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The New Illinois Videotape Statute in Child Sexual Abuse Cases: Reconciling the Defendant's Constitutional Rights with the State's Interest in Prosecuting Defenders, 22 J. Marshall L. Rev. 331 (1988)

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THE NEW ILLINOIS VIDEOTAPE STATUTE IN CHILD SEXUAL ABUSE CASES: RECONCILING THE DEFENDANT'S CONSTITUTIONAL RIGHTS WITH THE STATE'S INTEREST IN PROSECUTING DEFENDERS

In response to the recent public and professional outcry[1] over the alarming increase[2] in the reporting of child sexual abuse,[3] the Eighty-fifth General Assembly of Illinois overrode the governor's veto[4] and passed House Bill 510[5] ("H.B. 510"). The passage of this

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1. *See, e.g.*, AMERICAN BAR ASS'N CHILD SEXUAL ABUSE LAW REFORM PROJECT, PAPERS FROM A NAT'L POLICY CONFERENCE ON LEGAL REFORMS IN CHILD SEXUAL ABUSE CASES (1985) (providing papers presented at symposium discussing and analyzing innovations in legal system's handling of child sexual abuse cases); UNITED STATES DEP'T OF JUSTICE, PROTECTING OUR CHILDREN: THE FIGHT AGAINST MOLESTATION (1984) (collection of talks presented by various professionals who deal with child molestation); Baum, Grodin, Alpert & Glantz, *Child Sexual Abuse, Criminal Justice, and the Pediatrician*, 79 PEDIATRICS 437 (Mar. 1987) (discussing need for medical field and judicial system to work together to protect child victims from psychological trauma of testifying in legal system); *Mothers on the Run*, U.S. News & World Report, June 13, 1988, at 22 (underground railroad system helps abused children shortcut a flawed legal system). *Child Sexual Abuse: What Your Children Should Know* (WTTW television broadcast, Chicago, Ill. 1983) (transcript available from PTV Publications, Kent, Ohio).

2. The number of reported cases of child sexual abuse has increased about 19 times between 1976 and 1985. THE AMERICAN HUMANE ASS'N, HIGHLIGHTS OF OFFICIAL CHILD NEGLECT AND ABUSE REPORTING 1985 17 (1987) [hereinafter AMERICAN HUMANE]. *See also infra* note 12 for further information on the increase of child sexual abuse reporting.

3. The term "child sexual abuse" can be defined in the following manner:

> Contact or interactions between a child and an adult when the child is being used for the sexual stimulation of the perpetrator or another person. Sexual abuse may also be committed by a person under the age of 18 when that person is either significantly older then the victim or when the perpetrator is in a position of power or control over another child.

UNITED STATES DEP'T OF HEALTH & HUMAN SERVS., LITERATURE REVIEW OF SEXUAL ABUSE 2 (1986) [hereinafter LITERATURE REVIEW].

Sexual activity between children and adults is a crime in every state. AM. BAR ASSOC. NAT'L LEGAL RESOURCE CENTER FOR CHILD ADVOCACY AND PROTECTION, CHILD SEXUAL ABUSE AND THE LAW 1 (Bulkley ed. 1982). States specifically define what constitutes a criminal sexual offense between a child and an adult. *See id.* at 21-49 (provides a state-by-state breakdown of the criminal child sex offense statutes).

4. Illinois Governor James R. Thompson stated why he vetoed House Bill 510 in a letter to the members of the Illinois House of Representatives 85th General Assembly:

> Its intention is to reduce the trauma experienced by young children testifying in open court. In attempting to do so, this bill denies the defendant his constitutional rights of confrontation and cross-examination, and, in reality, does not adequately protect child-victims of sexual crimes from additional victimization by the court system.

new law amends the Illinois Code of Criminal Procedure to allow for

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Letter from Governor James R. Thompson to the Honorable Members of the House of Representatives, 85th General Assembly (Sept. 11, 1987). Governor Thompson also noted that a Texas statute (art. 38.071), which H.B. 510 was modeled after, had been struck down when the Texas Court of Criminal Appeals ruled in Long v. State, 742 S.W.2d 302 (Tex. Crim. App. 1987), *cert. denied sub nom.* Texas v. Long, 108 S. Ct. 1301 (1988), that it denied the defendant his constitutional rights. *Id.* The final vote on the bill was 81 for the bill and 32 against the bill. Ill. H.B. 510, Journal of the House of Representatives, on the floor of the 85th Gen. Assembly (Oct. 21, 1987).

5. The passage of H.B. 510 resulted in the enactment of article 106A to the Illinois Code of Criminal Procedure. The pertinent text of article 106A is as follows:

> Sec. 106A-1. Scope. This Article applies only to a proceeding in the prosecution of an offense of criminal sexual abuse, aggravated criminal sexual abuse, criminal sexual assault, or aggravated criminal sexual assault alleged to have been committed against a child 12 years of age or younger, and applies only to the statements or testimony of the child.
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> Sec. 106A-2(a). Upon the motion of the State at any time before the trial of the defendant begins, the court may order that a child's oral statement or testimony be recorded. The recording shall be made in the presence of the court, the attorneys for the defendant and for the prosecution and, in addition, may be made in the presence of the operator of the recording equipment, necessary security personnel, and any person who, in the court's discretion would contribute to the welfare and well-being of the child. *The defendant shall be permitted to be present at the making of the recording. Only the attorney for the prosecution or the court may question the child.* The court shall rule on evidentiary objections of the attorney for the defendant.
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> (b) The recording, or portions of the recording, may be admissible into evidence upon motion of either the State or the defendant, provided:
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> 1) the recording is both visual and aural and is recorded on film or videotape or by other electronic means;
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> 2) the recording equipment was capable of making an accurate recording, the operator of the equipment was competent, and the recording is accurate and has not been altered;
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> 3) every voice on the recording and every person present at the making of the recording is identified;
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> 4) the statement was not made in response to questioning calculated to lead the child to make a particular statement;
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> 5) the defendant or the attorney for the defendant is afforded the opportunity to view the recording before it is offered into evidence;
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> 6) the child is available to testify at trial; and
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> 7) the defendant or the attorney for the defendant is afforded the opportunity to cross-examine the child at trial.
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> Sec. 106A-3. The court may, on the motion of the attorney for any party and upon finding that it is in the best interest of the child, order that the testimony of the child be taken in a room other than the courtroom and be televised by closed circuit equipment in the courtroom to be viewed by the court and the finder of fact in the proceeding. Only the presiding judge and attorneys for the prosecution and defendant, the defendant, necessary security personnel, persons necessary to operate the recording equipment, and any person who, in the court's discretion, would contribute to the welfare and well-being of the child may be present in the room with the child during his testimony. Only the prosecuting attorney, the defense counsel or the court may question the child. The court, in its discretion, may require that persons operating the equipment shall be confined to an adjacent room or behind a screen or mirror that permits them to see and hear the child during his testimony, but does not permit the child to see or hear them. If the court orders the testimony of a child to be taken under this Section, the child may not be required to testify in the presence of anyone other than those who are authorized by this Act to be present when the testimony is taken.

the admissibility of videotaped testimony, taken outside of the courtroom, in cases involving child victims of certain sex offenses.[6] The statute, which is applicable to child victims 12 years of age and under, provides that the court may videotape a child's direct testimony concerning an alleged sexual offense before the actual trial commences.[7] The defendant may be present during the taping ses-

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ILL. ANN. STAT. ch. 38, ¶ 106A (Smith-Hurd Supp. 1988) (emphasis added).

The difference between the two provisions would appear to be that section 106A-3 allows cross-examination contemporaneously with the direct examination in contrast to section 106A-2 which provides for direct examination only at the time of videotaping, and an opportunity to cross-examine the child at trial. *Id.* Section 106A-2 specifically provides that at the time of trial the defendant or his counsel can cross-examine. *Id.* Section 106A-3 provides that only the prosecuting attorney, defense counsel or the court may question child and makes no mention of the defendant. *Id.* This provision would necessarily fail where the defendant chooses to represent himself. *See* Faretta v. California, 422 U.S. 806, 819 (1975) (criminal defendant has a constitutional right to represent himself). The defendant's right to pro se representation could clearly frustrate this technologically innovative method of taking testimony. Mlyniec & Dally, *See No Evil? Can Insulation of Child Sexual Abuse Victims Be Accomplished Without Endangering the Defendant's Constitutional Rights?*. 40 U. MIAMI L. REV. 115, 133 (1985) (defendant may frustrate prosecutor's attempt to use technologically innovative method of taking testimony by requesting to defend himself).

6. *See supra* note 5 for the provisions of the statute. Videotape technology as a means of procuring evidence for use in criminal trials is not a new device. *See* German, Merin & Rolfe, *Videotape Evidence at Trial*, 6 AM. J. TRIAL ADVOC. 209, 227 (1982) (use of videotape is standard procedure in law investigative techniques). In the criminal trial setting use of videotape by prosecutors has been primarily at the pretrial stage. *See, e.g.*, Hendricks v. Swenson, 456 F.2d 503 (8th Cir. 1972) (videotaped recording of confession); State v. Newman, 4 Wash. App. 588, 484 P.2d 473 (1971) (videotaped recording of line-up identification).

7. See *supra* note 5 for the provisions of the statute. The use of videotaped statements or depositions as evidence in child sexual abuse trials has been adopted in many states, see *infra* note 11, as a means of reducing the stress experienced by the child witness as a result of the traumatic nature of the adversarial judicial process. *See generally* Parker, *The Rights of Child Witnesses: Is the Court a Protector of Perpetrator?*, 17 NEW ENG. L. REV. 643, 643 (1982) (judicial system has not been sensitive to the victimization a child may face in the courtroom); Weisberg, *Sexual Abuse of Children: Recent Developments in the Law of Evidence*, 5 CHILDREN'S LEGAL RTS. J. No. 4 at 2 (1984) (author notes price for child victim's interaction with criminal justice system is long term emotional distress, confusion and guilty feelings); Note, *Videotaping Children's Testimony: An Empirical View*, 85 MICH. L. REV. 809, 809 (1987) (authors argue videotape technology serves to lessen emotional trauma to child while maintaining fair trial for defendant). For an excellent discussion pertaining to the so called "legal process trauma," see Libai, *The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System*, 15 WAYNE L. REV. 977 (1969). The author, an early advocate for the protection of the children who are victims of sex crimes, noted:

> Psychiatrists have identified components of the legal proceedings that are capable of putting a child victim under prolonged stress and endangering his emotional equilibrium: repeated interrogations and cross-examination, facing the accused again, the official atmosphere of the court, the acquittal of the accused for want of corroborating evidence to the child's trustworthy testimony, and the conviction of a molester who is the child's parent or relative.

Id. at 984 (citations omitted). For a complete breakdown of the states which have adopted legislation to permit the introduction of a child's videotaped statements or a deposition as evidence, see *infra* note 11.

sion, but the statute allows only the prosecutor or the court to ask the child questions.[8] The child's videotaped testimony is then admissible into evidence, provided the child is available[9] to testify and is subject to cross-examination at trial.[10]

By enacting H.B. 510, Illinois joins the growing number of states that have adopted legislation allowing the admissibility of videotaped testimony.[11] Chief among the concerns of the state legis-

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8. See *supra* note 5 for the pertinent provisions of the statute. A Texas court reviewing a similar provision found that the procedure was a violation of the defendant's sixth amendment right to confrontation. Long v. State, 742 S.W.2d 302 (Tex. Crim. App. 1987) *cert. denied sub nom* Texas v. Long, 108 S. Ct. 1301 (1988) (court held unconstitutional a statute that creates a per se rule of admissibility for an ex parte pretrial interview between a child sexual abuse complainant and a non-lawyer on condition that child may be called as witness at trial).

9. "Availability of the witness" is an issue in determining whether a court will admit hearsay testimony of a witness into evidence. *See, e.g.*, FED. R. EVID. 804(b) (defines hearsay statements which are admissible in evidence if the declarant is unavailable as witness). The Supreme Court held in Ohio v. Roberts, 448 U.S. 56 (1980) that admissibility of hearsay statements does not present a constitutional problem where the prosecution has demonstrated that the proponent of the hearsay statement is unavailable and the hearsay statement bears adequate "indicia of reliability." *Id.* at 65-66. The Court had an opportunity to further elaborate on this holding in United States v. Inadi, 475 U.S. 387 (1986). In *Inadi* the Court explained that "*Roberts* cannot fairly be read to stand for the radical proposition that no out-of-court statement can be introduced by the government without a showing that the declarant is unavailable." *Id.* at 394. For a listing of those instances which constitute unavailability see FED. R. EVID. 804(a).

10. See *supra* note 5 for the provisions of the statute. It is likely that the legislators included this provision to head off an anticipated confrontation clause challenge by the defendant. However, the inclusion of this provision negates any intent to spare the child the trauma of testifying in open court. *See supra* note 4 (Governor Thompson comments that bill does not adequately protect child victims from addition victimization). *See also* Long v. State, 742 S.W.2d 302, 315 (Tex. Crim. App. 1987), *cert. denied sub nom.* Texas v. Long, 108 S. Ct. 1301 (1988) (adding a provision whereby either party may call the child as a witness at trial nullifies the statute's purpose which is to reduce child's trauma).

11. Illinois Representative Lee Preston introduced H.B. 510 as a means to reducing "the trauma to the child of going through the court process." Ill. H.B. 510, Journal of the House of Representatives 85th Gen. Assembly (May 20, 1987). The representative indicated that the Illinois version was based on a law previously enacted in Texas. *Id.* (Texas law was subsequently found unconstitutional in Long v. State, 742 S.W.2d 302 (Tex. Crim. App. 1987), *cert. denied sub nom.* Texas v. Long 108 S. Ct. 1301 (1988)). Rep. Preston indicated that the Texas experience had shown that in about 50% of the cases the defendant, after seeing the tape, plead guilty. *Id.*

Use of videotaped testimony recorded before trial commences has been shown to arm the prosecution with a potent weapon in plea bargaining negotiations. Note, *The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations*, 98 HARV. L. REV. 806, 824 (1985). *See also* Hass, *The Use of Videotape in Child Abuse Cases*, 8 NOVA L.J. 373, 373 (1984) (once videotape interview is viewed by alleged perpetrator it may motivate plea negotiation); UNITED STATES DEP'T OF JUSTICE, NAT'L INST. OF JUSTICE, PROSECUTION OF CHILD SEXUAL ABUSE: INNOVATIONS IN PRACTICE 3 (Nov. 1985) [hereinafter INNOVATIONS] ("[p]rosecutors and victim advocates report that the technique encourages guilty pleas"); *Videotaping: Device for Fighting Child Abuse*, 70 A.B.A. J. 36 (Apr. 1984) (60 out of 75 defendants plead guilty after seeing the videotaped interview).

Heightened media attention has increased the public's awareness of the problem

lators responsible for these statutes is the steady increase of child sexual abuse reports,[12] coupled with the difficulty associated with

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of child sexual abuse. Bulkley, *Introduction: Background and Overview of Child Sexual Abuse*, 40 U. MIAMI L. REV. 5, 6 (1985). This awareness has resulted in an increase in reported cases which has led to a major law reform movement to better handle those cases coming into the criminal justice system. *Id.* The Attorney General's task force on family violence recommended procedures to allow the child sexual abuse victim's testimony to be presented on videotape. UNITED STATES DEP'T OF JUSTICE, ATTORNEY GENERAL'S TASK FORCE ON FAMILY VIOLENCE, FINAL REPORT 27, 33 (1984). The American Bar Association has recommended videotaping of a child's testimony as a means of addressing the difficulty in proving the crime of sexual abuse of a child and the emotional harm the legal system inflicts on child victims. Bulkley, *supra*, at 6-7. As a result of the legislative reform that followed, various states adopted statutes allowing special hearsay exceptions, videotaped testimony and testimony by closed circuit television. *Id.* at 7-8. See also *infra* note 17 for examples of these reform measures. A discussion of all of these legislative innovations is beyond the scope of this comment. For an excellent overview of these and other statutory reforms see J. BULKLEY, EVIDENTIARY AND PROCEDURAL TRENDS IN STATE LEGISLATION AND OTHER EMERGING LEGAL ISSUES IN CHILD SEXUAL ABUSE CASES (Nat'l Legal Resource Center for Child Advocacy & Protection, Am. Bar Ass'n 1985) [hereinafter TRENDS]; R. EATMAN & J. BULKLEY, PROTECTING CHILD VICTIM/ WITNESSES, SAMPLE LAWS AND MATERIALS (1986); D. WHITCOMB, E. SHAPIRO, L. STELLWAGEN, WHEN THE VICTIM IS A CHILD: ISSUES FOR JUDGES AND PROSECUTORS (Nat'l Inst. of Justice, U.S. Dep't of Justice, Aug. 1985) [hereinafter VICTIMS].

The following states have enacted statutes presently in effect that provide for the use of videotaped testimony: Alabama: ALA. CODE § 15-25-2 (Supp. 1988); Alaska: ALASKA STAT. § 12.45.047 (1984); Arizona: ARIZ. REV. STAT. ANN §§ 13-4251-4253 (Supp. 1986); Arkansas: ARK. STAT. ANN. §§ 43-2035-2037 (Supp. 1985); California: CAL. PENAL CODE § 1346 (West Supp. 1988); Colorado: COLO. REV. STAT. §§ 18-3-413, 18-6-401.3 (1986); Connecticut: CONN. GEN. STAT. § 54-86g (Supp. 1988); Delaware: DEL. CODE. ANN. tit. 11 § 3511 (Supp. 1987); Florida: FLA. STAT. § 92.53 (West Supp. 1988); Indiana: IND. CODE ANN. § 35-37-4-8 (c), (d), (d), (g) (Burns 1986); Iowa; IOWA CODE ANN § 910A.14 (Supp. 1988); Kansas: KAN. STAT. ANN. §§ 22-3433 to 3434 (Supp. 1987); Maine: ME. REV. STAT. ANN. tit. 15, § 1205 (Supp. 1988); Massachusetts: MASS. GEN. LAWS. ANN. ch. 278, § 16D (b)(2) (West Supp. 1988); Missouri: MO. ANN. STAT. § 492.304 (Vernon Supp. 1989); Montana: MONT. CODE ANN. §§ 46-15-401 to 403 (1986); Nevada: NEV. REV. STAT. § 174.227 (1988); New Hampshire: N.H. REV. STAT. ANN. § 517:13-a (Supp. 1988); New Mexico: N.M. STAT. ANN. § 30-9-17 (1984); New York: N.Y. CRIM. PROC. LAW § 190.32 (McKinney Supp. 1988); Ohio: OHIO REV. CODE ANN. § 2907.41 (A), (B), (D), (E) (1987); Oklahoma; OKLA. STAT. ANN. tit. 22, § 753 (C) (Supp. 1988); Pennsylvania; PA. STAT. ANN. tit. 42 §§ 5981, et seq. (Purdon Supp. 1988); Rhode Island: R.I. GEN. LAWS § 11-37-13.2 (Supp. 1988); South Carolina: S.C. CODE ANN. § 16-3-1530 (G) (Law Co-op 1985); South Dakota: S.D. CODIFIED LAWS ANN. § 23A-12-9 (1988); Tennessee: TENN. CODE ANN. § 24-7-116 (d), (e), (f), (Supp. 1988); Texas: TEX. CODE CRIM. PROC. ANN. art. 38.071 (Vernon Supp. 1989) (the Texas Court of Criminal Appeals held art. 38.071 § 2 unconstitutional in Long v. State 742 S.W.2d 302 (Tex. Crim. App. 1987), *cert. denied sub nom* Texas v. Long, 108 S. Ct. 1301 (1988)); Utah: UTAH CODE ANN. § 77-35-15.5 (3), (4) (Supp. 1988); Vermont: VT. R. EVID. § 807 (Supp. 1988); Wisconsin: WIS. STAT. ANN. § 967.04 (7) to (10) (West 1988); Wyoming: WYO. STAT. § 7-11-408 (1987).

The Kentucky Supreme Court declared Kentucky's videotape statute unconstitutional because it permitted the testimony of a child witness where the child had not been declared competent by the trial judge and did not require that the child take the oath. Gaines v. Kentucky, 728 S.W.2d 525 (Ky. 1987). The *Gaines* court did not discuss the question of whether the statute violated the defendant's right to confrontation.

12. The incidence of child sexual abuse reporting has increased dramatically. *See generally* AMERICAN HUMANE, *supra* note 2. The American Humane Association

the prosecution of such cases.[13] The Illinois Department of Children and Family Services indicated that, in 1986, 8,397 Illinois children were reported to have been sexually abused.[14] On the national level the American Humane Association estimates that 113,000 children were sexually abused in 1985.[15] Actual figures are difficult to calculate however, because many incidents of child molestation are not reported.[16]

In response to this escalating problem, states have adopted various legislative innovations to facilitate prosecution of the accused.[17] The impetus for these new proposals is the need to provide the prosecutor a means of obtaining evidence that would otherwise be un-

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reported 113,000 cases of child sexual abuse in 1985, the last available statistical year. *Id.* at 17. This figure shows the number of reported child sexual abuse cases has risen almost nineteenfold over the 6,000 cases reported in 1976. *Id.* Figures representing the prevalence of child sexual abuse vary because there are differing definitions of what constitutes child sexual abuse. LITERATURE REVIEW, *supra* note 3, at 3-4. The true extent of the problem of child sexual abuse is not really known because of cultural inhibitions and the secretive nature of the crime. *Id. See also* Note, *The Constitutionality of the Use of Two-Way Closed Circuit Television to Take Testimony of Child Victims of Sex Crimes*, 53 FORDHAM L. REV. 995, 996 n.3 (1985) (citing experts who concur that a substantial number of child sexual abuse cases are not reported). Various factors contribute to the under reporting of child sexual abuse. *See id.* (citing authorities which indicate reasons why child molestation cases are under reported: inability of young children to understand sexual abuse has occurred; cannot communicate fact of sexual molestation; fear that they will be disbelieved; fear that molester will carry out threats made to ensure nondisclosure). Another reason for the vague statistical picture is that most estimates of the sexual abuse problem do not include child victims of prostitution or pornographic exploitation. *See* LITERATURE REVIEW, *supra* note 3, at 3.

13. *See* Note, *supra* note 12, at 997 nn. 5-7 & 998 n.8 (citing authorities which indicate reasons for difficulty include: reluctance of parents to submit their child to further trauma; difficulty in obtaining competent testimony; child's fear of being present in same room as alleged perpetrator).

14. ILLINOIS DEP'T CHILDREN & FAMILY SERVS. (DCFS), CHILD ABUSE & NEGLECT STATISTICS, ANNUAL REPORT-FISCAL YEAR 1986 20 (1987). Of that total, DCFS substantiated 4,902 cases of sexual abuse. *Id.* In 50.3% of the substantiated cases the sexually abused child was under the age of nine. *Id.* at 22. In 80.4% of the substantiated cases the sexually abused child was female. *Id.* The natural parent of the child was indicated in approximately one out of three reported cases. *Id.* at 20. More than half of all indicated sexual abuse perpetrators were either natural parents, step-parents, or parental substitutes. *Id.* at 20, 23. In 78.9% of sexual abuse reports the alleged perpetrator was male. *Id.* at 23.

15. See *supra* note 12 and accompanying text. This figure indicates that an estimated 17.9 children are sexually abused per 10,000 U.S. children. AMERICAN HUMANE *supra* note 2, at 17.

16. See Note, *supra* note 12 for authorities which provide information on why the crime of child sexual abuse is under reported.

17. For examples of reform measures introduced by various states, see CAL. PENAL CODE § 868.7 (West 1985) (closing of courtroom during child's testimony); WASH. REV. CODE ANN. § 9A.44.120 (1988) (creating new hearsay exceptions). For a complete list of those states which have statutes addressing the procedure of videotaping of a child's testimony, see *supra* note 11. For those states which have introduced statutes allowing the use of two-way closed-circuit television, see *infra* note 91. Some states have adopted rule 601 of the Federal Rules of Evidence, establishing a presumption of competency for all persons. *See e.g.*, WIS. STAT. ANN. § 906.01 (West Supp. 1988).

available.[18] Statutes which provide for the admission of a child's videotaped deposition or prior testimony are prominent among the new developments which states have implemented.[19] The Illinois statute seeks to accommodate the child victim by providing a non-adversarial setting in which to elicit testimony.[20] This procedure, however well-intentioned, denies the defendant his constitutional right to confront his accuser under the sixth amendment[21] and does not adequately protect the child's interests.[22]

The Illinois videotape statute makes its appearance at a particularly significant time as the United States Supreme Court, during its 1988 term, addressed for the first time the relationship between a state measure to facilitate the prosecution of child sexual abusers and the defendant's right to confrontation.[23] Some lower courts have

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18. The evidence is unavailable because often the sexual abuse incident is not reported out of concern that the judicial process will traumatize or intimidate the child. *See* Thompson, *The Use of Modern Technology to Present Evidence in Child Sex Abuse Prosecutions: A Sixth Amendment Analysis and Perspective*, 18 U. WEST L.A. REV. 1, 3 (1986) (goals of statutory reforms are to provide alternatives to traditional confrontational testimony of child witness in order to facilitate prosecution of child molesters). *See also*, Parker, *The Rights of Child Witnesses: Is the Court a Protector or Perpetrator?*, 17 NEW ENG. L. REV. 643, 643 (1982) ("child who is required to testify in court may experience severe psychological stress in re-living the witnessed event"). Illinois Representative Lee Preston, who sponsored H.B. 510, clearly envisioned the bill as a means of reducing trauma to the child:

> If you read the paper this morning, there was a report of an instance where an employee of a school system was accused and admitted having a number of sexual encounters with students. And because of the trauma, the difficulty of going through the court process, there will be no prosecution of this individual. He is [sic] just agreed to not be a teacher for two years and that's it, because they could not get the children involved to come to court and testify.

Ill. H.B. 510, Journal of the House of Representatives, 85th Gen. Assembly (Oct. 21, 1987) (statement of Rep. Preston).

19. See *supra* note 11 for a breakdown of the states which have enacted statutes permitting the use of a child's videotaped deposition or prior testimony at trial.

20. ILL. ANN. STAT. ch. 38, ¶ 106A-2 (Smith-Hurd Supp. 1988). The setting is non-adversarial because only the prosecutor or the court can question the child.

21. The sixth amendment states, in pertinent part, that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ." U.S. CONST. amend. VI.

22. The child's interests are not adequately protected because the statute provides that the admissability of the videotaped recording is dependent upon the child being available to testify at trial. ILL. ANN. STAT. ch. 38, ¶ 106A-2(b)(6) (Smith-Hurd Supp. 1988). A similar situation was presented in Long v. State, 742 S.W.2d 302 (Tex. Crim. App. 1987) *cert. denied sub nom*, Texas v. Long, 108 S. Ct. 1301 (1988), where the court noted that the bill's purpose to protect the child from the trauma of confronting abuser is subverted by operation of the statute which requires child to testify in court. *Id.* at 315.

23. Coy v. Iowa, 108 S. Ct. 2798 (1988). In *Coy*, the defendant, charged with sexually assaulting two 13-year-old girls, claimed he was denied a fair trial because the trial court forced him to sit behind a large and specially lit screening barrier during the testimony of the two girls. *Id.* at 2799. The screen allowed for the witnesses to testify without seeing the defendant. The defendant was only able to dimly perceive the witnesses. The defendant argued that the device was in violation of his sixth amendment right to confrontation. In addition, he argued the procedure denied

addressed this same issue with differing results.[24] The Illinois Supreme Court, acting without the benefit of H.B. 510, ruled recently in *People v. Johnson*[25] that a trial court which excluded a defendant from the courtroom to allow the alleged victim, a five year old girl, and her seven year old brother to testify by videotape violated the defendant's right of confrontation.[26] When addressing the defendant's right to confrontation in other contexts, the United States Supreme Court has previously recognized that the states have a strong interest in effective law enforcement.[27] The Court has also indicated, however, that with respect to the defendant's right of confrontation, the court must closely examine competing interests[28] to ensure that the constitutional right is safeguarded when necessary to protect the accused.[29]

This comment will argue that although the Illinois videotape statute unnecessarily impinges upon the defendant's right to confront his accuser, in addition to a denial of due process, videotaped testimony can be utilized with the proper safeguards to protect the defendant's constitutional rights. Part I outlines the purpose and scope of confrontation by reviewing those cases interpreting the con-

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him the right to due process. *Id.* The Supreme Court, without reaching the defendant's due process claim, held that the use of the screen device violated the defendant's right to a face-to-face encounter. *Id.* at 2802-03. The Court, however, did not firmly decide whether the face-to-face requirement was absolute. *Id.* at 2804 (O'Connor, J., concurring). Thus, the *Coy* Court did not rule out the possibility that other procedural devices designed to protect child witnesses from the trauma of courtroom testimony would not violate the defendant's right to confront witnesses. *See id.* at 2803-05 (O'Connor, J., concurring).

24. *See* Herbert v. Superior Court, 117 Cal. App. 3d 661, 665, 671, 172 Cal. Rptr. 850, 851, 855 (1981) (court disapproved of testimony taken in manner that permitted five-year old witness to testify against defendant without having to look at him or be looked at by him); Commonwealth v. Ludwig, 531 A.2d 459, 464 (Pa. 1987) (defendant's right of confrontation was not violated when court allowed defendant's six-year old daughter to testify via closed-circuit television) *appeal granted*, 541 A.2d 744 (Pa. 1988).

25. 118 Ill. 2d 501, 517 N.E.2d 1070 (1987).

26. *Id.* The Illinois Supreme Court rejected the admissibility of the videotaped testimony in *Johnson* because the state failed to make a threshold showing that the witnesses were "unavailable" according to Supreme Court Rule 414(a). *Id.* at 507-08, 517 N.E.2d at 1073. The intent of rule 414(a), according to the court, was "to strike a balance between the need to obtain and preserve evidence, and a criminal defendant's right to have the witnesses against him appear before the jury, who may observe the witnesses' demeanor and judge their credibility." *Id.* at 508, 517 N.E.2d at 1074. The court stated that the appellate court had found the testimony of the children unavailable because the trial court believed they would be fearful, if not totally incapable, of testifying in front of the jury and others in the courtroom. *Id.*, 517 N.E.2d at 1073-74. The appellate court, the supreme court concluded, incorrectly equated reluctance to testify with unavailability of testimony. *Id.*, 517 N.E.2d at 1073-74.

27. Ohio v. Roberts, 448 U.S. 56, 64 (1980).

28. The competing interest in this respect are the defendant's right of confrontation and the state's interest in the prosecution of child molestation cases.

29. *See Roberts*, 448 U.S. at 64 ("competing interest if 'closely examined' may warrant dispensing with confrontation at trial").

stitutional right. Part II discusses how the State may effectively utilize technological innovations in the prosecution of child sexual abuse cases to enhance the truth-seeking process while maintaining the defendant's right to confrontation. Part III analyzes the Illinois videotape statute by focusing on the defendant's right to confrontation and due process. Part IV proposes a procedure that will ensure the defendant's constitutional rights, strengthen the prosecutor's hand, and minimize the child victim's trauma. This comment will conclude that, despite the unconstitutionality of H.B. 510 per se, legislative innovations which provide for the use of videotape and other technological devices are necessary in order to obtain otherwise unavailable testimony and prosecute child sexual abusers so that truth and justice will be served.

I. THE RIGHT OF CONFRONTATION

Any legislative reform which proposes an alternative to live, in-the-courtroom testimony by a witness against the accused must afford the defendant his sixth amendment right to confront witnesses[30] in order to avoid a constitutional challenge. Illinois' H.B. 510, in its present form, interferes with this right which is guaranteed by both the United States and Illinois[31] Constitutions by allowing the videotaped direct testimony of the child sexual abuse victim to be admissible into evidence while denying the defendant contemporaneous cross-examination.[32] This infringement forces the

30. See *supra* note 21 for the pertinent text of the sixth amendment. This sixth amendment right of confrontation was made applicable to the states by the fourteenth amendment in Pointer v. Texas, 380 U.S. 400 (1965). It is believed by at least some commentators that the confrontation clause owes its origin to the 1603 treason trial of Sir Walter Raleigh and the public's reaction to the infamous abuses which took place during the course of the trial. Commonwealth v. Ludwig, 531 A.2d 459, 473 (Pa. 1987) (citing various commentators who have written on the Raleigh trial and its connection to the sixth amendment right of confrontation) *appeal granted*, 541 A.2d 744 (Pa. 1988). The court convicted Raleigh of treason after a trial based solely on affidavits. The court denied Raleigh the opportunity to confront his accusers. The only evidence against him was a written document containing the confession of Lord Cobham. *Id.* Sir Walter demanded that Cobham be called as a witness

> [b]ut it is strange to see how you press me still with my Lord Cobham, and yet will not produce him; it is not for gaining of time or prolonging my life that I urge this; he is in the house hard by, and may soon be brought hither; let him be produced, and if he will yet accuse me or avow this confession of his, it shall convict me and ease you of further proof.

Id. (quoting R. PHILLIMORE, HISTORY AND PRINCIPLES OF THE LAW OF EVIDENCE 157 (1850)).

31. The Illinois Constitution provides that in criminal prosecutions the accused shall have the right "to meet the witnesses face-to-face." ILL. CONST. art. I, § 8.

32. For the text of the statute see note 5 *supra*. Although only the attorney for the prosecution may question the child at the time of the videotape recording, section 106A-2(b)(7) expressly indicates that the recording may be admissible into evidence provided the defendant or his attorney is afforded the opportunity to cross-examine the child at trial. ILL. ANN. STAT. ch. 38, ¶ 106A-2(b)(7) (Smith-Hurd Supp. 1988).

defendant to call the child witness at trial in order to exercise his right to confrontation.[33] While H.B. 510 may be constitutionally flawed, some of the cases interpreting the right to confront one's accuser suggest, however, that videotaped testimony and other technological innovations need not always undermine the spirit of the confrontation provision.[34]

The Supreme Court in 1895 first addressed the meaning of the confrontation clause in *Mattox v. United States*[35] where the Court emphasized the defendant's right to come face-to-face with his accuser.[36] Although the Court repeated this emphasis in other early confrontation clause decisions,[37] the Court did not consider merely facing one's accuser to be enough to satisfy the confrontation clause.[38] The Court's decisions also include cross-examination of the

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33. ILL. ANN. STAT. ch. 38, ¶ 106A-2(b)(7) (Smith-Hurd Supp. 1988). For the text of this section see note 5 *supra*.

34. *See* State v. Melendez, 135 Ariz. 390, 393, 661 P.2d 654, 657 (Ct. app. 1982) (introduction into evidence of videotaped testimony of six-year-old daughter of defendant did not violate his right of confrontation when defendant and his counsel were present during videotaping and were given opportunity to cross-examine at that time); State v. Sheppard, 197 N.J. Super. 411, 432, 484 A.2d 1330, 1343 (1984) (where defendant, judge, jury, and spectators could see and hear the child witness on videotape, and where adequate opportunity for cross-examination was provided, the constitutional demands of confrontation were satisfied); State v. Tafoya, 729 P.2d 1371, 1373-75 (N.M. 1986), (videotaped deposition procedure which required defendant to observe proceedings from control booth was not in violation of defendant's right to confrontation where defendant had full opportunity to cross-examine) *vacated and remanded*, Tafoya v. New Mexico, 108 S. Ct. 2890 (1988); Commonwealth v. Ludwig, 531 A.2d 459, 464 (Pa. 1987) (court's approval of closed circuit television procedure to allow jury to evaluate child witness' testimony enhanced the fact-finding process and did not violate defendant's right to confront his witness) *appeal granted*, 541 A.2d 744 (Pa. 1988).

35. 156 U.S. 237 (1895). In *Mattox* the Court affirmed the defendant's conviction based on the former cross-examined testimony of two witnesses who were deceased at the time of the retrial of the same case. *Id.* at 250. The Court concluded that because the defendant had an opportunity to confront the witnesses at the previous trial, the confrontation clause did not bar the consideration of the testimony from the prior trial. *Id.* at 244. The Court stated the object of the constitutional provision:

> . . . in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

Id. at 242-43.

36. *Mattox*, 156 U.S. at 244.

37. *See* Dowdell v. United States, 221 U.S. 325, 330 (1911) (sixth amendment intended to secure the right of the accused to meet the witnesses face-to-face at trial who give their testimony in his presence); Kirby v. United States, 174 U.S. 47, 55 (1899) (accused may be convicted only by testimony of those witnesses who confront him at trial and upon whom he can look while being tried).

38. *See, e.g.*, Douglas v. Alabama, 380 U.S. 415, 418 (1965), where the Court noted that "[o]ur cases construing the [confrontation] clause hold that a primary interest secured by it is the right of cross-examination; an adequate opportunity for cross-examination may satisfy the clause even in the absence of physical

witness as an essential element of confrontation.[39] For example, in *Davis v. Alaska*[40] the Supreme Court stated that the right to cross-examine witnesses is the purpose behind the confrontation clause.[41] Additionally, the Court also emphasized that the ability of the jury to view the demeanor of the witness is another important component of confrontation.[42] In determining whether the trial process has served the basic functions of confrontation, the Court in *California v. Green*[43] identified three requirements that need to be present.[44] Specifically, the Court stated that: the witness must give his statements under oath; the witness must submit to cross-examination; and the court must allow the fact-finder to observe the witness' demeanor.[45]

Although it appears that the modern interpretation of the confrontation clause focuses on the right to cross-examination,[46] the Court has not abandoned the requirement of face-to-face confrontation.[47] The Court has, however, recognized that the right to confrontation is not absolute.[48] Very early in its interpretation of the clause

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confrontation."

39. *See id. See also* California v. Green, 399 U.S. 149, 166 (1970) (where the witness is actually unavailable at trial, a previous opportunity to cross-examine may satisfy the demands of the confrontation clause).

40. 415 U.S. 308, 315-16 (1974).

41. *Id.* The *Davis* Court stated:

> The main and essential purpose of confrontation is *to secure for the opponent the opportunity of cross-examination.* The opponent demands confrontation, not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross-examination, which cannot be had except by the direct and personal putting of questions and obtaining immediate answers.

Id. (quoting 5 J. WIGMORE, EVIDENCE § 1395 at 123 (3d ed. 1940) (emphasis in original)).

42. California v. Green, 399 U.S. 149, 158 (1970). According to one commentator, the purpose of this meeting between the witness and jury is to allow the fact finder an opportunity to assess the witness' credibility and to produce upon the witness "a certain subjective moral effect." Note, *Criminal Procedure-Child Witnesses-The Constitutionality of Admitting the Videotape Testimony at Trial of Sexually Abused Children*, 7 WHITTIER L. REV. 639, 647 (1985) (citation omitted).

43. *Green*, 399 U.S. 149.

44. *Id.* at 158.

45. *Id.*

46. *See supra* note 41 and accompanying text. *See also* Douglas v. Alabama, 380 U.S. 415, 418 (1965) ("adequate opportunity for cross-examination may satisfy the [confrontation] clause even in the absence of physical confrontation"); Pointer v. Texas, 380 U.S. 400, 406-407 (1965) (major reason underlying confrontation is to provide accused opportunity to cross-examine adverse witnesses).

47. In Delaware v. Fensterer, the Court reaffirmed that the "literal right to 'confront' the witness at the time of trial . . . forms the core of the values furthered by the Confrontation Clause." 474 U.S. 15, 18 (1985) (citation ommitted).

48. Chambers v. Mississippi, 410 U.S. 284 (1973). The *Chambers* Court indicated that the right to confront . . . is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." *Id.* at 295. *See also* Ohio v. Roberts, 448 U.S. 56 (1980), where the Court noted that although "the Confrontation Clause reflects a preference for face-to-face confrontation at trial" this preference may be superseded where the "closely examined" competing

the Court noted that the right must sometimes bow "to considerations of public policy and the necessities of the case."[49] In this regard the Supreme Court has allowed numerous exceptions[50] to the provision, and has also noted many other instances which warrant dispensing with confrontation at trial.[51] Most notably, in *California v. Green*[52] the Court held that the statements of a juvenile witness made at a preliminary hearing which were subject to cross-examination were admissible at the defendant's trial as prior inconsistent statements when the witness became uncooperative and evasive at the trial.[53] Following *Green*, the Supreme Court had another opportunity to define the scope of confrontation in *Dutton v. Evans*.[54] In *Evans*, the Court held that the prosecution's introduction of the out-of-court declaration of an absent but available witness did not violate the defendant's confrontation rights.[55] The Court's decision in *Evans*, however, did not provide an answer to the question of what standard courts should utilize in determining the constitutional admissibility of an hearsay statement of an available but absent witness.[56]

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interest justifies it. *Id.* at 63-64 (citation omitted).

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

50. *See, e.g.*, Pointer v. Texas, 380 U.S. 400, 407 (1965) (confrontation clause is not violated by admission of dying declarations or deceased witness' former testimony); Snyder v. Massachusetts, 291 U.S. 97, 106 (1934) (right to confront one's accuser can be lost by consent or misconduct).

51. *See* Note, *supra* note 12, at 1009 nn. 77-80. For example, the defendant may waive his right to confrontation when he fails to appear at trial, engages in disruptive behavior, pleads guilty in a state criminal trial or threatens the witness. *Id.*

52. 399 U.S. 149 (1970).

53. *Id.* at 165-68. Under the Federal Rules of Evidence a prior inconsistent statement is not hearsay and is admissible as substantive evidence. FED. R. EVID. 801(d)(1) advisory committee's note.

54. 400 U.S. 74 (1970). In *Evans* the Court was reviewing the constitutionality of the trial court's admission of a hearsay statement pursuant to a Georgia statute which provided that statements made by a co-conspirator were admissible as exceptions to the rule against hearsay. *Id.* The court reasoned that the admission of the co-conspirator's hearsay statement was not a violation of the defendant's right of confrontation, to ensure the reliability of inculpatory statements, because the basic purpose behind the confrontation clause had been satisfied. *Id.* at 89. According to the Court, the confrontation right was satisfied when the defendant cross-examined the witness who had testified about what he had heard the co-conspirator say. *Id.*

55. *Id.* at 87-88. Justice Stewart in his plurality opinion indicated: "[T]he mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that 'the trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement." *Id.* at 89 (citation omitted).

56. Graham, *Indicia of Reliability and Face to Face Confrontation: Emerging Issues in Child Sexual Abuse Prosecutions*, 40 U. MIAMI L. REV. 19, 41 (1985). The author notes that Justice Stewart's plurality opinion focused on the factors relevant to providing the jury a satisfactory basis for evaluating the truth of the prior statement. *Id.* According to the author, however, the opinion falls short in its failure to advise the lower courts the proper weight to give to these factors. *Id.*

In *Ohio v. Roberts*,[57] the Supreme Court addressed the problem of when an out-of-court statement is constitutionally admissible against a defendant and established guidelines for courts to apply when the prosecution offers into evidence a non-testifying witness' out-of-court statement.[58] Under *Roberts*, the prosecution must satisfy two requirements for such hearsay statements to be admissible.[59] Initially, the prosecution must establish the unavailability of the witness.[60] Next, the hearsay statement is admissible only if it bears adequate "indicia of reliability."[61] The *Roberts* Court emphasized that the confrontation clause reflects a preference for face-to-face confrontation at trial, and that the right of cross-examination is a primary interest secured by the confrontation provision.[62]

Illinois courts have similarly held this cross-examination right to be the touchstone of Illinois' confrontation clause.[63] Moreover, although the Illinois confrontation clause provides that the accused shall have the right "to meet the witnesses face-to-face" in criminal prosecutions,[64] the Illinois Supreme Court has held that this language protects the same interests as that protected by the United States Constitution's confrontation clause.[65] It would appear, then, that the same principles that the United States Supreme Court previously articulated in its decisions interpreting the right of confron-

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57. 448 U.S. 56 (1980).

58. *See id.* at 66.

59. *Id.*

60. *Id. But see* United States v. Inadi, 475 U.S. 387, 394 (1986) (may not always be required to show that hearsay declarant is unavailable in order for government to introduce out-of-court statement). See also *supra* note 9 for further discussion of "unavailability."

61. *Roberts*, 448 U.S. at 66. The *Roberts* Court summarized its position as follows:

> [W]hen a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where 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.

Id.

62. *Id.* at 63 (quoting Douglas v. Alabama, 380 U.S. 415, 418 (1965)).

63. *See People v. Tennant*, 65 Ill. 2d 401, 408, 358 N.E.2d 1116, 1119 (1976) (Illinois confrontation clause and federal confrontation clause protect the same interests).

64. ILL. CONST. art. 1 § 8.

65. *Tennant*, 65 Ill. 2d at 408, 358 N.E.2d at 1119. In *Tennant* the court held the preliminary hearing testimony of a deceased witness was properly admitted at the trial of the defendant where the defendant had an adequate opportunity to cross-examine the witness at the preliminary hearing. *Id.* at 410, 358 N.E.2d at 1121. In People v. Behm, 49 Ill. App. 3d 574, 364 N.E.2d 636 (1977), the appellate court specifically addressed the scope of the state constitutional provision and concluded, based on *Tennant*, that the right to confront witnesses as provided by the state constitution was not broader than that afforded by the federal constitution. *Id.* at 577-78, 364 N.E.2d at 639.

tation govern any analysis of H.B. 510 under the Illinois constitution. When applying these principles to the Illinois videotape statute it is clear that H.B. 510 does not adequately safeguard the defendant's constitutional rights.

H.B. 510 is the Illinois legislative response to the difficulties present when prosecuting child sexual abusers using the testimony of child witnesses. However, because the statute fails to provide for cross-examination at the time of the videotaping session, this essential element of confrontation has not been met. The problem lies not with the videotaping of a child witness' direct testimony, but rather with the manner in which the videotaping takes place. Providing the state with alternative methods of eliciting testimony from a child victim, such as videotape and other technological innovations, can mean the difference between obtaining the necessary evidence to successfully prosecute a child abuser or not obtaining the evidence at all. In order to utilize these devices, however, the state must preserve the essential elements of confrontation.

II. TECHNOLOGICAL INNOVATIONS AND THE PROSECUTION OF CHILD SEXUAL ABUSE

The crime of child sexual abuse[66] poses special problems for the criminal justice system. In most cases the child is the only witness to the crime.[67] Physical evidence of molestation is not available in a vast majority of the cases.[68] Children who are very young often lack

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66. See *supra* note 3 for an explanation of how states treat sexual activity between an adult and a child.

67. Pennsylvania v. Ritchie, 480 U.S. 39 (1987). In *Ritchie*, the Court observed that "[c]hild abuse is one of the most difficult crimes to detect and prosecute, in large part because there often are no witnesses except the victim.' *Id.* at 60. This observation is confirmed by statistics. As one commentator noted, statistics show that in the majority of sexual abuse cases the alleged perpetrator is known to the child and therefore the sexual assault most often takes place in the privacy of the home, without any witnesses. Note, *Legislative Responses to Child Sexual Abuse Cases: The Hearsay Exception and the Videotape Deposition*, 34 CATH. U.L. REV. 1021, 1024 (1985). *See also, A Hidden Epidemic*, NEWSWEEK, May 14, 1984, at 31 (statistics show that 75% of child molesters are related to the child or are friends or neighbors).

68. *See* LITERATURE REVIEW, *supra* note 3, at 5. (majority of child sexual abuse cases do not involve penetration, venereal disease, or infliction of serious physical injury). *See also;* C. SPELMAN, TALKING ABOUT CHILD SEXUAL ABUSE (National Committee for the Prevention of Child Abuse, third printing 1986). The author indicates that sexual contact includes forms of physical contact which will not leave any physical evidence i.e., handling of child's or offender's genitals or breasts and oral sex. *Id.* at 3. Another author notes that there has been an increased use of psychologist and psychiatrist expert testimony in child sexual abuse litigation because in most cases the child is the only witness for the crime and usually there is no corroborating medical or other direct evidence. Murray, *Expert Testimony in Sexual Abuse Litigation*, FOR THE DEFENSE, July 1988, at 14 (quoting Stevens & Berliner *Special Techniques for Child Witnesses* in THE SEXUAL VICTIMOLOGY YOUTH 246, 248 (Schultz ed. 1980); Lloyd, *The Corroboration of Sexual Victimization of Children*, in CHILD SEXUAL ABUSE AND THE LAW (Bulkley 3d ed. 1982).

the verbal capacity to tell anyone about the incident, or the awareness that the activity was not appropriate or even criminal.[69] Although child sexual abuse reporting has dramatically increased,[70] studies indicate that the crime is drastically under reported.[71] Once a case is reported, the prosecutor often is reluctant to institute criminal proceedings.[72] Several reasons account for this reluctance, perhaps most notably the belief that children are incompetent, unreliable and not credible witnesses.[73] However, due to the growing public awareness[74] of the sexual abuse of children, a trend has developed in favor of criminally prosecuting alleged abusers.[75]

In response to the increase of sexually abused children entering the criminal justice system,[76] a legislative reform movement began in the 1980's in an effort to improve the handling of such cases in the legal system.[77] Because technological innovations such as video-

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69. INNOVATIONS, *supra* note 11, at 1. The child's silence may be a result of the molester threatening the child. *Id. See also* People v. Edgar, 113 Mich. App. 528, 530-31 317 N.W.2d 675, 676 (1982) (four-year-old girl sexually abused by mother's boyfriend was threatened by boyfriend that she would be whipped if she told about the abuse); Farris v. State, 643 S.W.2d 694, 695-96 (Tex. Crim. App. 1982) (child victim threatened with knife and told parents would be killed if anyone was told of the incident).

70. *See supra* notes 2 & 12 and accompanying text regarding sexual abuse statistics in reporting.

71. *See supra* note 12 and accompanying text regarding sexual abuse statistics in reporting.

72. Prosecutors who lack faith in the child's ability to convince the jury are reluctant to proceed. Comment, *Defendant's Rights in Child Witness Competency Hearings: Establishing Constitutional Procedures for Sexual Abuse Cases*, 69 MINN. L. REV. 1377, 1377 n.3 (citing Berliner & Barbieri, *The Testimony of the Child Victim of Sexual Assault*, J. SOC. ISSUES, Summer 1984, at 125, 127, 130 (indicating reasons include the inability to establish the crime, insufficient evidence, unwillingness to expose child to more trauma, child unable to provide competent, reliable or credible testimony). See also *How Credible Are Children as Witnesses*, 23 THE JUDGES' J., 1, 2 (1984) (article notes mixed reaction to children as witnesses).

73. INNOVATIONS, *supra* note 11, at 1.

74. *See* Note, *supra* note 11, at 806 (highly publicized cases involving alleged sexual molestation of children have focused public sensitivity on the issue). Public awareness of child sexual abuse is also evidenced by public service announcements appearing on children's television programs. Vartabedian & Vartabedian, *Striking a Delicate Balance*, THE JUDGES' J. 16 (1985). The authors also note these programs focus on what a child should do if they have been abused. *Id.* at 17. In addition these programs include children's cartoons featuring stories with a similar message. *Id.* For statistics which indicate that the reporting of child sexual abuse has increased substantially, see *supra* notes 2 & 12.

75. Landwirth, *Children as Witnesses in Child Sexual Abuse Trials*, 80 PEDIATRICS 585 (1987).

76. As the public became more aware of the extent of the problem of child sexual abuse, reporting increased which resulted in pressure on the criminal justice system to prosecute more cases and consequently more children entered the system as witnesses. Berliner, *The Child Witness: The Progress and Emerging Limitations*, in PAPERS FROM A NAT'L POLICY CONFERENCE ON LEGAL REFORMS IN CHILD SEXUAL ABUSE CASES 93 (1985).

77. *See generally* TRENDS, *supra* note 11 (author notes the various legislative reforms which states have undertaken to improve the legal system's handling of child

taped testimony and closed-circuit television are relatively new devices in the prosecution of alleged child abusers, courts have had little opportunity to address the specific issues involved. In those cases where the courts have utilized the innovations the results have been mixed.[78]

A. *Advantages of Videotaping Testimony*

The paramount goal of the criminal justice system is to seek the truth in order that justice may be served.[79] Videotaping child sexual abuse victims' testimony serves this goal by arming the prosecutor with a tool to encourage the reporting of child sexual abuse and, therefore, brings child molesters to justice. Parents would be less reluctant to involve their children in a legal system that is sensitive to the needs of child witnesses.[80]

Once the child's testimony is videotaped it should be treated as the functional equivalent of live testimony.[81] By treating the videotaped testimony as the functional equivalent to live testimony, the question of availability[82] does not arise because the child, in effect, is available and testifying before the jury.[83] By videotaping the child's testimony in advance of the trial the state does not have to subject the child to the frightening ordeal of testifying in open court.[84] Further it enables the state to obtain the child's testimony

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sexual abuse cases). *See also supra* note 17 and accompanying text for examples of some of the reform measures introduced.

78. *See* People v. Johnson, 118 Ill. 2d 501, 517 N.E.2d 1070 (1987) (videotaped testimony taken of child witnesses while defendant sat in control room and viewed testimony on videomonitor resulted in violation of defendant's right to confront witnesses); State v. Sheppard 197 N.J. Super. 411, 442, 484 A.2d 1330, 1348 (1984) (court allowed admission of videotaped testimony of child victim because it did not unduly inhibit defendant's right of confrontation); Commonwealth v. Ludwig, 531 A.2d 459 (Pa. 1987) (defendant's right of confrontation was not violated when six-year-old child abuse victim was permitted to testify via closed circuit television); Long v. State, 742 S.W. 2d 302 (Tex. Crim. App. 1987) *cert. denied sub nom* Texas v. Long, 108 S. Ct. 1301 (1988) (admission of videotaped testimony taken of child sexual assault victim in defendant's absence deprived him of his right to confrontation).

79. *See* Dutton v. Evans, 400 U.S. 74, 89 (1970) (mission of confrontation clause is to advance concern for accuracy of truth-determining process in criminal trials).

80. *See* Parker, *supra* note 7, at 651 (insensitive judicial system to victimization child witness may undergo in courtroom important factor in parent's failure to report sexual assaults).

81. If videotaped testimony allows for cross-examination as this comment suggests, the major purposes behind the confrontation clause are satisfied through the videotape procedure. See *supra* notes 43-45 and accompanying text for the major purposes behind confrontation. See *infra* notes 87-89 and accompanying text for a discussion of how videotape can convey the witness' demeanor to the jury.

82. See *supra* note 9 for an explanation of the legal concept of "availability."

83. Barber & Bates, *Videotape in Criminal Proceedings*, 25 HASTINGS L.J. 1017, 1035 (1974). The authors note that because the tape is not a transcription of the declarant's out-of-court statement, the question of hearsay does not come up. *Id.*

84. See *supra* note 7 for those authorities which discuss how testifying at trial

at a time closer to the actual sexual abuse incident, when the event is fresh in the mind of the victim. Reports indicate that young children do not have an objective sense of time, that their memories tend to be inaccurate, and their ability to communicate what they do comprehend and are able to remember is limited.[85] Because the time between the sexual abuse occurrence and the trial could be lengthy, use of videotape to obtain the child victim's testimony can be especially critical.[86]

In addition to bringing the witness before the accused, another purpose behind the requirement that witnesses testify live is to provide the jury an opportunity to observe and assess the demeanor and credibility of the witness.[87] Because the videotape is an exact photographic transcription of the testimony as it occurs, it allows the jury to observe the child witness' demeanor just as they would have if the child were testifying in the courtroom. Although some commentators have suggested that the use of this technique distorts the evidence,[88] adjustments to the lens or angle variations would en-

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can be an emotionally burdening experience for a child witness. *See also* McAllister, *Article 38.071 of the Texas Code of Criminal Procedure: A Legislative Response to the Needs of Children in the Courtroom*, 18 ST. MARY'S L.J. 279 (1986). The author notes several obstacles which children encounter when they enter the legal system. *Id.* at 295-98. The actual courtroom environment, which is in stark contrast to a child's usual environment because of the lack of other children or play things, can seem intimidating to a child. *Id.* at 297-98. The anxiety and fear which any adult witness might encounter is increased many times over when the witness is a small child. As another author points out in cautioning attorneys to prepare children for the experience of testifying in legal proceedings:

> [w]hen the individual on the stand is a child whose head is barely visible above the rail of the witness box, and whose feet dangle a foot or more from the floor, the trial lawyer faces unique challenges . . . . To a young child the courtroom is a huge and foreboding place filled largely with strangers. The robed judge sits high atop a throne. Even though the child has been told the judge is a "nice" person, the sheer presence of the court may be intimidating. In a criminal case, the defendant is seated at counsel table, just a few feet away. If the defendant has injured the child, or threatened harm if the child testifies, the child's fear of the defendant can be overpowering.

Myers, *The Child Witness: Techniques for Direct Examination, Cross-Examination, and Impeachment*, 18 PAC. L.J. 801, 804 (1987).

85. Note, *Parent-Child Incest: Proof at Trial Without Testimony in Court by the Victim*, 15 J.L. REFORM 131, 137 (1981) (citations omitted). For an excellent overview of child memory development and the inherent limitations and capabilities of a young child see Christiansen, *The Testimony of Child Witnesses: Fact, Fantasy, and the Influence of Pretrial Interviews*, 62 WASH. L. REV. 705 (1987). *See also* Yates, *Child's Preference - Developmental Issues*, 10 FAM. ADVOC. 30, 33-34 (1988) (provides stages of child development and factors involved in influence of young children).

86. *See* Bernstein, *Out of the Mouths of Babes: When Children Take the Witness Stand*, 4 CHILDREN'S LEGAL RIGHTS, J. 11, 14 (1982) (because trials are prone to delay those working with children must be ready for additional stresses placed on child witness). *See also* Weisberg, *supra* note 7 (legal process from time of public complaint to actual trial could take several months to several years).

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

88. Note, *The Criminal Videotape Trial: Serious Legal Questions*, 55 OR. L. REV. 567, 574-75 (1976). The author notes that videotape profoundly effects the trial

sure that the subtle changes in the witness' demeanor such as nervous fidgeting, paling or blushing are not lost.[89] The only deviation from traditional live testimony is that the child is not physically present in the courtroom. However, the purpose behind requiring the live testimony is adequately satisfied.

Videotaping testimony is an alternative testimonial procedure which is frequently necessary in cases of child sexual abuse in order to facilitate the fact-finding process. The nature of the crime often leaves the child as the only witness to the sordid event.[90] If the child is too frightened to testify in open court, the prosecutor probably will not have the evidence to go forward with the case. By allowing this alternative device to elicit testimony, the criminal justice system is better served because relevant evidence which may not otherwise be available is placed before the finder of fact.

B. *The Necessity of Closed-Circuit Television*

Another testimonial procedure which aids prosecutors in the truth-seeking process is two-way closed-circuit television.[91] This procedure allows for the simultaneous transmission of the testimony and image of the child into a separate room which the defendant occupies, and the defendant's image to the testimonial room where the child is located. The effect of this procedure is that the defend-

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process in three ways: distortion of evidence, exclusion of evidence and interference with the jury process. *Id.* at 574-78. The evidence is distorted because the camera by its nature has already selectively processed what the jury will see. *Id.* at 574-76. Some evidence might be excluded because the camera may be focusing on a particular part of the witness' body and therefore is unable to pick up something else of significance. *Id.* at 576-77. The videotape could affect the jury process in its substitution of a mechanical medium in place of the live element providing the historical "electricity" of the criminal trial. *Id.* at 577 n.71. *But see* Bermant & Jacoubovitch, *Fish Out of Water: A Brief Overview of Social and Psychological Concerns about Videotaped Trials*, 26 HASTINGS L.J. 999, 100 (1975) (research conducted of juror responses to videotaped versus live presentations found videotaped format did not have detrimental effects on juror responses). For authorities generally discussing the use of videotape technology and the legal system see the following: Barber & Bates, *Videotape in Criminal Proceedings*, 25 HASTINGS L.J. 1017 (1974); Bermant, Chappell, Crockett, Jacoubovitch & McGuire, *Juror Responses to Prerecorded Videotape Trial Presentations in California and Ohio*, 26 HASTINGS L.J. 975 (1975), Brakel, *Videotape in Trial Proceedings: A Technological Obsession*? 61 A.B.A. J. 956 (1975); German, Merin & Rolfe, *Videotape Evidence at Trial*, 6 AM. J. TRIAL ADVOC. 209 (1982); Morrill, *Enter—The Video Tape Trial*, 3 J. MARSHALL J. OF PRAC. & PROC. 237 (1970).

89. Note, *supra* note 12, at 1014.

90. See *supra* note 67 for authorities which state that in cases of child sexual abuse there are usually no witnesses.

91. The following five statutes allow for the simultaneous transmission of the child witness' testimony via a two-way closed-circuit television: California: CAL. PENAL CODE § 1347 (West 1988); Hawaii: 1985 HAW. SESS. LAWS (Act 279); New York: N.Y. CRIM. PROC. LAW §§ 65.00 to 65.30 (McKinney Supp. 1988); Ohio: OHIO REV. CODE ANN. § 2907.41 (C), (E) (Anderson 1987); Vermont: VT. R. EVID. § 807 (Supp. 1988).

ant is physically removed from the child's presence in order that the child will not be afraid to testify.[92] Studies have shown that the child abuse victim's biggest fear is facing the defendant.[93] The knowledge that the victim will ultimately be required to face the defendant in the traditional courtroom environment undoubtedly has a chilling effect on the reporting of child sexual abuse.[94] In addition, for those cases that are reported and ultimately prosecuted, the frightening ordeal of facing the defendant frequently causes the child witness to freeze on the stand, unable to testify.[95] Even if the child is able to testify, the testimony is often ineffective because of the child's fidgeting, stammering and general inability to convey to the fact-finder testimony which is credible.[96] Testifying out of the

92. *See* Commonwealth v. Willis, 716 S.W.2d 224, 226 (Ky. 1986) (use of videotape and closed circuit television to present testimony of 5-year-old sexual abuse victim was sought when child responded she was unable to answer questions because she did not want the defendant who was in the room to hurt her); State v. Tafoya, 729 P.2d 1371, 1375 (N.M. 1986) (defendant required to watch proceedings from control booth when expert testimony indicated child victims would suffer unreasonable and unnecessary mental or emotional harm if required to testify in front of defendant); *vacated and remanded*, Tafoya v. New Mexico, 108 S. Ct. 2890 (1988); Commonwealth v. Ludwig, 531 A.2d 459, 464 (Pa. 1987) (use of closed circuit television was necessary to protect welfare of child when expert witness opined child would be traumatized if required to testify in physical presence of father).

93. *See supra* note 92 for examples of child abuse victim's fear of testifying in presence of defendant. Researchers discovered the fear of facing the defendant was the most troubling aspect about child witnesses in the criminal justice system reported by prosecutors, judges and social workers. "The most frequently mentioned fear was facing the defendant. That experience is frightening . . . to a child who does not understand the reason for confrontation. . . . [T]he participation and experience of being in close proximity to the defendant can be overwhelming." VICTIMS, *supra* note 11, at 17-18.

94. *See* Parker, *supra* note 7, at 651 (parents reluctant to involve children in legal system insensitive to their needs).

95. *See* People v. Johnson, 118 Ill.2d 501, 517 N.E.2d 1070 (1987). In *Johnson* the five-year-old victim had received external and internal injuries consistent with the insertion of an adult penis. *Id.* at 503, 517 N.E.2d at 1071. Following a competency hearing in which the victim had failed to give audible responses to any of the prosecutor's questions, the trial court reserved ruling on the child's competency and ruled, sua sponte, that the victim could testify on videotape in front of the defendant with the jury and spectators removed from the courtroom. *Id.* at 505, 517 N.E.2d at 1072. The child was then able to answer some questions but ceased speaking when the prosecutor asked questions concerning the day she got hurt. *Id.* Although the child was able to resume testifying once the court ordered the defendant from the room, her testimony became unresponsive and contradictory upon cross-examination and redirect examination. *Id. See also Tafoya*, 729 P.2d at 1375 (expert testified child victims would become incoherent or freeze if they were to see defendant).

96. *See supra* notes 92-95 for examples of the effect of the defendant's presence on child sexual abuse witnesses. *See also* Comment, *Confronting Child Victims of Sexual Abuse: The Unconstitutionality of the Sexual Abuse Hearsay Exception*, 7 U. PUGET SOUND L. REV. 387 (1984) (a child who is afraid to testify or testifies in terror results in no testimony or poor testimony). In Commonwealth v. Ludwig, 531 A.2d 459 (Pa. 1987), the court noted that authorities indicate that eyeball-to-eyeball contact, instead of increasing veracity, operates to cause anxiety which in turn influences memory by causing interferences with focused attention. *Id.* at 465 (quoting Mahady-Smith, *The Young Victim as Witness for the Prosecution: Another Form of*

defendant's presence relieves much of the child's fear and places the child in a better posture to testify, thus enhancing the truth-seeking process.

Because truth is the ultimate quest, the court should not lightly dismiss legislative reforms which serve this end. However, the court also must not forsake the defendant's right to confrontation in the process. Therefore, the legislature must carefully draft any alternative procedure to the traditional presentation of evidence in order to avoid a confrontation challenge by the defendant.

III. H.B. 510: Illinois' Legislative Response to Facilitate the Prosecution of Child Sexual Abuse

H.B. 510[97] seeks to provide an alternative to the traditional manner in which a child witness testifies. The statute is an attempt to address the difficulty in prosecuting the crime of child sexual abuse.[98] There is no question that the trauma which the child victim of sexual abuse frequently suffers at the hands of the present criminal justice system compromises the state's ability to effectively prosecute child molestation cases. The perceived inability of the judicial process to accommodate the special problems inherent with child witnesses is the catalyst behind the various legislative reforms which states have enacted.[99] Although the states have a strong interest in effective law enforcement,[100] courts must closely examine any legislative enactment which would intrude upon a defendant's right of confrontation.[101] Analyzing H.B. 510 under the constitutional microscope, the Illinois statute does not adequately protect confrontation clause values.[102]

Initially, the statute is overly broad in its intrusion on the defendant's rights. The statute does not require the court to find that the videotaping procedure is necessary to enable the prosecution to present its case.[103] The Supreme Court cases interpreting the de-

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Abuse? 89 Dick. L. Rev. 721, 724 n.21 (1985)).

97. See *supra* note 5 for the pertinent text of H.B. 510.

98. See *supra* notes 67-69 and accompanying text (providing examples of why child sexual abuse cases are difficult to prosecute).

99. See *supra* note 17 for the various legislative reforms which states have adopted.

100. *See* Ohio v. Roberts, 448 U.S. 55, 64 (1980) (every jurisdiction has strong interest in effective law enforcement).

101. Chambers v. Mississippi, 410 U.S. 284, 295 (1973).

102. See *supra* notes 35-65 and accompanying text for a discussion on confrontation clause values.

103. With respect to that portion of the statute which provides for videotaping of the child's testimony, the statute makes no reference that the court is required to make a finding that the procedure is necessary to facilitate the prosecution of the defendant. See *supra* note 5 for the text of H.B. 510. This creates a danger of an enlargement to the provision to encompass those witnesses who are capable of testify-

fendant's confrontation right show a strong preference for in-person, face-to-face confrontation at trial.[104] Therefore, in order to utilize this alternative procedure, the prosecution should be required to show that it is necessary in order to obtain the testimony of the only witness who was present at the time of the crime.[105] The prosecution could meet this burden by providing proof that the child will either be unable to testify, or will suffer further traumatization if required to testify in open court in the physical presence of the defendant.[106] By requiring the prosecution to show by a preponderance of the evidence[107] that the alternative procedure is necessary to obtain the child victim's testimony, the defendant's confrontation right is safeguarded from further restriction.[108]

The Illinois videotape statute also violates the defendant's right to due process.[109] One of the purported goals behind the statute was to provide the prosecutor with a device to encourage defendants to plead guilty.[110] In the facilitation of this goal, section 106A-2 of H.B. 510 requires that in order for the prosecution to use videotape testi-

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ing through traditional means.

104. *See* Ohio v. Roberts, 448 U.S. 55, 63 (1980) (confrontation clause reflects preference for face-to-face confrontation at trial); California v. Green, 399 U.S. 149, 157 (1970) ("literal right to 'confront' the witness at trial that forms the core of the values furthered by the Confrontation Clause"); Barber v. Page, 390 U.S. 719, 725 (1968) ("right to confrontation is basically a trial right"); Dowdell v. United States, 221 U.S. 325, 330 (1911) (accused to be tried on testimony of those witnesses who meet him face-to-face at trial and give their testimony in the defendant's presence). *See also*, C. MCCORMICK, EVIDENCE § 252 at 606 (2d ed. 1972). McCormick notes that the confrontation clause contemplates face-to-face confrontation at trial by requiring the "personal presence of the witness at trial, enabling the trier to observe his demeanor as an aid in evaluating his credibility and making false accusation more unlikely because of the presence of the accused and the solemnity of the occasion." *Id.*

105. *See* Chambers v. Mississippi, 410 U.S. 284, 295 (1973) (confrontation right may be outweighed by state interest but only where state interest is closely examined).

106. The proof could be obtained through expert testimony of a psychiatrist who would state that in order for the child to testify a less stressful environment is necessary. *See* State v. Tafoya, 729 P.2d 1371, 1375 (N.M. Ct. App. 1986), *vacated and remanded*, Tafoya v. New Mexico, 108 S. Ct. 2890 (1988) (expert testified that if child was required to testify in court in defendant's presence the child would become incoherent or freeze).

107. One commentator notes that to charge the prosecution with a higher burden of proof would impose a standard that would eliminate the possibility of finding a deviation from the defendant's sixth amendment right acceptable. See Note, *supra* note 12, at 1016.

108. By confining the special procedure to only those child molestation cases which require it there will be no danger of enlargement to include cases where someone is just uncomfortable testifying in the defendant's presence. *Cf.* United States v. Benfield, 593 F.2d 815, 822 (8th Cir. 1979) (adult woman's fear of testifying in front of defendant did not justify the infringement placed on the defendant's right of confrontation).

109. *See* California v. Trombetta, 467 U.S. 479, 485 (1984) (due process clause of fourteenth amendment requires criminal prosecutions to comport with prevailing notions of fundamental fairness).

110. See *supra* note 11 for remarks of Illinois Representative Lee Preston.

mony, it must request the testimony before the trial commences.[111] The prosecution's ability to conduct direct examination before the trial commences gives the prosecutor a distinct advantage in plea-bargaining negotiations and in planning trial strategy. The defendant, on the other hand, is unable to conduct cross-examination until after the trial commences.[112] This inability to engage in contemporaneous cross-examination handicaps the defendant by preventing him from impeaching the witness while the witness' testimony is still fresh and susceptible to challenge.[113]

The defendant's inability to engage in contemporaneous cross-examination is the most disturbing aspect of H.B. 510. The interests at stake during the videotape session are the same interests which are at stake at trial.[114] The same parties are present and the witness' testimony is given under circumstances which closely resemble those which take place at a typical trial.[115] The fact that the statute gives the defendant a subsequent opportunity to cross-examine the witness at trial does not negate the question of confrontation.[116] In *Cal-*

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111. See *supra* note 5 for the text of section 106A-2.

112. See *supra* note 5 for the text of section 106A-2(b)(7).

113. State v. Saporen, 205 Minn. 358, 362, 285 N.W. 898, 901 (1939). In *Saporen* the Minnesota Supreme Court said:

> [t]he chief merit of cross examination is not that at some future time it gives the party opponent the right to dissect adverse testimony. Its principal virtue is in its immediate application of the testing process. Its strokes fall while the iron is hot. False testimony is apt to harden and become unyielding to the blows of truth in proportion as the witness has opportunity for reconsideration and influence by the suggestion of others, who interest may be, and often is, to maintain falsehood rather than truth.

Id.

In California v. Green, 399 U.S. 149 (1970), the Supreme Court indicated that there may be times that belated cross-examination could serve as a constitutionally adequate substitute for cross-examination contemporaneous with the original statement. *Id.* at 159. However, in *Green*, the witness' testimony at trial was favorable to the defendant, and inconsistent with his preliminary hearing testimony which had been unfavorable to the defendant. The Court, relying on *Saporen*, recognized the danger of belated cross-examination when dealing with the possibility of false testimony hardening. *Id.* But, the Court reasoned that the danger had disappeared because the witness' testimony instead of hardening was in fact softened to the point where he was repudiating his former testimony. *Id.* Based on the Court's recognition in *Green* of the possibility of false testimony hardening, if a witness' trial testimony remains the same as the unchallenged former testimony the Court clearly will find the belated cross-examination of the former testimony constitutionally inadequate. *See id.*

114. *See Green*, 399 U.S. at 165 (preliminary hearing, where witness' testimony was under oath and cross-examined by defendant's counsel, provided circumstances closely resembling typical trial).

115. *Id.*

116. *See supra* note 113 (providing authority which supports proposition that belated cross-examination is not constitutionally adequate). *See also* Long v. State, 742 S.W.2d 302 (Tex. Crim. App. 1987), *cert. denied sub nom* Texas v. Long 108 S. Ct. 1301 (1988) (inability to engage in cross-examination contemporaneous with direct testimony is violation of confrontation).

ifornia v. Green[117] the former testimony of a witness at the preliminary hearing was admissible at the trial of the accused precisely because the defendant in *Green* had the opportunity to cross-examine the witness' testimony contemporaneously with his direct testimony.[118] The witness' prior testimony had been put to the test of veracity by the defendant's immediate and vigorous cross-examination and emerged unshaken.[119] By withstanding the defendant's cross-examination, the prosecution was able to show that the witness was reliable and trustworthy at the time he formerly testified.[120]

In contrast to *Green*, Illinois' videotape statute enables the witness to testify knowing that the defendant cannot subject her testimony to cross-examination until a much later time. This situation is fundamentally unfair to the defendant because with the passage of time, the possibility of false testimony of the victim can be reinforced by the prosecution, thus becoming solidified in the witness' mind and unshakable by subsequent cross-examination.[121] The separation of the belated cross-examination from the direct testimony renders it meaningless. In essence, it is not cross-examination at all because the passage of time destroys the defendant's opportunity to subject the statement to an immediate challenge to determine its truthfulness and credibility. The mechanics of the Illinois videotape statute therefore operate unfairly against the defendant, prejudicing his position at trial in violation of the due process clause of the fourteenth amendment.[122]

The Illinois videotape statute does not require the prosecution to call the child witness during the presentation of its case in order to have the court admit the videotaped testimony.[123] In order for the recording to be admissible into evidence, the statute requires that the child be available to testify at trial, and the defendant or the attorney for the defendant is afforded the opportunity to cross-examine the child at trial.[124] This aspect of the Illinois statute is remarkably similar to a Texas statute that the Texas Court of Criminal Appeals recently found unconstitutional in *Long v. State*.[125] In

117. 399 U.S. 149 (1970).

118. *Green*, 399 U.S. at 165.

119. *See id.* (defendant had every opportunity to examine witness).

120. *Id.* (witness' cross-examination at preliminary hearing was sufficient to satisfy the confrontation clause).

121. *See supra* note 113 (chief merit of cross-examination is to be able to strike while the witness' testimony is still fresh and susceptible to challenge).

122. *See In re* Murchison, 349 U.S. 133, 136 (1955) (fair trial in fair tribunal is basic requirement of due process).

123. See *supra* note 5 for the pertinent text of H.B. 510.

124. See *supra* note 5 for the pertinent text of section 106A-2 (b)(6), (7).

125. 742 S.W.2d 302 (Tex. Crim. App. 1987), *cert. denied sub nom.* Texas v. Long, 108 S. Ct. 1301 (1988).

Long, the statute provided that the ex parte videotaped statement of a child sexual abuse victim, made in the absence of the defendant or any attorneys for either party, was admissible in open court provided the child was available to testify.[126] The court, in finding the statute unconstitutional, held that it imposed a constitutionally unacceptable burden on the defendant by requiring the defendant to call his accuser as his witness in order to avail himself of his right to cross-examination.[127]

This is the same dilemma facing the defendant under the Illinois statute. The fourteenth amendment of the United States Constitution provides that the right to a fair trial is a fundamental liberty.[128] This right guarantees that the defendant's trial is free from prejudicial factors which might interfere with this liberty. In this regard, the process of a fair trial means that neither the prosecution nor the defense is vested with an unfair advantage over the other.[129] It is incumbent upon a court, therefore, to closely examine any courtroom procedure which might dilute the defendant's right to receive a fair trial.[130]

In *Estelle v. Williams*,[131] the Supreme Court said in dicta that a court must, to its best ability, evaluate the impact of a particular procedure on the jury.[132] The *Williams* Court concluded that compelling an accused to stand trial in prison clothing prejudiced his case because of the risk of impairment to the presumption of innocence in the minds of the jury.[133] Applying the reasoning of *Williams* to the situation presented by the Illinois videotape statute, the defendant is clearly in a prejudiced position because the jury is likely to respond negatively to a defendant who is compelling a child witness to testify.[134]

The Supreme Court addressed both the right to confrontation and the right to due process in *Lee v. Illinois*.[135] In *Lee*, the Court observed that an integral part of fairness in a criminal trial is the

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126. *Id.* at 314.
127. *Id.* at 320.
128. Estelle v. Williams, 425 U.S. 501, 503 (1976) (citation omitted).
129. To ensure that this system of fair play is given its full effect, the Supreme Court provided in *Williams*, that a court must be alert to factors which may weaken the fairness of the fact-finding process. *See id.*
130. *Id.* at 504.
131. 425 U.S. 501 (1976).
132. *Id.* at 504.
133. *Id.* at 504-05. The Court indicated that a constant reminder of the accused's condition may affect the judgment of a juror.
134. *See* Long v. State, 742 S.W.2d 302, 320-21 (Tex. Crim. App. 1987), *cert. denied sub nom.* Texas v. Long, 108 S. Ct. 1301 (1988). The *Long* court concluded that the admission of the child sexual abuse victim's videotaped testimony followed by the defendant's calling of the child witness resulted in a prejudicial effect and was not consistent with the concept of due process. *Id.*
135. 476 U.S. 530 (1986).

right to confront and cross-examine witnesses.[136] To this end, the Court noted the confrontation clause advances the idea of fairness in a criminal trial by ensuring that the accused and the accuser engage in an open and even contest.[137] The confrontation clause ensures that a jury will not convict a defendant on the basis of witnesses whose testimony he has not had an opportunity to challenge.[138] Under the Illinois videotape statute, however, the defendant is faced with an unchallengeable witness if he does not call the child to testify. The statute thus places the defendant in a Catch-22 situation.[139] If he calls the child witness he risks incurring the wrath of the jury. If he chooses not to call the child he loses his right to cross-examination, which has been described as "the greatest legal engine ever invented for the discovery of truth."[140]

The defendant's inability to conduct a contemporaneous cross-examination places him at a distinct disadvantage, which constitutes an infringement upon his rights of confrontation and due process. The Illinois videotape statute also fails of its essential purpose because it does not serve to reduce the trauma to the sexually abused child witness. If the accused exercises his right to cross-examine the child witness, the child must then testify at trial in the presence of the defendant.[141]

The defendant's constitutional rights and the state's interest in using alternative methods to obtain testimony in order to prosecute child sexual abusers do not necessarily have to conflict. Although the Supreme Court has not addressed the constitutionality of whether the use of videotaped testimony, or testimony via closed circuit television, violates the defendant's rights to confrontation or due process,[142] many lower courts have dealt with the issue.[143] Some of these courts have concluded that technological innovations, if carefully used, preserve the essential elements of confrontation and therefore comport with due process.[144]

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

137. *Id.* at 540-41. The Court recognized that the "right to confront and cross-examine adverse witnesses contributes to the establishment of a system of criminal justice in which the perception as well as the reality of fairness prevails." *Id.* at 540.

138. *Id.*

139. "Catch-22" is an expression which originated from the 1961 novel by the same name written by Joseph Heller. It is understood to mean a paradox in a practice that makes one a victim of its provisions no matter what one does. WEBSTER'S NEW WORLD DICTIONARY 224 (2d ed. 1979).

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

141. See *supra* note 5 for the pertinent provision of H.B. 510.

142. See *supra* note 23 and accompanying text for an explanation of Coy v. Iowa, 108 S.Ct. 2798 (1988) in which the Supreme Court dealt with a state measure to protect child witnesses and its impact on the defendant's right to confrontation.

143. See *supra* note 78 for cases which have addressed the issue of whether the use of technological innovations violates a defendant's constitutional rights.

144. See *supra* notes 78, 92 for cases which have concluded a defendant's con-

IV. Harmonizing Technology with Constitutional Rights

For the reasons given in the preceding section, it is clear that any alternative testimonial procedure must provide the defendant with cross-examination contemporaneous with the child's direct testimony. To meet that end, this comment proposes that the Illinois legislature amend H.B. 510 to allow for a testimonial room separated from the defendant in which the child sexual abuse victim would testify on videotape at any time before the trial begins. In order to avail itself of this procedure, the prosecution would need to show that the procedure is necessary in order to obtain the child's testimony and that the child cannot testify effectively in any other manner.[145] The child sexual abuse victim would testify in the presence of the court and the attorneys for both parties. The attorney for the defendant would have a headset and microphone so that he could be in direct contact with the defendant.[146] The defendant would, therefore, have an adequate opportunity to participate in the cross-examination.[147] A two-way closed-circuit television would transmit the child witness' image and testimony to the defendant located in a separate room so that he could see and hear the testimony.[148] The closed-circuit television would transmit the defendant's image into the room where the child was testifying so that she could face the accused.[149]

This procedure would facilitate the state's interest in effective law enforcement by providing the state with the means to obtain reliable evidence which otherwise would be unavailable. By providing a means to obtain testimony which is sensitive to the needs of

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stitutional rights are not violated by technological innovations.

145. See *supra* notes 103-08 and accompanying text for a discussion regarding the need to show necessity in order to admit a videotape.

146. The defendant's right of confrontation is a right personal to the accused and is intended for the defendant's benefit. United States v. Carlson, 547 F.2d 1346, 1357 (8th Cir. 1976). In Faretta v. California, 422 U.S. 806 (1975), the Supreme Court held that a defendant has a constitutional right to self-representation. *Id.* at 819. In so holding, the Court stated that it is not the accused's counsel who must be confronted with the witnesses against him but the accused. *Id.* Because the confrontation clause contemplates the active participation of the defendant during all phases of his trial, any alternative procedure to the traditional face-to-face meeting must provide the defendant with the ability to remain a participant. *See* United States v. Benfield, 593 F.2d 815, 821 (8th Cir. 1979). See *infra* notes 169-70 and accompanying text regarding a court's approval of the same procedure advocated here.

147. *See* State v. Tafoya, 729 P.2d at 1373, 1375 (N.M. Ct. App. 1986) *vacated and remanded sub nom.* Tafoya v. New Mexico, 108 S. Ct. 2890 (1988) (procedure which allowed defendant to confer with his attorney and to cross-examine did not violate defendant's confrontation rights).

148. *See* Commonwealth v. Willis, 716 S.W.2d 224, 227 (Ky. 1986) (closed-circuit television procedure enables the accused to hear and observe the witness).

149. *See* Kansas City v. McCoy, 525 S.W.2d 336, 337 (Mo. 1975) (en banc) (closed-circuit television procedure provided instantaneous view of witness and defendant to each other).

children, parents would be less reluctant to allow their children to enter the criminal justice system, and prosecutors would be better equipped to prosecute cases. The use of two-way closed-circuit television would allow the defendant and the child victim witness to be in each other's view during the entire proceeding. Thus, this procedure adequately satisfies all the interests which the Supreme Court has found implicit in the confrontation clause.[150] By allowing the parties to utilize the procedure before trial, the child would be able to provide her testimony closer to the time of the occurrence when the incident is fresh in her mind. The ability to pre-record would also remove the child from the criminal justice system sooner and allow her to go forward with her life, leaving behind the devastating sexual abuse incident.

V. Applying the Proposed Reform

When a child has been the victim of prolonged sexual abuse, often by a trusted adult in the child's life, the child frequently keeps silent about the incident because the abuser has intimidated the child by words or physical aggression, or has threatened physical harm to the child or another person important to the child.[151] It is for this reason that the child's biggest fear is physically facing the defendant.[152] Two-way closed-circuit television satisfies the requirement that the accusor come face-to-face with the accused. Although the witness is not physically in the defendant's presence the parties are confronting one another through an electronic device. Their view of one another is instantaneous. Although the Supreme Court uses the words "face-to-face" to mean physical presence,[153] consideration of the technological context in which the Court reviewed these cases can help explain the physical presence requirement. In the eighteenth and nineteenth centuries live testimony was the only way that a person could observe a witness testifying.[154] The fact that nineteenth century justices interpreting the meaning of confrontation could not foresee the technological innovation of closed-circuit television should not stand in the way of a twentieth century invention

150. See *supra* notes 30-62 and accompanying text for a discussion on the scope and meaning of the confrontation clause. *See generally* Note, *supra* note 12, at 1011 (closed-circuit television provides most acceptable balance between confrontation clause and state's interest in prosecuting sexual abuse cases).

151. See *supra* note 69 and accompanying text indicating that a child's failure to report the incident may be a result of the molester's threats.

152. See *supra* notes 92-93 and accompanying text for information pertaining to the child's fear of testifying in the defendant's presence.

153. The face-to-face requirement was first acknowledged in Mattox v. United States, 156 U.S. 237 (1895). See *supra* note 35 for the context in which the Mattox Court discussed the face-to-face requirement.

154. Commonwealth v. Ludwig, 531 A.2d 459, 462 (Pa. 1987).

which has produced a means to capture the testimony of a witness and transmit it instantaneously to another.[155]

In *Kansas City v. McCoy*,[156] the Missouri Supreme Court found that the use of a closed-circuit television did not interfere with the defendant's right of confrontation.[157] The court held that the confrontation clause did not require an expert witness giving testimony against the defendant to be physically present in the courtroom.[158] The court reasoned that although the witness was not physically present in the courtroom, his image and his voice were there which fulfilled the purpose behind cross-examination.[159] Proponents of physical face-to-face confrontation argue that the physical requirement is necessary to ensure the trustworthiness of the witness' testimony.[160] The constitutional right of confrontation, however, does not include this so called "eyeball-to-eyeball" contact.[161] In *Commonwealth v. Ludwig*,[162] the trial court allowed the use of a closed circuit television to present the testimony of a six year old child who had frozen on the stand and was unable to testify in the presence of her father.[163] The Superior Court of Pennsylvania, reviewing the trial court's decision, rejected the defendant's claim that because the court did not require the witness to look at the defendant the procedure was a violation of his right to confrontation.[164] The court emphasized that there is a difference between confrontation and intimidation.[165] The determination of whether the abused child's testimony was reliable, the court stated, was not dependent upon the child's ability to withstand the psychological trauma of testifying under the steady gaze of a parent accused of sexually abusing her.[166] The court then concluded that cross-examination and the

155. *See* State v. Sheppard, 197 N.J. Super. 411, 430, 484 A.2d 1330, 1341 (1984) (praising use of modern videotape procedure and noting that "television camera is a stranger only in the slower moving apparatus of justice").

156. 525 S.W.2d 336 (Mo. 1975).

157. *Id.* at 339.

158. *Id.*

159. *Id.*

160. *See* United States v. Benfield, 593 F.2d 815, 821 (8th Cir. 1979) ("recollection, veracity, and communication are influenced by face-to-face challenge"). *But see* Commonwealth v. Ludwig, 531 A.2d 459, 463 (Pa. 1987) (disagrees that eyeball-to-eyeball contact is necessary to insure trustworthiness of witness' testimony).

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

162. 531 A.2d 459 (Pa. 1987).

163. *Id.*

164. *Ludwig*, 531 A.2d at 463 n.8. The court disagreed with the defendant's contention that testimony given in the absence of "eyeball-to-eyeball" contact is unreliable. *Id.* The court reasoned that if that were the law various evidence would not be admissible including former testimony and dying declarations. *Id.* n.8. If the defendant's test was essential to the right of confrontation, the court indicated, problems would exist with the testimony of blind persons and witnesses who refuse to look at the defendant while giving their testimony. *Id.*

165. *Id.* at 462.

166. *Id.* at 463.

jury's ability to observe the child's demeanor while testifying were the factors which assured the reliability of the child's testimony.[167]

Because the right to confront belongs to the defendant,[168] the court must afford the accused the right to consult with his attorney during the child's testimony. In *State v. Tafoya*,[169] the court approved a procedure whereby the defendant's attorney wore a headset and microphone to facilitate communication with the defendant, who was not physically present when the child victim witnesses testified, but who observed the proceedings from a control booth.[170] Although under the proposed reform the defendant is not physically present in the room with the child, the use of two-way closed-circuit television protects his interests. The defendant can see and hear the testimony, and the witness can see the defendant. The defendant can also participate fully in the cross-examination of the witness by being able to confer with his attorney.[171]

When the prosecution offers a child's videotaped testimony as evidence in the trial of the accused, certain constitutional concerns are present because the testimony is technically hearsay. The Supreme Court, in *Ohio v. Roberts*,[172] specifically held that hearsay evidence, because of its unreliability, was not admissible unless it met certain requirements.[173] If courts are going to treat videotaped testimony as hearsay, under the two requirements established in *Roberts*, the videotaped testimony of the child victim would be inadmissible unless the child was available to testify at the trial of the accused or the prosecution could show that the witness was unavailable.[174] However, even then the admissibility of an unavailable wit-

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167. *Id.* These factors, the court indicated, were accomplished by closed-circuit television.

168. See *supra* note 146 for authorities which indicate the right to confront is personal to the accused.

169. 729 P.2d 1371 (N.M. Ct. App. 1986), *vacated and remanded sub nom.* Tafoya v. New Mexico, 108 S. Ct. 2890 (1988).

170. *Id.* at 1373. The court reasoned that because the procedure allowed the defendant to confer with his attorney and provided full opportunity for cross-examination the defendant's confrontation rights were not abrogated. *Id.* at 1373, 1375.

171. This procedure would not be able to be utilized if the defendant represents himself. See Mlyniec & Dally *supra* note 5 at 133 (pro se representation could frustrate prosecutor's ability to use technologically innovative methods).

172. 448 U.S. 56 (1980).

173. See *supra* notes 60-61 and accompanying text regarding the requirements of *Roberts*.

174. *Id.* at 65-67. The test formulated in *Roberts* does not, however, end the matter. The Supreme Court elaborated in United States v. Inadi, 475 U.S. 387 (1986), that there may be instances where the government could introduce an out-of-court declaration without having to show that the declarant is unavailable. *Id.* at 394-95. The Court concluded that the mission of the confrontation clause is to advance the accuracy of the truth-determining process in criminal trials and that the unavailability rule is not likely to enhance that process. *Id.* at 396. It would seem, therefore, that in light of *Inadi* if the surrounding circumstances of the out-of-court declaration are sufficiently trustworthy, the Court will not have the statement's admissibility hinge

ness would be dependent upon whether the surrounding circumstances of the statement show that the child's testimony possessed sufficient indicia of trustworthiness.[175] This would be rather difficult to prove where the videotaped testimony includes only the child's unchallenged direct testimony. In that instance it is obvious that the prosecution conducted the testimony for the specific purpose of introducing it as evidence at the defendant's trial.[176] To get past this dilemma, in addition to avoiding the necessity of making the child available to testify at trial, the videotaped testimony should provide for both direct and cross-examination. Where the videotaping allows cross-examination, the court can treat the testimony as the functional equivalent of live testimony and accept it in lieu of the child's testimony at trial. When the videotaped testimony includes a full opportunity to cross-examine the child witness, the testimony takes on the same element of trustworthiness which marks former testimony of an unavailable witness and allows for its subsequent admissibility.[177]

Although cross-examination is an essential element of confrontation,[178] the Supreme Court has suggested that the ability of the fact finder to view the witness' demeanor was also an important element of the defendant's right to confrontation because it aids the jury in assessing the witness' credibility.[179] Videotaped testimony adequately fulfills this element of confrontation by providing the fact finder a picture of the proceedings as they occur.[180] Not all the courts which have addressed the use of videotape technology have reached the conclusion that videotaped testimony adequately preserves the essential elements of confrontation.[181] Those that have,

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on a finding of unavailability. Additionally, the Supreme Court in Kentucky v. Stincer, 107 S. Ct. 2658 (1987), construed *Roberts* to hold that an out-of-court statement by an unavailable witness was reliable enough to be admitted as evidence, without violating the confrontation clause, because the unavailable witness had already been subjected to full cross-examination at the preliminary hearing where the statement originated. *Id.* at 2663.

175. *Roberts*, 448 U.S. at 66.

176. It is the circumstances surrounding the testimony which make it unreliable. The direct testimony is given with complete assurance that it will not be challenged. This casts doubt on its reliability. See *supra* note 113 regarding the importance of immediate cross-examination.

177. *See* Roberts, 448 U.S. at 73 (witness' prior cross-examined testimony from the preliminary hearing bore sufficient "indicia of reliability" and was therefore admissible).

178. *See supra* note 41 (opportunity to cross-examine is main and essential purpose of confrontation).

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

180. *See* People v. Moran, 39 Cal. App. 3d 398, 114 Cal Rptr. 413 (1974). In *Moran* the court observed that videotaped testimony was close enough to live testimony to permit the jury to properly perform its function. *Id.* at 410, 114 Cal. Rptr. at 420. Thus, the court recognized that the use of videotaped testimony did not compromise the jury's ability to view the witness' demeanor. *Id.*

181. *See, e.g.*, United States v. Benfield, 593 F.2d 815, 822 (8th Cir. 1979) (par-

however, recognize the value of a modern means to allow the jury to hear testimony which otherwise would not have been available.[182]

CONCLUSION

The current Illinois videotape statute is an inadequate as well as a constitutionally unacceptable answer to the problems of sexually abused children becoming witnesses for the prosecution. The defendant's right to confrontation and due process is violated by his inability to cross-examine contemporaneous with the direct testimony. The child is not spared any trauma because the child must testify in the defendant's presence at the time of direct testimony and again at the time of trial if the defendant exercises his right to cross-examine.

If technological innovations can advance the state's interest in bringing the child molester to justice while preserving the defendant's constitutional rights the courts should give them strong approval. The defendant's right to confrontation is not absolute. The Supreme Court recognizes that some limitations on the right of confrontation are acceptable as long as the purposes behind the confrontation clause are satisfied.[183] The proposal to amend the Illinois videotape statute does not represent a material departure from the underlying purposes of confrontation. The child is subject to cross-examination and the videotape process conveys the child's demeanor to the finder of fact. The child's separation from the defendant enhances her ability to provide more reliable evidence because she is not as frightened and distracted. The defendant can see, hear and adequately participate in his defense. This proposed procedure will facilitate the prosecution of the crime of child sexual abuse at less cost to the child, while preserving the defendant's right to confrontation and a fair trial.

Denise C. Hockley-Cann

ADDENDUM:

On January 24, 1989, the Illinois Supreme Court heard oral arguments on the issue of whether the Illinois videotape statute is constitutional. Golden, *Videotaped Testimony Issue Argued*, Chicago Daily L. Bull., Jan. 24, 1989, at 1, col. 2. The matter arose out of the trial court's denial of the state's motion to record the child's

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tial confrontation of witness through videotaped deposition was inadequate).

182. *See, e.g.*, Commonwealth v. Ludwig, 531 A.2d 459, 464 (Pa. 1987) (modern technological means to provide jury testimony enhanced fact-finding process).

183. *See* Snyder v. Massachusetts, 291 U.S. 97, 107 (1934) (exceptions to confrontation may be enlarged as long as there is no material departure from general rule).

testimony in the Perry County case of People v. Steven & Morris, No. 88 CF 10. *Id.* The justices focused on the statute's failure to provide for contemporaneous cross-examination of the child at the time of the videotaping. *Id.* The court also inquired whether the statute's purpose of protecting the child is diminished by the requirement that the child be available to testify at trial. *Id.* at 20. In light of the tenor of the justices' inquiry, it appears that the high court is questioning the validity of the Illinois videotape statute's ability to protect the defendant's right to confront his accuser.