, two thirteen-year-old girls who were camping out in a make-shift tent in a suburban backyard were awakened by a man in the middle of the night. Their assailant, who wore either makeup or a mask to hide his identity, shone a flashlight in the girls' eyes so that they could not identify him. The assailant demanded that the girls undress, fondled them, and forced them "to kiss each other and pretend that they were enjoying it."¹³⁹ Approximately one and a half hours later, the attacker disappeared.¹⁴⁰

One victim's father suspected that John Avery Coy had been the girls' abuser. He had seen Coy, who lived next door to where the girls had camped out, watching as they had set up their tent.¹⁴¹ The father reported his suspicions to the police, who subsequently arrested Coy.

On August 14, 1985, Coy was charged with two counts of lascivious acts with a child.¹⁴² On November 6, 1985, just seven days prior to Coy's trial, the State moved to have the girls testify via closed-circuit television or to have Coy placed behind a screen, thereby preventing the girls from viewing him.¹⁴³ Coy objected to use of the screen, claiming that it violated his right to due process and his sixth amendment confrontation right. Coy claimed that the screen violated his due process rights because the procedure made him appear guilty, vitiating the presumption of innocence.¹⁴⁴ Coy also claimed that his right of confrontation was violated because the screen prevented face-to-face confrontation between him and the witnesses testifying against him.¹⁴⁵

The trial court ruled that a one-way screen be placed in the courtroom; the screen allowed the defendant to watch the wit-

139. Appellee's Motion to Dismiss at 1.

140. *See id.*

141. *See id.* at 1-2.

142. *See* Brief of Appellant at 3.

143. *See id.* This motion was made pursuant to IOWA CODE ANN. § 910A.3 (West Supp. 1988).

144. The courtroom lights had to be turned off, and "a panel of bright lights had to be focused directly on" the screen for the device to work. Brief of Appellant at 6-7. In fact the trial judge noted "the thing does cause sort of a dramatic emphasis, but we'll have to instruct on it if we grant the motion." *Id.* at 6.

145. *See id.* at 4.

nesses, but prevented the witnesses from viewing him. The trial judge did not consider any evidence that the girls would be traumatized by testifying in open court. On appeal the Iowa Supreme Court affirmed Coy's conviction, holding that Coy could cross-examine the two child-witnesses.¹⁴⁶ The court stated that "[confrontation] cannot be had except by the direct and personal putting of questions and obtaining immediate answers."¹⁴⁷

In an opinion written by Justice Scalia, who was joined by five other Justices, the Supreme Court reversed the holding of the Iowa Supreme Court. Initially, the Court noted that the right of confrontation existed in early Roman law.¹⁴⁸ The Court then rejected the State's contention that Coy's cross-examination of the child witnesses had not been impaired and that Coy's right of confrontation, therefore, was not violated.¹⁴⁹ The Court clearly declared that a defendant's sixth amendment right requires more than the right of cross-examination.¹⁵⁰ The confrontation clause, according to the Court, requires eye-to-eye confrontation.¹⁵¹ Justice Scalia quoted Shakespeare,¹⁵² the New Testament,¹⁵³ as well as a 1953 speech made by President Eisenhower to the B'nai B'rith Anti-Defamation League¹⁵⁴ to illustrate the confrontation clause's historical requirement of a face-

146. See *State v. Coy*, 397 N.W.2d 730 (Iowa 1986), *rev'd*, 108 S. Ct. 2798 (1988).

147. See *id.* at 733 (quoting *Lee v. Illinois*, 476 U.S. 530 (1986)).

148. See *Coy v. Iowa*, 108 S. Ct. at 2800.

149. See *id.* at 2802-03.

150. See *id.* at 2802 ("The perception that confrontation is essential to fairness has persisted over the centuries because there is much truth in it. . . . [T]he right to face-to-face confrontation serves much the same purpose as a less explicit component of the Confrontation Clause . . . — the right to cross-examine the accuser.").

151. The Court stated, "We have never doubted . . . that the Confrontation Clause guarantees the defendant a *face-to-face* meeting with the witnesses." *Id.* at 2800 (emphasis added).

152. See *id.* ("Shakespeare was thus describing the root meaning of confrontation when he had Richard the Second say: 'Then call them to our presence — face to face, and frowning brow to brow, ourselves will hear the accuser and the accused freely speak.'" (quoting *Richard II*, Act 1, Scene 1)).

153. See *id.* ("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.") (quoting *Acts* 25:16).

154. See *id.* at 2801. ("[Eisenhower] said, it was necessary to '[m]eet anyone face to face with whom you disagree. . . . In this country if someone dislikes you, or accuses you, he must come up in front. He cannot hide behind the shadow.'" (citing press release quoted in Pollitt, *The Right of Confrontation: Its History and Modern Dress*, 8 J. Pub. L. 381, 381 (1959)).

to-face meeting.

Scalia turned next to the State's second argument that the defendant's right of confrontation was outweighed by a need to protect child victims from abuse. He initially noted that the right of confrontation is not absolute but "may give way to other important interests."¹⁵⁵ He stated, however, that

[t]o hold that our determination of what implications are reasonable must take into account other important interests is not the same as holding that we can identify exceptions, in light of other important interests, to the irreducible literal meaning of the clause: "a right to *meet face to face* all those who appear and give evidence *at trial*."¹⁵⁶

Scalia left open the possibility of exceptions, but stated that such exceptions would be allowed only if "necessary to further an important public policy."¹⁵⁷

The Court rejected the notion that the Iowa statute's presumption of trauma to the child witness could provide the necessity.¹⁵⁸ The Court indicated that individualized findings that a particular witness needs protection would be necessary; since there had been only generalized findings in this case, the majority concluded that Coy's conviction "could not be sustained by any conceivable exception."¹⁵⁹ The case was remanded to the Iowa Supreme Court to determine whether denial of Coy's right of confrontation was harmless error.¹⁶⁰

Justice O'Connor, who joined in the majority's opinion, wrote a separate opinion,¹⁶¹ which is important because it gives the states some indication how to avoid creating constitutionally infirm child protection statutes. Scalia's majority opinion made no mention of O'Connor's concurrence, but specifically rebutted points found in the dissenting opinion of Justice Blackmun and Chief Justice Rehnquist.

O'Connor wrote to stress her view that the right of face-to-

155. 108 S. Ct. at 2802.

156. *Id.* at 2803 (quoting *California v. Green*, 399 U.S. 149, 175 (1970) (emphasis in original)).

157. *Id.*

158. *See id.*

159. *See id.*

160. *See id.*

161. *See id.* (O'Connor, J., concurring).

face confrontation is not absolute and may “permit the use of certain procedural devices designed to shield a child witness.”¹⁶² O’Connor, joined by Justice White, recognized the problems of child abuse and the efforts made by various states to protect child abuse victims. The point of O’Connor’s concurrence was “to make clear that nothing in today’s decision necessarily dooms such efforts by state legislatures to protect child witnesses.”¹⁶³ O’Connor also stressed that even if a particular statute violated the confrontation clause, it might fall under an exception and its use, therefore, might be permitted.¹⁶⁴ The concurrence finally suggested that many state statutes designed to protect child witnesses will not run afoul of the confrontation clause so long as the trial courts utilize a case-by-case analysis to determine whether the statute’s protection is necessary.¹⁶⁵

Justice Blackmun, joined by Chief Justice Rehnquist, dissented.¹⁶⁶ Blackmun believed that Coy’s conviction should be affirmed because his sole objection was that the witnesses could not see him while they testified. Supreme Court precedent, Blackmun argued, did not support such an objection.¹⁶⁷ The dissent further opined that even if such an objection were plausible, a defendant’s right to be seen by witnesses would be outweighed by a “sufficiently significant state interest.”¹⁶⁸ Additionally, Blackmun noted that the majority’s requirement of particularized findings was flawed. In support he pointed to other accepted exceptions to the confrontation clause, such as excited utterances and business records, which do not require a “case-specific inquiry.”¹⁶⁹

In December 1988 on remand from the Supreme Court, the Iowa Supreme Court determined that violation of Coy’s right to

162. *Id.*

163. *Id.* at 2804.

164. *See id.*

165. *See id.* at 2805.

166. *See id.* (Blackmun, J., dissenting).

167. *See id.* at 2806-07.

168. *Id.* at 2808.

169. *Id.* at 2809 n.6. These exceptions to the hearsay rules, along with the other twenty-seven exceptions recognized by the Federal Rules of Evidence, are based on the notion of inherent reliability. For example, a dying declaration is inherently reliable because the person uttering the declaration is unlikely to lie in the face of “the beating of the wings of the dark angel.” I. YOUNGER, *supra* note 105.

confront his accusers was not harmless error.¹⁷⁰ The Iowa court noted that the only direct evidence against Coy was the girl's testimony, which had been stricken; the remaining circumstantial evidence did not establish Coy's guilt beyond a reasonable doubt. The court, therefore, reversed Coy's conviction and remanded the case for a new trial.¹⁷¹ The children that the court had attempted to protect will now be subjected to another proceeding.

V. THE POST-Coy DECISIONS

A. State Court Opinions

In the months following the Supreme Court's decision in *Coy*, various state courts have been faced with the question that the *Coy* majority "[left] for another day":¹⁷² whether any exceptions to the requirement of face-to-face confrontation at trial, in fact, do exist. The majority opinion in *Coy* clearly states that the right of confrontation is something more than the right to cross-examine witnesses.¹⁷³ At the very core of the right of confrontation is the defendant's right to come face-to-face with the witnesses against him.¹⁷⁴ Scalia's brief opinion does not clearly state whether a defendant must come face-to-face with these witnesses at trial or whether such an encounter at some other time would suffice. Based upon reasoning in the Supreme Court's prior confrontation opinions, particularly *California v. Green*,¹⁷⁵ face-to-face confrontation satisfies the defendant's sixth amendment right if it occurs either at trial or when the testimony is given.¹⁷⁶

Scalia's opinion in *Coy* arguably indicates that this right of face-to-face confrontation applies if a witness testifies in the courtroom and not if a witness testifies at any other time.¹⁷⁷

170. See *State v. Coy*, 433 N.W.2d 714, 715 (Iowa 1988).

171. See *id.*

172. 108 S. Ct. at 2803.

173. See *id.* at 2802.

174. See *id.*

175. 399 U.S. 149 (1970).

176. See *supra* note 123 and accompanying text.

177. Scalia stated that "it confers at least 'a right to meet face to face all those who appear and give evidence at trial.'" 108 S. Ct. 2798, 2800 (1988) (quoting *California v. Green*, 399 U.S. 149, 175 (1970) (Harlan, J., concurring)) (emphasis added). Scalia fur-

Scalia likely did not intend to preclude the defendant from coming face-to-face with witnesses whose testimony is introduced at trial through alternate methods. The defendant's sixth amendment rights are implicated regardless of whether his accusers testify on the stand or through a videotaped deposition.

What seems striking about the post-*Coy* decisions is their almost universal determination that such exceptions to the right of confrontation do exist. In the clear majority of post-*Coy* state court opinions, the courts either upheld use of a witness protection procedure or held that the defendant's confrontation right was violated because the trial judge failed to make particularized findings of necessity.¹⁷⁸

Craig v. State,¹⁷⁹ decided by the Maryland Court of Special Appeals less than two months after the Supreme Court's decision in *Coy*, often is cited in post-*Coy* opinions.¹⁸⁰ The appellant, Sandra Ann Craig, who owned a kindergarten and preschool, was accused of sexually abusing several children who attended the school.¹⁸¹ On appeal, the Maryland court rejected Craig's contention that her constitutional right of confrontation had been violated because several children had been permitted to testify through closed-circuit television.¹⁸² The *Craig* court applied *Coy* and extrapolated three rules from the majority opinion in *Coy*: (1) the face-to-face requirement is not absolute; (2) exceptions to this requirement were not precluded; and (3) if Scalia's opinion ruled out the use of closed-circuit television, his opinion was not shared by a majority of the Court.¹⁸³

Applying these three rules and focusing on both Justice O'Connor's concurring opinion and state precedent,¹⁸⁴ the *Craig*

ther added, "We have never doubted, therefore, that the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses *appearing* before the trier of fact." *Id.* (emphasis added).

178. See, e.g., *State v. Thomas*, 770 P.2d 1324 (Colo. Ct. App. 1988), cert. granted, No. 89SC25 (Colo. March 13, 1989) (LEXIS, States Library, Colo. file) (en banc).

179. 76 Md. App. 250, 544 A.2d 784 (Md. Ct. Spec. App.), cert. granted, 314 Md. 468, 550 A.2d 1168 (1988).

180. See *Thomas*, 770 P.2d 1324; *State v. Tafoya*, 108 N.M. 1, 765 P.2d 1183 (Ct. App. 1988), cert. denied, 109 S. Ct. 1572 (1989); *State v. Logan*, 141 Misc. 2d 790, 535 N.Y.S.2d 322 (Sup. Ct. 1988).

181. See *Craig*, 76 Md. App. at 254, 544 A.2d at 786.

182. See *id.* at 280-84, 544 A.2d at 799-800. This procedure was implemented pursuant to a Maryland statute. See MD. CTS. & JUD. PROC. CODE ANN. § 9-102 (Supp. 1988).

183. See 76 Md. App. at 280, 544 A.2d at 798.

184. The court relied in part on *Wildermuth v. State*, 310 Md. 496, 530 A.2d 275

court first determined that there are exceptions to the confrontation clause's requirement of face-to-face confrontation.¹⁸⁵ Citing *Ohio v. Roberts*¹⁸⁶ and *United States v. Inadi*,¹⁸⁷ the court noted that exceptions, "in particular the use of extra-judicial declarations based on a firmly rooted exception to the hearsay rule,"¹⁸⁸ previously had been permitted. The court concluded that if *Coy* dictated that the face-to-face requirement was absolute, then it would have overruled *Roberts*, *Inadi*, and all other decisions allowing the use of extra-judicial declarations at trial.¹⁸⁹

Having concluded that the confrontation clause's eye-to-eye requirement does admit exceptions, the *Craig* court next determined that procedures may be implemented to prevent a child abuse witness from gazing upon a defendant or from testifying in his presence if such a witness would be traumatized if forced to testify in court.¹⁹⁰ The court additionally rejected *Craig*'s contention that Maryland's closed-circuit statute¹⁹¹ was an unconstitutional violation of the right of confrontation, holding that if the law were properly implemented, a defendant's sixth amendment right would not be violated.¹⁹² The *Craig* bench stated that Maryland's prior decision, *Wildermuth v. State*,¹⁹³ prescribed the manner in which the statute must be implemented — by showing a witness's unavailability as well as showing that the statement bears adequate indicia of reliability.¹⁹⁴ The court finally noted that key to the statute's implementation is a finding that a child cannot testify because of trauma and thus would be unable to "reasonably communicate."¹⁹⁵

The majority of other post-*Coy* decisions have interpreted

(1987), in which the Maryland Court of Appeals addressed several issues related to § 9-102 of the Maryland Code.

185. See 76 Md. App. at 280-81, 544 A.2d at 799.

186. 448 U.S. 56 (1980). See *supra* notes 128-133 and accompanying text.

187. 475 U.S. 387 (1986).

188. *Craig*, 76 Md. App. at 281, 544 A.2d at 799.

189. See *id.* at 281-82, 544 A.2d at 799.

190. See *id.* at 280-81, 544 A.2d at 790.

191. Md. CTS. & JUD. PROC. CODE ANN. § 9-102 (Supp. 1988).

192. See 76 Md. App. at 282-83, 544 A.2d at 800.

193. 310 Md. 496, 530 A.2d 275 (1987). The *Wildermuth* court rejected the defendant's contention that the procedure prescribed by statute contravened his right of confrontation.

194. See *Craig*, 76 Md. App. at 282-83, 544 A.2d at 800.

195. *Id.* at 283, 544 A.2d at 800.

Coy similarly, holding that exceptions to Coy's face-to-face requirement do exist and that the states may adopt procedures to avoid requiring a child sexual abuse victim to testify in court. For example, the Louisiana Court of Appeals stated that these exceptions may not be created judicially but must "be created by a statute designed to procedurally accommodate the competing interests."¹⁹⁶

Introduction of a three-year-old child's videotaped deposition was upheld in *Strickland v. State*,¹⁹⁷ in which the Alabama Court of Criminal Appeals weighed public policy against the right of confrontation. It concluded that protection of child victims from trauma, which reduced emotional and mental harm to the child, as well as the reliability of testimony outweighed the right of confrontation in child abuse cases.¹⁹⁸ The court concluded that the defendant's right of confrontation had not been violated, since the defendant had been given full opportunity to cross-examine the child during her deposition, which was taken pursuant to an Alabama statute.¹⁹⁹

Introduction of a videotaped deposition also has been upheld even when the defendant's presence was precluded. In a recent opinion, *Glendenning v. State*,²⁰⁰ the Supreme Court of Florida upheld use of a three-year-old girl's videotaped deposition against her father's contention that it violated his right to confront his accusers.²⁰¹ The procedure adopted in the former differs from that in *Strickland* because the defendant in *Glendenning* was confined behind a two-way mirror.²⁰²

Introduction of a child's testimony through closed-circuit television similarly has been upheld against constitutional attack. For example, in *State v. Rivera*²⁰³ a New York court up-

196. *State v. Roberts*, 533 So. 2d 1071 (La. Ct. App. 1988).

197. No. 2 Div. 575 (Ala. Crim. Ct. App. Oct. 11, 1988) (LEXIS, States Library, Ala. file).

198. *See id.*

199. ALA. CODE § 15-25-2 (Supp. 1988) ("[S]uch deposition shall be taken before . . . the defendant and his attorney. . . . Examination and cross-examination of the alleged victim or witness shall proceed at the taking of the videotaped deposition as though the alleged victim or witness were testifying personally in the trial of the case.").

200. 536 So. 2d 212 (Fla. 1988).

201. *See id.*, at 217-19.

202. The *Glendenning* court consistently referred to the mirror as two-way; it noted, however, that the child was not able to see her father as she testified. *See id.* at 218.

203. 141 Misc. 2d 1031, 535 N.Y.S.2d 909 (Sup. Ct. 1988).

held the use of "a 'two-way' television system,"²⁰⁴ noting that it was "effectively used."²⁰⁵ The court also stated that "the child witness was able to testify outside of the presence of the defendant while being able to view him on the screen before her."²⁰⁶ Likewise, in *State v. Logan*²⁰⁷ another New York court upheld the introduction of testimony presented through closed-circuit television. The Superior Court of New Jersey also has held that testimony presented through this medium does not violate the face-to-face requirement of the sixth amendment's confrontation clause.²⁰⁸ In that case, the court stated, "We cannot say that the New Jersey statute . . . falls within the absolute strictures of *Coy v. Iowa*."²⁰⁹

IV. RECOMMENDATIONS

The various state courts that have upheld introduction of videotaping and closed-circuit television have relied primarily on Justice O'Connor's concurring opinion in *Coy*. Although Scalia did not specifically hold that implementation of these techniques would be unconstitutional, a majority of the Court clearly believed that introduction of testimony through alternate procedures would be permitted only in exceptional circumstances to "further an important public policy."²¹⁰ Legislatures considering enactment of provisions that provide for videotaping or closed-circuit television should carefully balance the defendant's constitutional right of confrontation against society's desire to protect sexual abuse victims. At a minimum, a number of protections should be incorporated into legislation to protect the defendant's rights and to advance society's desire to protect the victims of abuse.

A. *The Judge's Findings*

The first of these recommendations is that the trial judge

204. *Id.* at ___, 535 N.Y.S.2d at 912.

205. *Id.*

206. *Id.*

207. 141 Misc. 2d 790, 535 N.Y.S.2d 322 (Sup. Ct. 1988).

208. *See State v. Davis*, 229 N.J. Super. 66, 550 A.2d 1241 (Ct. App. Div. 1988).

209. *Id.* at 75, 550 A.2d at 1245.

210. 108 S. Ct. 2798, 2803 (1988).

make individualized findings that the child victim in a particular case would be traumatized if required to testify at trial. The majority in *Coy* clearly stated that such particularized findings are necessary.²¹¹ O'Connor further declared that exceptions to the face-to-face requirement may exist, but stressed the need for "case-specific finding[s] of necessity."²¹²

In the post-*Coy* era, state courts correctly have interpreted *Coy* as requiring particularized findings. For example, in those cases that have held that introduction of a child's testimony violated the defendant's right of confrontation, the focus has not been on the notion that the confrontation clause prohibits exceptions. Rather, these cases have set forth the rule that exceptions will be permissible *if* the trial court makes certain findings about that particular child witness. Findings concerning children in general have been found insufficient: "[A] court . . . must make particularized findings concerning the unavailability of the individual child-witness involved."²¹³ One Florida court reversed a conviction because the children's testimony through videotape was introduced without individualized findings.²¹⁴ In only one post-*Coy* opinion did a court uphold use of a videotaping procedure without focusing on whether individualized findings had been made. In that case, *Strickland v. State*,²¹⁵ the Alabama Court of Criminal Appeals upheld introduction of a videotaped deposition of a three-year-old. The court in that case held that the implicated Alabama statute²¹⁶ was "not repugnant to the confrontation clause"²¹⁷ because it provided for cross-examination.

Although the courts, as well as a number of state statutes, require individualized findings of trauma, few guidelines are given concerning how these findings must be made.²¹⁸ At a mini-

211. See *id.* at 2803 ("[S]omething more than the type of generalized findings [here] . . . is needed.").

212. *Id.* at 2805 (O'Connor, J., concurring).

213. *State v. Thomas*, 770 P.2d 1324, 1328 (Colo. Ct. App. 1988), *cert. granted*, No. 89SC25 (Colo. March 13, 1989) (LEXIS, States Library, Colo. file) (en banc).

214. See *Jagers v. State*, 536 So. 2d 321 (Fla. Dist. Ct. App. 1988).

215. No. 2 Div. 575 (Ala. Crim. Ct. App. Oct. 11, 1988) (LEXIS, States Library, Ala. file).

216. ALA. CODE § 15-21-1 (Supp. 1988).

217. *Strickland*, 2d Div. 575.

218. Compare ALA. CODE § 15-21-2(a) (Supp. 1988) ("[T]he court shall consider the age and maturity of the child, the nature of the offense, the nature of testimony that

times the child's testimony has been repeated.²²⁹

In addition to considering testimony from expert witnesses, courts also should hear testimony from either the parents or someone close to the child.²³⁰ Although the court must consider the witness's natural bias, this testimony will enable the court to learn about changes in the child's behavior and the possible effects from the child's testifying in court.

Finally, a trial judge should personally interview the child or examine the child's reactions to various court proceedings since the decision to implement an alternate procedure ultimately rests in the judge's hands. For example, the trial judge in *State v. Rivera*²³¹ observed that "[t]he child . . . suddenly stopped [testifying] and refused to answer any more questions,"²³² and also that "her fear which was reflected in her facial expressions."²³³

Once the trial court has made these particularized findings, the question becomes how traumatized or fearful must a child be in order for the trial judge to find that a videotaping or closed-circuit television procedure should be utilized? The wording used and the degree of harm required vary significantly from state to state. In New Mexico, the state code provides that the videotaping procedure may be implemented if "the child is unable to testify before the court without suffering unreasonable and unnecessary mental or emotional harm."²³⁴ Applying a much lower standard, the Supreme Court of Florida upheld introduction of a videotaped deposition that the trial court had found admissible because a substantial likelihood existed that the child would "suffer at least moderate emotional or mental harm"²³⁵ if required to testify. Such a procedure may be implemented in Ohio if it would prevent "traumatization of the child."²³⁶ Finally, a child has been found in need of protection in

229. See Telephone interview with Geoffrey R. McKee, *supra* note 226; telephone interview with Joshua Williams, *supra* note 226.

230. See *Strickland v. State*, No. 2 Div. 575 (Ala. Crim. App. Oct. 11, 1988) (LEXIS, States Library, Ala. file).

231. 141 Misc. 2d 1031, 535 N.Y.S.2d 909 (Sup. Ct. 1988).

232. *Id.* at —, 535 N.Y.S.2d at 910.

233. *Id.*

234. *State v. Tafoya*, 108 N.M. 1, 765 P.2d 1183 (Ct. App. 1988) (quoting N.M. STAT. ANN. § 30-9-17 (1978)).

235. See *Glendening v. State*, 536 So. 2d 212, 218 (Fla. 1988).

236. *State v. Eastham*, 39 Ohio St. 3d 307, 307, 530 N.E.2d 409, 410 (1988).

New York if he is deemed a “vulnerable witness.”²³⁷ Clearly quantifying the harm or trauma necessary for implementation of a child protection procedure is virtually impossible. This determination must be left in the hands of the trial judge who has the benefit of testimony from experts, family members, and the child.

B. Facing the Defendant

The second recommendation to legislatures attempting to balance the rights of the criminal defendant against a desire to protect sexual abuse victims relates to the defendant’s presence during the child’s testimony. The majority of the post-*Coy* decisions did not consider whether the defendant must be present when one of these alternate methods of testimony was used. *Coy* leaves open the question of whether any exceptions to the requirement of face-to-face confrontation exist, and thereby gives no guidance to the state courts that determine whether such exceptions are permissible. *Coy*, however, clearly states that the confrontation clause requires eye-to-eye confrontation.²³⁸ The face-to-face requirement helps to ensure that the witness will testify truthfully and allows the trier of fact to examine the witness’ demeanor. If a court allows a witness to testify outside of the defendant’s presence, the requirement of face-to-face confrontation is thwarted. Following the Supreme Court’s reasoning in *California v. Green*,²³⁹ confrontation either at trial or when the testimony is given will satisfy the requirements of the sixth amendment.

The Supreme Court of Ohio addressed this precise issue in *State v. Eastham*²⁴⁰ when it held that use of closed-circuit television violated the defendant’s constitutional rights. In *Eastham* the trial judge implemented a procedure whereby the child, the judge, both attorneys, and a court reporter were confined to a room adjoining the courtroom, and a camera transmitted the proceedings to the jury. The child could not see the defendant,

237. *State v. Logan*, 141 Misc. 2d 790, ___, 535 N.Y.S.2d 322, 324 (Sup. Ct. 1988).

238. Scalia wrote, “We have never doubted, therefore, that the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses.” *Coy v. Iowa*, 108 S. Ct. 2798, 2800 (1988).

239. 399 U.S. 149 (1970).

240. 39 Ohio St. 3d 307, 530 N.E.2d 409 (1988).

times the child's testimony has been repeated.²²⁹

In addition to considering testimony from expert witnesses, courts also should hear testimony from either the parents or someone close to the child.²³⁰ Although the court must consider the witness's natural bias, this testimony will enable the court to learn about changes in the child's behavior and the possible effects from the child's testifying in court.

Finally, a trial judge should personally interview the child or examine the child's reactions to various court proceedings since the decision to implement an alternate procedure ultimately rests in the judge's hands. For example, the trial judge in *State v. Rivera*²³¹ observed that "[t]he child . . . suddenly stopped [testifying] and refused to answer any more questions,"²³² and also that "her fear which was reflected in her facial expressions."²³³

Once the trial court has made these particularized findings, the question becomes how traumatized or fearful must a child be in order for the trial judge to find that a videotaping or closed-circuit television procedure should be utilized? The wording used and the degree of harm required vary significantly from state to state. In New Mexico, the state code provides that the videotaping procedure may be implemented if "the child is unable to testify before the court without suffering unreasonable and unnecessary mental or emotional harm."²³⁴ Applying a much lower standard, the Supreme Court of Florida upheld introduction of a videotaped deposition that the trial court had found admissible because a substantial likelihood existed that the child would "suffer at least moderate emotional or mental harm"²³⁵ if required to testify. Such a procedure may be implemented in Ohio if it would prevent "traumatization of the child."²³⁶ Finally, a child has been found in need of protection in

229. See Telephone interview with Geoffrey R. McKee, *supra* note 226; telephone interview with Joshua Williams, *supra* note 226.

230. See *Strickland v. State*, No. 2 Div. 575 (Ala. Crim. App. Oct. 11, 1988) (LEXIS, States Library, Ala. file).

231. 141 Misc. 2d 1031, 535 N.Y.S.2d 909 (Sup. Ct. 1988).

232. *Id.* at —, 535 N.Y.S.2d at 910.

233. *Id.*

234. *State v. Tafoya*, 108 N.M. 1, 765 P.2d 1183 (Ct. App. 1988) (quoting N.M. STAT. ANN. § 30-9-17 (1978)).

235. See *Glendening v. State*, 536 So. 2d 212, 218 (Fla. 1988).

236. *State v. Eastham*, 39 Ohio St. 3d 307, 307, 530 N.E.2d 409, 410 (1988).

New York if he is deemed a “vulnerable witness.”²³⁷ Clearly quantifying the harm or trauma necessary for implementation of a child protection procedure is virtually impossible. This determination must be left in the hands of the trial judge who has the benefit of testimony from experts, family members, and the child.

B. Facing the Defendant

The second recommendation to legislatures attempting to balance the rights of the criminal defendant against a desire to protect sexual abuse victims relates to the defendant’s presence during the child’s testimony. The majority of the post-*Coy* decisions did not consider whether the defendant must be present when one of these alternate methods of testimony was used. *Coy* leaves open the question of whether any exceptions to the requirement of face-to-face confrontation exist, and thereby gives no guidance to the state courts that determine whether such exceptions are permissible. *Coy*, however, clearly states that the confrontation clause requires eye-to-eye confrontation.²³⁸ The face-to-face requirement helps to ensure that the witness will testify truthfully and allows the trier of fact to examine the witness’ demeanor. If a court allows a witness to testify outside of the defendant’s presence, the requirement of face-to-face confrontation is thwarted. Following the Supreme Court’s reasoning in *California v. Green*,²³⁹ confrontation either at trial or when the testimony is given will satisfy the requirements of the sixth amendment.

The Supreme Court of Ohio addressed this precise issue in *State v. Eastham*²⁴⁰ when it held that use of closed-circuit television violated the defendant’s constitutional rights. In *Eastham* the trial judge implemented a procedure whereby the child, the judge, both attorneys, and a court reporter were confined to a room adjoining the courtroom, and a camera transmitted the proceedings to the jury. The child could not see the defendant,

237. *State v. Logan*, 141 Misc. 2d 790, ___, 535 N.Y.S.2d 322, 324 (Sup. Ct. 1988).

238. Scalia wrote, “We have never doubted, therefore, that the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses.” *Coy v. Iowa*, 108 S. Ct. 2798, 2800 (1988).

239. 399 U.S. 149 (1970).

240. 39 Ohio St. 3d 307, 530 N.E.2d 409 (1988).

who was seated in the courtroom. The court stated that the appellant's right of confrontation was violated by the procedure, noting that "the child witness was totally cloistered from appellant."²⁴¹

In fact, Justice O'Connor's concurrence implies that testimony taken outside of court must be given while in the defendant's presence. O'Connor stated, "Initially, many such procedures may raise no substantial Confrontation Clause problem since they involve testimony *in the presence of the defendant*."²⁴²

States have adopted alternate procedures for presenting a child sexual abuse victim's testimony at trial to avoid subjecting children to the trauma of testifying in front of their alleged abuser.²⁴³ Allowing victims to testify at another time via videotaped deposition or in another room through closed-circuit television provides this protection. Nevertheless, as Scalia noted, the defendant's right of confrontation "may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser."²⁴⁴ Although the defendant's right of confrontation may admit some exceptions, it may not be totally sacrificed by excluding a defendant from all outside testimony. In addition, the defendant must be informed prior to the taping of videotaped testimony that the results will be introduced at trial. Defendants should consider the testimony as the equivalent of trial testimony rather than as merely discovery.

C. Procedures for Implementation

The third and final recommendation to be considered in the wake of *Coy* concerns the methods used to transmit testimony through videotape or closed-circuit television. The courts will soon be faced with questions of how to implement alternate procedures. For example, may the camera focus only on the child's face?

241. *Id.* at ___, 530 N.E.2d at 411.

242. 108 S. Ct. 2798, 2804 (1988) (O'Connor, J., concurring) (emphasis added).

243. See *Strickland v. State*, No. 2 Div. 575 (Ala. Crim. Ct. App. Oct. 11, 1988) (LEXIS, States Library, Ala. file); *Jaggers v. State*, 536 So. 2d 321 (Fla. Dist. Ct. App. 1988).

244. *Coy*, 108 S. Ct. at 2802.

In recent years, studies have been conducted on the extent to which body language may reveal an individual's true state of mind. One commentator has noted that we often act out our feelings with nonverbal body language.²⁴⁵ A number of jury studies have been conducted to compare the effects of videotaped testimony with live testimony at trial. Many of these studies indicate that a trial's outcome is generally the same regardless of whether testimony is live or taped.²⁴⁶ Other studies, however, indicate that use of videotaped testimony may have a substantial effect at trial.²⁴⁷ In one study, jurors generally felt that the use of videotape should be precluded in criminal proceedings.²⁴⁸ In fact, one juror stated, "It is strictly a gut reaction on my part because I simply feel that because of the seriousness of a criminal trial, absolutely every word that is spoken and absolutely every emotion should be observed personally."²⁴⁹

Given the differences of opinion about whether videotaped testimony is advisable, as well as the idea that nonverbal communication affects trial proceedings,²⁵⁰ in child sexual abuse cases the camera should focus on the entire body of the child. This will enable the jury to examine closely the witness's de-

245. See J. FAST, BODY LANGUAGE (1970).

246. See Miller, Bender, Boster, Florence, Fontes, Hocking & Nicholson, *The Effects of Videotape Testimony in Jury Trials: Studies on Juror Decision Making, Information Retention, and Emotional Arousal*, 1975 B.Y.U. L. REV. 331, 344 (1975) ("[W]e find that the videotape trial format does not produce detrimental effects on juror responses."); Short, Florence & Marsh, *An Assessment of Videotape in the Criminal Courts*, 1975 B.Y.U. L. REV. 423, 451 (1975) ("[The study's results] do suggest that the behavioral and attitudinal impact of videotape recording is insignificant in relation to other factors in the courtroom environment."); Miller, *Televised Trials: How Do Juries React?*, 58 JUDICATURE 242, 246 (1974) ("[T]he results of the first study indicate that the fears of [the videotape's] possible negative effects on the legal system are largely groundless.").

247. See Williams, Farmer, Lee, Cundick, Howell, & Rooker, *Juror Perceptions of Trial Testimony as a Function of the Method of Presentation: A Comparison of Live, Color Video, Black-and-White Video, Audio, and Transcript Presentations*, 1975 B.Y.U. L. REV. 375, 410 (1975) ("[S]ignificant differences in juror perceptions did occur between the media and live trials."); Bermant, Chappell, Crockett, Jacobovitch, & McGuire, *Juror Responses to Prerecorded Videotape Trial Presentations in California and Ohio*, 26 HASTINGS L.J. 975, 994 (1974-75) [hereinafter Bermant] ("Time and again in the jurors' responses there appears a more or less explicit belief that there is a difference in the outcome of a trial . . . produced by live versus taped testimony.").

248. See Bermant, *supra* note 247, at 994.

249. *Id.*

250. See LeVan, *Nonverbal Communication in the Courtroom: Attorney Beware*, 8 LAW AND PSY. REV. 83 (1984).

meanor while testifying in his or her alleged attacker's presence. In fact, cameras preferably should focus on both the witness and the defendant so that the trier could gauge their reactions to each other as well.²⁵¹

Legislatures also may want to consider confining camera operators behind screens, thereby reducing the number of strangers the child would be required to face while his or her testimony is recorded.²⁵² Additionally, the focus and camera angle should be specified. A fixed focus will avoid unnerving the child as well as overdramatizing certain portions of the child's testimony.²⁵³ Finally, the number of people permitted to attend the videotaping and the location should be specified in order to avoid any additional trauma to a child already deemed to be in need of protection.²⁵⁴

D. Post-Coy South Carolina

In at least one instance since the Supreme Court's decision in *Coy*, a child victim's videotaped testimony has been introduced in a criminal prosecution in South Carolina. In *State v. Murrell*²⁵⁵ the solicitor moved to have the videotaped deposition

251. This might be accomplished by using a split screen or by implementing two cameras. Allowing the camera operator to pan back and forth between the defendant and the child would allow that operator to use his judgment as to whom should be the focus of the camera.

252. See, e.g., R.I. GEN. LAWS § 11-37-13.2 (Supp. 1988) ("The persons operating the equipment shall be confined to an adjacent room or behind a screen or mirror which permits them to see and hear the child during his or her testimony."); TEX. CODE CRIM. PROC. ANN. art. 38.071, § 3(a) (Vernon Supp. 1989) ("To the extent practicable, the persons necessary to operate the equipment shall be confined to an adjacent room or behind a screen or mirror that permits them to see and hear the child, . . . but does not permit the child to see or hear them.").

253. Rule 30(h)(2)(d) of the South Carolina Rules of Civil Procedure, which applies to videotaped depositions, forbids use of close-up views of witnesses unless agreed upon or ordered by the court. See S.C.R. Civ. P. 30(h)(2)(d).

254. See, e.g., R.I. GEN. LAWS § 11-37-13.2 (Supp. 1988) ("Only the judge, attorneys for the parties, persons necessary to operate the recording or broadcasting equipment, and any person whose presence would contribute to the welfare and well-being of the child may be present in the room with the child during his or her testimony."); TEX. CODE CRIM. PROC. ANN. art. 38.071, § 3(a) (Vernon Supp. 1989) ("To the extent practicable, only the judge, the attorneys for the defendant and for the state, persons necessary to operate the equipment, and any person whose presence would contribute to the welfare and well-being of the child may be present in the room with the child during his testimony.").

255. No. 88-GS-24-245 (Aug. 31, 1988 - Sept. 1, 1988).

of a five-year-old child introduced²⁵⁶ pursuant to South Carolina's previously enacted Victims and Witness's Bill of Rights,²⁵⁷ a South Carolina statute allowing deposition testimony of rape victims,²⁵⁸ and pursuant to *State v. Cooper*.²⁵⁹ The court, after hearing testimony of a child psychiatrist, the child's mother, and the child's aunt, ordered that the child's testimony be taken by videotape.²⁶⁰ Present at the videotaping session were the judge, court reporter, child, both attorneys, and a support person for the child. The defendant was precluded from the taping but was able to view the proceedings and was in constant contact with counsel. The videotaped testimony was taken about two weeks prior to trial and was introduced at trial in lieu of live testimony by the child.²⁶¹ The jury, which returned its verdict in two hours and twenty-two minutes, convicted Murrell of criminal sexual conduct with a minor.²⁶²

South Carolina appellate courts have not considered a constitutional challenge to the recently enacted statute.²⁶³ The statute likely will withstand facial challenge because it is limited to family court proceedings for abuse and neglect.²⁶⁴ The provisions of the sixth amendment are applicable only in criminal proceedings; therefore, the defendant's right of confrontation is not implicated. Although the provisions of this statute apply only in family court, its application may implicate the defendant's fundamental right to family.²⁶⁵

256. Solicitor's Notice of Motion & Motion to Allow Videotaped Interview of Minor Child in Court (July 7, 1988).

257. S.C. CODE ANN. § 16-3-1530(G) (Law. Co-op. 1976).

258. That statute provides that "[b]efore or during the trial of a person charged with rape or assault with intent to ravish, . . . the judge . . . may, in his discretion, by an order direct that the deposition of such witness be taken at a time and place designated." *Id.* § 16-3-660.

259. 291 S.C. 351, 353 S.E.2d 451 (1987).

260. Record of Motion Hearing (July 29, 1988); Record of Motion Hearing (Aug. 9, 1988); Order (Aug. 18, 1988).

261. Telephone interview with Timothy W. Woolston, Assistant Solicitor in Greenwood County (Feb. 10, 1989).

262. See Record at 200.

263. See S.C. CODE ANN. § 19-1-180 (Law. Co-op. Supp. 1988).

264. See *id.* § 19-1-180(A). This subsection reads:

An out-of-court statement made by a child under twelve years of age at the time of the family court proceeding brought pursuant to Section 20-7-610 or 20-7-736 concerning an act of abuse or neglect . . . is admissible in the family court proceeding if the requirements of this section are met.

265. Section 20-7-736(F) permits a petition for termination of parental rights. See

South Carolina's new statute has been applied judiciously thus far.²⁶⁶ Nevertheless, it may face constitutional challenge when applied. Its application in a family court proceeding may directly affect a criminal conviction in two ways. First, a child's deposition may be introduced in a family court proceeding and later in a criminal conviction under the hearsay exception for prior sworn testimony.²⁶⁷ Second, a child's testimony introduced through videotape in a family court proceeding could influence plea negotiations in a pending criminal prosecution.²⁶⁸

If the provisions of the South Carolina statute are applied in a criminal context and a child witness is permitted to testify through videotaped deposition or closed-circuit television, the statute will not pass constitutional muster. The statute seems to equate the right of confrontation with the right to cross-examine witnesses.²⁶⁹ Section 19-1-180(B)(1),²⁷⁰ which provides that a child abuse victim's statement may be introduced either live at trial, through videotaped deposition, or through closed-circuit television, gives no guidance as to how either of these two alternate procedures should be implemented. The defendant is not required to be present when the child is deposed, leaving the defendant's presence within the trial judge's discretion. No

S.C. CODE ANN. § 20-7-736(F) (Law. Co-op. 1976).

266. The new South Carolina statute has been applied very few times since it was enacted. Thus far, it has been applied only in family court proceedings. The solicitors' offices generally are cautious in using the statute following the Supreme Court decision in *Coy*. Telephone interview with Robert Hall, Assistant Solicitor in Spartanburg County (Jan. 4, 1989); telephone interview with Catherine Christophilis, Assistant Solicitor in Greenville County (Feb. 10, 1989); telephone interview with Timothy W. Woolston, *supra* note 261.

267. Rule 804(b)(1) of the Federal Rules of Evidence permits former testimony that was subject to cross-examination to be introduced in a subsequent proceeding. *See* FED. R. EVID. 804(b)(1). The declarant, however, must be found unavailable. Section 804(a)(4) possibly may be applicable. That section provides that a declarant is unavailable if he is "unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity." FED. R. EVID. 804(a)(4). A judge may refuse to admit this prior testimony because of inherent unfairness to the defendant. *See* Telephone interview with Catherine Christophilis, *supra* note 266.

268. If the attorneys for the prosecution and the defense felt that the child's testimony in the family court proceeding had been particularly effective, the defendant might be encouraged to plead guilty to a criminal charge against him. *See* Telephone interview with Robert Hall, *supra* note 266.

269. Section 19-1-180(B)(1) provides that an out-of-court statement is admissible if it was "subject to cross-examination." S.C. CODE ANN. § 19-1-180(B)(1) (Law. Co-op. Supp. 1988).

270. *Id.*

guidelines are given concerning camera angle or focus. In regard to closed-circuit television, the statute indicates neither whether a one-way or two-way method should be implemented nor the manner through which the defendant may communicate with his attorney. The South Carolina statute simply provides that the child be subject to cross-examination at the time of his testimony.²⁷¹

Perhaps an even greater infirmity is the statute's failure to require particularized findings that a child would be traumatized to some extent if required to testify in open court. If exceptions to the defendant's right to confrontation exist, Scalia's majority opinion and O'Connor's concurrence in *Coy*, along with the various post-*Coy* decisions, clearly show that particularized findings are necessary to avoid constitutional infirmity. Section 19-1-180(B)(2)(a)²⁷² of the statute, which admits out-of-court statements if the child is unavailable, lists a number of factors to be considered by a trial judge. These factors, however, do not apply to the previous subsection, which creates the exception for testimony presented through videotape or closed-circuit television. Additionally, section 19-1-180(E),²⁷³ which requires the court to place on the record findings of a witness's unavailability and the trustworthiness of out-of-court statements, seems to apply only to subsection (B)(2), which requires either unavailability or "particularized guarantees of trustworthiness."²⁷⁴

IV. CONCLUSION

The Supreme Court's opinion in *Coy v. Iowa* dramatically affects the various attempts made by state legislatures to protect the victims of child sexual abuse. *Coy* marks a definite move away from prior Supreme Court cases holding that the central provision of the confrontation clause was the right of cross-ex-

271. *See id.*

272. *Id.* § 19-1-180(B)(2)(a).

273. *Id.* § 19-1-180(E).

274. *Id.* § 19-1-180(B)(2)(b). Introduction of testimony either through videotaping or closed-circuit television pursuant to South Carolina's Victims and Witness's Bill of Rights, S.C. CODE ANN. § 16-3-1530(G) (Law. Co-op. 1976), will face similar constitutional pitfalls. That statute similarly gives no guidelines to the trial judge considering introduction of testimony or to the solicitor seeking introduction. No particularized findings are required nor are the defendant's presence and videotaping methods specified.

amination. The majority opinion in *Coy* stated that the defendant's right to come face-to-face with his accusers lies at the core of the sixth amendment right of confrontation. The Court, however, left open the question of whether any exceptions to this right exist, that is, whether the states in fact can use videotaping or closed-circuit television to present a child victim's testimony.

If the Supreme Court subsequently determines that the defendant's right of face-to-face confrontation does allow exceptions supported by public policy, a majority of states likely will provide that the testimony of a child sexual abuse victim may be presented through videotaped deposition or closed-circuit television. If either procedure is implemented, as both have been in South Carolina, three recommendations may be extrapolated from the opinions in *Coy*, from the cases decided thereafter, and from balancing the defendant's sixth amendment rights against society's desire to protect the victims of abuse.

First, a trial judge considering implementation of these alternate procedures must make individualized findings that a particular child would be traumatized if required to testify in court. The judge making this finding should consider testimony from expert witnesses, parents or close family members, and should personally interview the child. Second, the defendant must be present when the testimony is given. Finally, the following should be considered: (1) confining camera operators behind screens; (2) the focus and angle of the camera; (3) the number of people permitted to be present while the testimony is taken; and (4) the location to be used for the testimony.

In conclusion, children who are victims of the emotional and physical trauma of sexual abuse may be afforded some protection from the harm they suffer in the hands of the judicial system. The heinousness of the alleged crimes, however, cannot blind courts and legislatures to the constitutional guarantees provided by the sixth amendment.

Stephanie Ann Holmes

4