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Testimony of Children via Closed-Circuit Television in Indiana: Face (to television) to Face Confrontation

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TESTIMONY OF CHILDREN VIA CLOSED-CIRCUIT TELEVISION IN INDIANA: FACE (TO TELEVISION) TO FACE CONFRONTATION

It is common knowledge that a camera can be so placed, and lights and shadows so adjusted, as to give a distorted picture of reality.

BENJAMIN N. CARDOZO
Snyder v. Massachusetts,
291 U.S. 97, 115 (1934).

In 1986, Indiana enacted a statute regarding the testimony of children in certain cases.[1] The statute provides, *inter alia*, that on the prosecution's

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1. IND. CODE ANN. § 35-37-4-8 (West Supp. 1986). The statute in relevant part reads as follows:

(a) This section applies to criminal actions for felonies under IND. CODE ANN. § 35-42 and for neglect of a dependent (IC 35-46-1-4) and for attempts of those felonies (IC 35-41-5-1).

(b) On the motion of the prosecuting attorney, the court may order that:

(1) the testimony of a child be taken in a room other than the courtroom and be transmitted to the courtroom by closed-circuit television; and

(2) the questioning of the child by the prosecution and the defense be transmitted to the child by closed circuit television.

(c) . . . .

(d) The court may not make an order under sub-section (b) or (c) unless:

(1) the testimony to be taken is the testimony of a child who:

(A) is less than ten (10) years of age;

(B) is the alleged victim of an offense listed in subsection (a) for which the defendant is being tried or is a witness in a trial for an offense listed in subsection (a);

(C) is found by the court to be a child who should be permitted to testify outside the courtroom because:

(i) a psychiatrist has certified that the child's testifying in the courtroom would be a traumatic experience for the child;

(ii) a physician has certified that the child cannot be present in the courtroom for medical reasons; or

(iii) evidence has been introduced concerning the effect of the child's testifying in the courtroom, and the court finds that it is more likely than not that the child's testifying in the courtroom would be a traumatic experience for the child;

(2) the prosecuting attorney has informed the defendant and the defendant's attorney of the intention to have the child testify outside the courtroom; and

(3) the prosecuting attorney informed the defendant and the defendant's attorney under subdivision (2) within a time that will give the defendant a fair opportunity to prepare a response before the trial to the prosecuting attorneys motion to permit the child

motion, or on the court's own motion, the court may allow a child under ten years of age who has been a victim of or witness to a felony to testify in a room separate from the courtroom. Under the statute, the child both receives questions from the courtroom and responds via closed-circuit television. By removing the child from the presence of the judge, jury, defendant, and audience, the legislators apparently hoped to reduce the anxiety and trauma that a child may experience under such circumstances.[2] The Indiana statute has not been challenged in the Indiana courts. The questions arising from the use of closed-circuit television in such procedures concern the fact that the statute abridges the defendant's right to confront his accusers face-to-face, as provided in the sixth amendment of the United States Constitution and interpreted over the past century by the United States Supreme Court.[3]

The purpose of this note is twofold. Its main thrust is an assessment of the statute's ramifications *vis a vis* the sixth amendment, since the statute appears to be in conflict with the right of confrontation. The note's second-

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to testify outside the courtroom.

(e) If the court makes an order under subsection (b), only the following persons may be in the same room as the child during the child's testimony:

(1) Persons necessary to operate the closed-circuit television equipment.

(2) Persons whose presence the court finds will contribute to the child's well being.

(3) A court bailiff or court representative.

(f) . . . .

(g) If the court makes an order under subsection (b), only the following persons may question the child:

(1) The prosecuting attorney.

(2) The defendant's attorney (or the defendant, if the defendant is not represented by an attorney).

(3) The judge.

Id.

2. *See* Miller v. State, 517 N.E.2d 64 (Ind. 1987). *Miller* gives a synopsis of the legislative intent of IND. CODE ANN. § 35-37-4-6 (West 1988)(admits into evidence videotaped interviews of children in certain cases), a statute similar to IND. CODE ANN. § 35-37-4-8 (West Supp. 1987). In summing up the need for such legislation, the court stated:

> In an effort to reduce trauma for child molesting victims in a manner which resolves both confrontation and hearsay problems, all but a few states have recently enacted statutes which allow testimony by such children through videotaping or live broadcast over closed circuit television. Such legislation has been prompted by the high number of cases involving sexual abuse of children and the difficulties inherent in successfully prosecuting them. The National Center on Child Abuse and Neglect has estimated that more than 100,000 cases of child sexual abuse occur annually, but other sources place the number as high as 500,000 for female children alone.

Miller, 517 N.E.2d at 69.

3. Although many constitutional rights may be affected by the use of closed-circuit television, this note will only discuss such provision's effects on the right to confront one's accusers. The other rights that may be infringed include: the right to represent oneself, the right to compulsory process of favorable witnesses, the right to be present at certain proceedings, and the fourteenth amendment due process right to a fair trial.

ary aim is an examination of all aspects of the statute in the hope of devising a more artfully worded statute to lessen the conflict with the sixth amendment.

After examining several United States Supreme Court decisions on the Confrontation Clause, the note explores the Indiana statute and compares it to several other states' attempts at similar legislation, as well as the case law on the topic in other jurisdictions. Here the note will discuss both sixth amendment concerns and other issues not directly related to confrontation rights but germane to a fair trial.[4] Additionally, guidelines are proposed to aid the trial court in its decision whether to use closed-circuit television when the Indiana courts are faced with its application.[5]

Finally, amendments are offered to better balance the interests of all the parties involved.[6] Current case law demonstrates that the right to confrontation may be limited and may constitutionally yield to other compelling state interests.[7] The statute should contain a clear and narrow statement of these compelling state interests and a requirement that these interests be present before the statute's provisions can be invoked.

I. THE CONFRONTATION CLAUSE: AN HISTORICAL ANALYSIS

The sixth amendment to the United States Constitution provides in relevant part that "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[8] However, since the ratification of the sixth amendment on December 15, 1791, the amendment has been "camouflaged by case law and nibbled by necessity."[9] Since the first American judge admitted some type of out-of-court statement by a witness who was not present at the trial,[10] or admitted some other type of

4. *See infra* section II and accompanying notes.

5. *See infra* text accompanying notes 137-38.

6. *See infra* section III and accompanying notes.

7. *See infra* section I and accompanying notes.

8. U.S. Const. amend. VI; *see also* IND. CONST. art. I § 13 ("In all criminal prosecutions, the accused shall have the right . . . to meet the witnesses face-to-face."). *But see* Miller v. State, 517 N.E.2d 64, 71 (Ind. 1987). "[T]he face-to-face language in the Indiana clause, as in other states, has not always been interpreted literally. Otherwise, the testimony of all absent witnesses, whether unavailable through death or illness or threat, would never be admissible at trial." *Id.* at 71.

9. United States v. Benfield, 593 F.2d 815, 818 (8th Cir. 1979); *see also* Lee v. Illinois, 476 U.S. 530, 557 (1986)(Blackmun, J., dissenting). "The Court's cases have construed the Confrontation Clause in a pragmatic fashion, requiring 'substantial compliance' with its purposes, see Ohio v. Roberts . . . [and] California v. Green . . . but acknowledging the need to balance the interests of the accused against the public's 'strong interest in effective law enforcement'. . . ." *Id.* at 557 (citations omitted).

10. *See* E. CLEARY, MCCORMICK ON EVIDENCE, § 245, at 728 (3d ed. 1984) [hereinafter MCCORMICK]. "Courts are constantly receiving . . . hearsay evidence of various kinds

hearsay,[11] the accused's right to confront his accusers has been diminished.[12] Practically speaking, producing every witness or allowing confrontation of every statement used at trial is impossible.[13] The common law and the Federal Rules of Evidence have in essence provided exceptions[14] to the Confrontation Clause. Both systems of evidence provide exceptions to the hearsay rule for those statements that bear indicia of reliability.[15] The right to confront one's accusers may, therefore, be outweighed or limited in the interest of justice.[16] The important question is whether the limitations provided by the Indiana statute regarding the testimony of children via closed-circuit television are constitutional.

There are two related issues arising out of the sixth amendment Confrontation Clause. Both the United States Supreme Court[17] and the Indiana

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under the numerous exceptions to the hearsay rule." *Id.*; Ladd, *The Hearsay We Admit*, 5 OKLA. L. REV. 271 (1952)(most of the cases dealing with hearsay involve the exceptions).

11. MCCORMICK, *supra* note 10, at 728; *see also* Ohio v. Roberts, 448 U.S. 56, 62 (1980)("The basic rule against hearsay, . . . is riddled with exceptions developed over three centuries.").

12. Although the Confrontation Clause differs in significant ways from the common law rule against the introduction of hearsay, the two "stem from the same roots," Dutton v. Evans, 400 U.S. 74, 86 (1970)(plurality opinion), and "protect similar values," California v. Green, 399 U.S. 149, 155 (1970).

13. MCCORMICK, *supra* note 10.

14. *See infra* note 15; *see also* Roddy v. State, 254 Ind. 50, 53, 257 N.E.2d 816, 818 (1970). "*Res Gestae* means literally 'things done' and covers words spoken that are so closely connected to the occurrence as to be part of it, namely, 'the whole of the transaction under investigation and every part of it.' [N]ormally it is thought of as an exception to the hearsay rule." *Id.* at 53, 257 N.E.2d at 818.

15. *Compare* Fed. R. Evid. 803(24) & 804(5)(rules providing for exceptions to the hearsay rule that bear an indicia of reliability) *with* C.T.S. Corp. v. Schoulton, 270 Ind. 34, 383 N.E.2d 293 (1978). The Indiana Supreme Court in *C.T.S. Corp.* specifically rejected the view that hearsay not falling within traditionally recognized exceptions might be admitted upon a showing of a probability of trustworthiness and a necessity for the evidence. *Id.* However, commentators have interpreted this to mean that the absence of such a provision as Fed. R. Evid. 803(24) and 804(5) in Indiana law reserves to the state's appellate courts the opportunity to create new exceptions to the hearsay rule, if any are to be created. MILLER, INDIANA EVIDENCE § 803.124 (1984); *see also* Connell v. State, 470 N.E.2d 701 (Ind. 1984). "[R]ules of evidence must remain subject to change and modification to accommodate reality. . . . There is good and sound cause upon which to predicate an exception to the hearsay rule to permit the impeachment use of a television schedule to persuade a trier of fact what program was or was not actually broadcast." *Id.* at 706. .

16. *See infra* notes 23 & 43. *See also* Coy v. Iowa, 108 S. Ct. 2798 (1988)("[R]ights conferred by the Confrontation Clause are not absolute, and may give way to other important interests."). *Id.* at 2802.

17. *See* Coy v. Iowa, 108 S. Ct. 2798 (1988)(*infra* notes 36-43 and accompanying text); Pennsylvania v. Ritchie, 480 U.S. 39 (1987); Delaware v. Fensterer, 474 U.S. 15 (1985)(*infra* note 34); Ohio v. Roberts, 448 U.S. 56 (1980)(*infra* notes 20-24 and accompanying text); California v. Green, 399 U.S. 149, 157 (1970)(the "literal right to 'confront' the witness at the time of trial . . . forms the core of values furthered by the Confrontation Clause"); Dowdell v. United States, 221 U.S. 325 (1910)(sixth amendment protects the de-

courts[18] have emphasized that the Confrontation Clause reflects both a preference for face-to-face confrontation at trial as well as the right to conduct cross-examination.[19] However, several cases appear to place the former aspect of the Confrontation Clause in a subordinate position to that of the latter and are willing to forego face-to-face confrontation when adequate cross-examination is allowed.

One of the most oft-cited United States Supreme Court cases in recent years dealing with the Confrontation Clause is *Ohio v. Roberts*.[20] Quoting from a 1895 Supreme Court case,[21] the *Roberts* Court stated that the Confrontation Clause was aimed at not only providing an opportunity for cross-examination and testing the witness' recollection but also of "compelling [the witness] to stand face-to-face with the jury in order that they may look at him, and judge . . . his demeanor."[22] The Court added that although the right of confrontation is very important, sometimes competing interests may warrant dispensing with actual confrontation at trial.[23] In *Roberts*, the Court held that where the witness was unavailable, the requirements for face-to-face confrontation would be waived in the interest of justice.[24]

Six years prior to the decision in *Roberts*, the United States Supreme Court examined the Confrontation Clause and reached a conclusion similar

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fendant's right to test the recollections of the witnesses via cross-examination).

18. *See* Lagenour v. State, 268 Ind. 441, 376 N.E.2d 475 (1978)(the right to confront witnesses granted by both the federal and state constitutions includes the right to full, adequate and effective cross-examination and is fundamental to a fair trial); Marjason v. State, 225 Ind. 652, 654, 75 N.E.2d 904, 905 (1947)("Meeting the witness face to face must also include the right to cross-examination."); Iseton v. State, 472 N.E.2d 643, 648 (Ind. App. 1984)(incorporating California v. Green, 399 U.S. 149 (1970)). *See also* Pointer v. Texas, 380 U.S. 400, 403 (1965)(applying the sixth amendment to the states *via* the fourteenth amendment).

19. *See infra* notes 20-34 and accompanying text.

20. 448 U.S. 56 (1980). The defendant in *Roberts* was convicted of possessing stolen goods and heroin. The Supreme Court held that introduction in evidence at defendant's trial of the preliminary hearing testimony of a witness who did not appear at trial was constitutionally permissible where the witness' testimony at the preliminary hearing had been tested by questioning that was the equivalent of cross-examination and where the circumstances established that the witness was unavailable, in the constitutional sense, to appear at trial. *Id.*

21. Mattox v. United States, 156 U.S. 237, 242-43 (1895).

22. In *Roberts*, 448 U.S. at 63-64, the Court stated:

> In short, the Clause envisions '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.

23. *Id.* at 64. "[G]eneral rules of law of this kind, [the right to confront witnesses at trial] however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case." *Id.*

24. *Id.* at 74-78.

to that in *Roberts*. In *Davis v. Alaska*,[25] the defendants were allowed to confront the witness at trial but were not allowed to impeach the witness with his juvenile record. The state's policy of barring inquiry into a witness' juvenile record was allegedly to protect the juvenile from embarrassment.[26] The Supreme Court held that the Confrontation Clause meant more than being allowed to confront the witness physically; the right to confront ensured the right to cross-examine.[27] The Court did not use the "face-to-face" language in its opinion but instead emphasized that the Confrontation Clause's main feature was to provide for cross-examination.[28] The Court concluded that the right to cross-examine outweighed the potential embarrassment suffered by a witness in having his juvenile record exposed.[29]

Recently, the United States Supreme Court discussed the three main attributes of the Confrontation Clause in *Lee v. Illinois*.[30] First, confrontation ensures that the witness is under oath, thus impressing upon him the seriousness of his obligation to tell the truth.[31] Second, it forces the witness to submit to cross-examination.[32] Third, it allows the jury to observe the demeanor of the witness, adding to their assessment of the witness' credibility.[33] Any courtroom logistics that allow for these three tenets of the sixth

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25. 415 U.S. 308 (1974).

26. *Id.* at 309-15.

27. *Id.* at 315-16. Quoting from Professor Wigmore's treatise on evidence, 5 J. WIGMORE, EVIDENCE § 1395, at 123 (3d ed. 1970), the 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. (first emphasis in original, second emphasis added); *see also* Douglas v. Alabama, 380 U.S. 415, 418 (1965)("Our cases construing the [Confrontation] Clause hold that a primary interest secured by it is the right of cross-examination . . . [and] an adequate opportunity for cross-examination may satisfy the clause even in the absence of physical confrontation."). *Id.*

28. 415 U.S. at 308.

29. *Id.* at 319. *But see id.* at 321 (White, J., dissenting)("As I see it, there is no constitutional principle at stake here. This is nothing more than a typical instance of a trial court exercising its discretion to control or limit cross-examination.").

30. 476 U.S. 530 (1986)(trial court's reliance upon the codefendant's confession as substantive evidence against petitioner violated her rights under the Confrontation Clause).

31. *Id.*

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

Id.

32. *Id.*

33. *Id.*

amendment apparently would pass constitutional muster.[34] More recently, however, the United States Supreme Court has been willing to distinguish the two different ideas expressed in the Confrontation Clause as separate and equal parts of the clause.[35]

Coy v. Iowa[36] appears to refute the notion that confrontation is solely to provide for the opportunity for cross-examination. Justice Scalia, speaking for a divided court, gave a literal interpretation to the right to confront one's accusers. In *Coy*, the trial court placed a screen between the defendant and child witness/victim[37] so that the defendant could see the child but the child, although made aware of the defendant's presence, could not see the defendant. In reversing a conviction for sexual assault, the court stated that the Confrontation Clause guarantees the defendant the right to literally stand face-to-face with the witnesses appearing before the trier of fact.[38]

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34. One element of the Confrontation Clause, however, is the trial judge's role in matters of cross-examination, discussed in Delaware v. Van Arsdall, 475 U.S. 673 (1986). In ruling that a trial judge could limit cross-examination as to impeaching evidence concerning the witness' potential bias for the prosecution, the Court stated that the "trial judge retains a wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, . . . harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Id.* at 679. *See also* Delaware v. Fensterer, 474 U.S. 15, 20, (1985)(per curiam)("Generally speaking, the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way and to whatever extent, the defense might wish.")(emphasis in original); *see also supra* note 27.

35. *See* Coy v. Iowa, 108 S. Ct. 2798 (1988)(*infra* notes 36-38 and accompanying text); Pennsylvania v. Ritchie, 480 U.S. 39 (1987).

36. 108 S. Ct. 2798 (1988).

37. The lights of the courtroom were also dimmed to allow the defendant to see the witness, but the witness could not see the defendant. *Id.* at 2799.

38. *Id.* at 2800. Although the majority cites such eminent sources as Shakespeare, President Eisenhower, and The Bible, Justice Blackmun's dissent, based in part on Professor Wigmore's treatise on evidence, is infinitely more persuasive. There is no real support for the majority's allegation in *Coy* that confrontation was ever meant to provide for anything more than the three reasons discussed below, President Eisenhower, Shakespeare, The Bible, and latin prefixes notwithstanding. *Id.* at 2800-01.

Almost all the cases that proport to render an opinion as to the real meaning of the Confrontation Clause cite to Mattox v. United States, 156 U.S. 237, 242-43 (1895). The facts in *Mattox* show that two witnesses testified at the defendant's first trial and were subject to cross-examination. On remand for a new trial, the two witnesses had died and their statements from the first trial were read into evidence at the second trial. Defendant appealed, saying that his right to confront these two witnesses at the second trial had been abridged. In affirming the second trial court's acceptance of the stenographic records of the first trial, the United States Supreme Court stated:

> The primary object of the constitutional provision in question was to prevent depositions or *ex parte* affidavits, such as were sometimes admitted in civil cases, being used against a prisoner 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

Although *Coy* is important for the proposition that "confrontation" is to be interpreted literally, *Coy* does not substantially affect this note's scope, because it deals with an Iowa statute that allows for the complete screening of the defendant.[39] The proper use of closed-circuit television though will provide for the transmission of the defendant's live image to the child, as well as the child's image to the courtroom.[40] More important is Justice O'Connor's concurring opinion, where she makes very clear that the majority's opinion is limited to situations where the witness is unable to see the defendant.[41] O'Connor states that the majority's opinion does not doom efforts by state legislatures to protect child witnesses and, in fact, mentions two-way television systems, insinuating that such a procedure would be constitutional.[42] The Justice reiterated that the right to confront witnesses face-to-face is not absolute and will give way to compelling state interests and public policy, the protection of a child witness being one such policy.[43]

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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. This authority is cited with approval in many subsequent cases, including Dutton v. Evans, 400 U.S. 74, 80, 89 (1970); California v. Green, 399 U.S. 149, 157-58 (1970); and Dowdell v. United States, 221 U.S. 325, 330 (1910).

A close examination of these cases, including Pennsylvania v. Ritchie, 480 U.S. 39 (1987) and Delaware v. Fensterer, 474 U.S. 15 (1985), shows that confrontation has not been required for the purpose of allowing the defendant and the witness to stand . . . "face to face and frown[ing] brow to brow," (*Coy* 108 S. Ct. at 2800, quoting Shakespeare, Richard II, act 1, sc. 1), but instead for three reasons: compelling the witness to be under oath, making the witness stand before the *jury* so that they might judge his demeanor, and providing for cross-examination before the trier of fact. *See also* WIGMORE, supra note 27, § 1397, at 158 (cited in *Coy*, at 2807)(Blackmun, J., dissenting)("There was never at common law any recognized right to an indispensable thing called confrontation *as distinguished from cross-examination.*")(emphasis in original); Dutton v. Evans, 400 U.S. at 89. "The decisions of this court make it clear that the 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.*

In his dissent in *Coy*, Justice Blackmun goes on to say that the only opinion that could possibly be understood to ascribe substantial weight to the notion that a defendant has a right to have the witnesses see him while they testify, is California v. Green, 399 U.S. at 157. "Our own decisions seem to have recognized at an early date that it is the literal right to 'confront' the witness at the time of trial. . . ." *Id.* However, *Green* immediately explains that the Confrontation Clause was to prevent the use of *ex parte* affidavits, to provide for cross-examination, and to compel the witness to stand face-to-face with the jury. *Id.* There is no language suggesting that the witness must stand face-to-face with the defendant.

39. IOWA CODE ANN. § 910A.14 (West Supp. 1988).

40. *See infra* text accompanying notes 138-41.

41. *Coy* 108 S. Ct. at 2803-05.

42. *Id.* at 2804. "I wish to make clear that nothing in today's decision necessarily dooms such efforts by state legislatures to protect child witnesses. Initially, many such procedures may raise no substantial Confrontation Clause problem since they involve testimony in the presence of the defendant." *Id.*

43. *Id.* at 2804-05. Although Justice O'Connor agreed with the majority that the Con-

Accordingly, based on Justice O'Connor's concurring opinion in *Coy*, literal face-to-face confrontation is not a problem when two-way closed-circuit television is used. However, the question arises whether the rest of the considerations of the Confrontation Clause are met.[44] Of the three qualities listed in *Lee v. Illinois*,[45] the requirement that the witness be under oath is unrelated to the issue of televised testimony of children. The child's ability to take an oath to tell the truth is a matter for the judge's discretion,[46] whether the child testifies in court or via closed-circuit television. However, when television screens are interposed between the child and the accused, an analysis of the second and third factors in *Lee* results in some serious questions as to the effectiveness of cross-examination and the ability to judge the child's demeanor.

Assuming that a child's attention span normally is short, that period of time is arguably much shorter when a television, normally dismissed by the child's flip of a dial, is interposed.[47] How this will affect cross-examination is debatable.[48] Furthermore, questions arise concerning the jury's ability to judge the child's demeanor when the camera, with its obvious limitations,[49] becomes the juror's eyes and ears.[50] Arguably, the jury will not see as much via the camera as they would in the ordinary courtroom setting. Nor will the jury see those non-televised influences, such as any coaching or the mere proximity and visual reinforcements by the person whom the judge may allow to be in the child's room to "comfort" the child.[51] Using the

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frontation Clause embodies a "general requirement that a witness face the defendant," she also agreed with the fact that this right is not absolute and will yield to public policy concerns. The protection of a child witness is, according to Justice O'Connor, one such compelling public policy. *Id.*

44. *See supra* notes 30-33 and accompanying text.

45. 476 U.S. 530, 540 (1986).

46. *See* Wheeler v. United States, 159 U.S. 523, 524-25 (1895)(the decision of a child's competency rests primarily with the trial judge); United States v. Hardin, 443 F.2d 735, 737 (D.C. Cir. 1970)("The determination as to whether a person is legally competent to testify as a witness is a matter that rests largely within the discretion of the trial court.").

47. A child normally watches television for idyll entertainment full of fantasy and imagination (e.g., Sesame Street, Mister Rogers' Neighborhood, and The Smurfs). Upon becoming bored, disinterested, or distracted, the child merely flips channels, turns off the television, or leaves the room. Proponents of the statute now place the child in a similar atmosphere, in front of the "boob tube," and expect the child's attention span to be dramatically increased and his concept of reality to be enhanced.

48. *See infra* note 50.

49. *See infra* notes 145-48 and accompanying text.

50. *See* Note, *The Criminal Videotape Trial: Serious Constitutional Questions*, 55 OREG. L. REV. 567, 577-78 (1976)("[T]he interposition of a screen between viewer and evidence reduces a juror's attention span and lessens concentration on the facts presented."). *See also* Doret, *Trial by Videotape - Can Justice be Seen to be Done?*, 47 TEMP. L.Q. 228, 245-53 (1974)(discussion on the effect of the use of videotaped testimony on the jury, witnesses, attorneys, and proceedings in general); *see also infra* note 111.

51. IND. CODE ANN. § 35-37-4-8(e)(2)(West 1986). The court may allow those people

criteria in *Lee* as a benchmark against which various courtroom logistics affecting confrontation will be measured for their constitutionality, a statute authorizing closed-circuit television should consider these potential problems and include measures to lessen their effect on the trial.

II. A Comparison Of Jurisdictional Approaches

A. *A Comparison Of Statutes*

Indiana is not the first state to attempt to allow a child to testify out of the courtroom or to provide procedures to make the process less traumatizing; at least twenty-two other states have enacted similar statutes.[52] Although the specific requirements for the use of these special procedures vary from state to state, the intentions and end results are very similar.[53]

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in the child's room whom the court feels would comfort the child. The statute does not provide for the transmission of their images to the court room. *Id.*

52. ARIZ. REV. STAT. ANN. § 13-4253(A)(Supp. 1988); CAL. PENAL CODE § 1347 (West Supp.); CONN. GEN. STAT. ANN. § 54-86g (West Supp. 1987); FLA. STAT. ANN. § 92.54 (West Supp. 1987); GA. CODE ANN. § 17-8-55 (Supp. 1988); Rule 616, Hawaii Rules of Evidence, chapter 626, HAWAII REV. STAT. (1985); IND. CODE ANN. § 35-37-4-8 (West 1986); IOWA CODE ANN. § 910A.14 (Supp. 1988); KY. REV. STAT. ANN. § 421.350 (Supp. 1986); LA. REV. STAT. ANN. tit. 15, § 283 (Supp. 1988); MD. CTS. & JUD. PROC. CODE ANN. § 9-102 (Supp. 1988); MASS. GEN. LAWS ANN., ch. 278 § 16D (West Supp. 1988); MINN. STAT. ANN. § 595.02 (West 1988); MISS. CODE ANN. § 13-1-405 (Supp. 1988); N.J. STAT. ANN. § 2A:84A-32.4 (West Supp. 1988); N.Y. CRIM. PROC. LAW § 65.00-65.30 (McKinney Supp. 1987); OHIO REV. CODE ANN. § 2907.41 (Baldwin 1986); OKLA. STAT. ANN. tit. 22 § 753 (West Supp. 1989); 42 PA. CONS. STAT. ANN. § 5985 (Purdon Supp. 1988); R.I. GEN. LAWS § 11-37-13.2 (Supp. 1988); TENN. CODE ANN. § 24-7-116 (Supp 1988); TEX. CODE CRIM. PROC. ANN. art. 38.071 (Vernon Supp. 1989); UTAH CODE ANN. § 77-35-15.5 (Supp. 1987); VT. STAT. ANN. Rules of Evidence § 807 (Supp. 1988).

53. *See* Miller v. State, 517 N.E.2d 64 (Ind. 1987). The *Miller* court held that a statute similar to IND. CODE ANN. § 35-37-4-8 was constitutional. The court stated that the General Assembly's objective in passing this similar law, to protect children who suffer the tragedy of sexual abuse, was altogether important and appropriate: "Legislation allowing the videotaped testimony of the child victim is intended to reduce trauma to the child and facilitate successful prosecution of child molesters." *Id.* at 69.

In *Miller*, the defendant was charged with multiple counts of child molesting, incest, confinement, and battery. *Id.* at 65. The child/victim (apparently about nine years old) was interviewed by police approximately ten times between the start of the investigation and the videotaping of her statement. Some of those interviews were tape recorded and transcribed. They show that the detective used strongly leading questions and that the child's initial descriptions of the attacks were somewhat inconsistent with her videotaped statements. The transcriptions also reveal that police induced the child to talk by promising that she would be helping her molested cousin. *Id.* Neither the defendant nor her counsel were notified of the videotaping, given the opportunity to attend or allowed to cross-examine the child at the competency hearing. *Id.* at 66.

After admitting the videotape into evidence, the trial court found the defendant guilty on several of the counts. *Id.* at 65-67. Although the Indiana Supreme Court held that the statute allowing for the use of videotaped interviews of a child, IND. CODE ANN. § 35-37-4-6 (West 1986), was not unconstitutional *per se*, the case was remanded for a new trial because the

Of the twenty-three states with such legislation, five significant points of divergence emerge. The first point concerns the types of underlying crimes that trigger the statute's application. In Indiana, the trial court may apply the statute's provisions when the defendant is accused of homicide, battery, kidnapping, sex crimes, robbery,[54] or neglect of a dependent.[55] Indiana is one of only two states that allows the use of this statute for any felony; almost all other states limit their application to sex-related offenses.[56]

The second area of divergence focuses on whether the child is a victim or merely a witness to the alleged crime and again raises the concern that such proceedings only be used where trauma to the child will be great. Indiana procedures apply whether the child is a victim of or a witness to the

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defendant did not have the opportunity to cross-examine the child. *Miller*, 517 N.E.2d at 72-74. *See also* State v. Gilbert, 109 Wis. 2d 501, 326 N.W.2d 744 (1982)(good discussion on the roles of the court and prosecuting attorney in making it easier and less traumatic for a child to testify in such cases).

54. IND. CODE ANN. § 35-37-4-8(a)(West 1986)(includes the attempts of those crimes).

55. *Id. See also* IND. CODE ANN. § 35-42, § 35-46-1-4, and § 35-41-5-1 (West 1986), for descriptions of the crimes listed in IND. CODE ANN. § 35-37-4-8(a)(West 1986).

56. The following data is a compilation of all the states that have a law or laws providing for use of closed-circuit television in some type of criminal prosecution for a crime against a child. The first column represents the state; the second column is the requisite age of a child before the closed-circuit television may be used; the third column states whether the child must be a victim (V) or merely a witness (W) to the crime; and the fourth column lists the types of crimes where these procedures may be used. For specific statutory cites, *see supra* note 52.

crime,[57] whereas approximately two-thirds of the other states require that the child be a victim of the crime.[58] The Indiana statute allows for the use of the closed-circuit procedure in a greater number of circumstances than most other states.

The third difference involves the age of the child. The Indiana statute requires that the child be under ten years of age to enjoy the protection of this provision.[59] This is the lowest age requirement among the several statutes examined. Rhode Island, for example, allows children seventeen years or younger to testify via closed-circuit television,[60] although the average age is between twelve and thirteen.[61]

The fourth, and arguably most critical, concern with the televised testi-

STATE	AGE	VICTIM/WITNESS	CRIME
Ariz.	under 15	V or W	any crime against child
Cal.	10 or under	V	sex offense
Conn.	12 or under	V	sex abuse or assault
Fla.	under 16	V or W	sex offense
Ga.	14 or under	V	sex offense
Haw.	under 16	V	abuse or sex abuse
Ind.	under 10	V or W	any felony
Iowa	under 14	V	sex related offense
Ky.	12 or less	V	sex abuse or sex offense
La.	under 14	V	sex abuse or abuse
Md.	under 18	V	sex abuse or abuse
Mass.	under 15	V or W	sex related crimes
Minn.	under 10	V	sexual abuse or abuse
Miss.	under 16	V or W	sex abuse
N.J.	16 or less	V or W	sex related or neglect
N.Y.	12 or less	V or W	sex abuse or battery
Ohio	under 11*	V	sex related
Okla.	12 or less	V	any offense against child
Pa.	under 14**	V or W	any crime
R.I.	17 or less	V	sexual assault
Tenn.	under 13	V	sexual abuse
Tex.	12 or less	V	sexual abuse or abuse
Utah	under 14	V or W	sexual abuse or abuse
Vt.	12 or less	V	sexual abuse or abuse

* at the time the complaint was filed

** In Pennsylvania 14-15 years old creates a rebuttable presumption that the child will benefit from the use of closed-circuit television. 16-17 years old creates a rebuttable presumption that the child will not benefit from the use of closed-circuit television.

57. IND. CODE ANN. § 35-37-4-8(d)(l)(B)(West Supp. 1986). Hence, theoretically, a child could be a witness to a bank robbery and receive this special treatment.

58. *See supra* note 56.

59. IND. CODE ANN. § 35-37-4-8(d)(I)(A)(West 1986).

60. R.I. GEN. LAWS § 11-37-13.2 (Supp. 1988).

61. *See supra* note 56.

mony statutes as they relate to the Confrontation Clause deals with what circumstances must be present before invoking these protective procedures. Whereas most states demand that the prosecutors show "good cause" prior to using these procedures, Indiana, to its credit, specifically lists three possible methods of establishing that the child is unable to testify. One method enables a psychiatrist to certify that the child's in-court testimony would be traumatic.[62] A second and similar method[63] is for a physician to certify that the child cannot be present due to medical reasons.[64] The third method allows the trial court, *sua sponte*, to find that the child would more likely than not be traumatized by testifying in court.[65]

Because the child is not technically testifying in court when closed-circuit television is used, a problem concerning "unavailability," as articulated by the United States Supreme Court in *Ohio v. Roberts*,[66] may arise. The *Roberts* Court placed the requirements for confrontation in an "either, or" ultimatum—either the prosecutor must produce the witness for testimony or he must demonstrate the unavailability of the witness.[67] This begs the question as to the meaning of "unavailability." The Indiana statute in question does not require a showing of unavailability *per se* prior to invoking the statute's provisions. At first glance, this appears to put the statute in direct conflict with *Roberts*,[68] as the statute does not require a showing of unavailability before face-to-face confrontation may be discarded.[69]

However, a 1986 Indiana case, *Altmeyer v. State*,[70] provides further enlightenment as to the more subtle aspects of unavailability and shows

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62. IND. CODE ANN. § 35-37-4-8(d)(l)(C)(i)(West 1986).

63. IND. CODE ANN. § 35-37-4-8(d)(l)(C)(ii)(West 1986).

64. This is in line with FED. R. EVID. 804(a)(4)(a witness is unavailable if the declarant is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity).

65. IND. CODE ANN. § 35-37-4-8(d)(l)(C)(iii)(West 1986). This section shows the wide latitude given the trial judge in allowing for these procedures. Conceivably, both a psychiatrist and a physician could say the child is able to testify and the trial judge could still authorize these special proceedings. The statute is also unclear as to what type of evidence needs to be admitted to allow the court to find that the child would be traumatized. *Id.*

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

67. *Id.* at 74-75. In *Roberts*, once the adult-witness was declared unavailable, the witness did not testify at all. Although this differs from the situation where the child testifies via closed-circuit television, the correlation between *Altmeyer v. State* (*infra* notes 70-73 and accompanying text) and *Roberts* shows that it is a distinction without a difference.

68. *See* Burke, *Indiana's Statutory Provisions for Alternative Testimony in Child Sexual Abuse Cases: Is It Live or Is It Memorex?*, 20 IND. L. REV. 161, 172-73 (1987)(suggesting that the Indiana statute's lack of a requirement of unavailability may put the statute at odds with *Roberts*).

69. *Roberts*, 448 U.S. at 75.

70. 496 N.E.2d 1328 (Ind. Ct. App. 1986). In *Altmeyer*, a psychiatrist certified that the child would be traumatized by testifying in court; hence, the child's previously videotaped interview with the police and social workers was admitted. *Id.*

that perhaps a strict interpretation of the word is not entirely correct. In *Altmeyer*, the court stated that finding a child to be unavailable based on a psychiatrist's certification of undue trauma was consistent with Rule 23 of the Indiana Rules of Trial Procedure.[71] Apparently, emotional trauma has been added to the list that allows a witness to be labeled "unavailable."[72] If the results of *Altmeyer* are applied to closed-circuit television, once the trial court finds that the child would be traumatized by testifying in court, the child would be "unavailable," as defined by *Roberts* and would not have to testify in court. The child's "out-of-court testimony"—the simultaneous transmission via closed-circuit television—could then be used.[73]

The fifth difference between statutes concerns the type of confrontation that is allowed by the statute. At present, seven states require that the child be told or made aware that the defendant is watching or that the defendant's image be transmitted via closed-circuit television to the child's room so that the child can see the accused.[74] Indiana has no such provision, ex-

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71. *Id.* at 1331; IND. RULES TRIAL PROC., Rule 23(a)(permitting introduction into evidence of a witness' deposition where he is unable to testify because of age, sickness, or infirmity).

72. *But see* State v. Gollon, 115 Wis. 2d 592, 340 N.W.2d 912 (1983)(six year old's mother's testimony that the victim was too afraid to testify in a prosecution for first degree sexual assault was insufficient to establish unavailability so as to satisfy the unavailability requirement of the Confrontation Clause); Vasquez v. State, 145 Tex. Crim. 376, 167 S.W.2d 1030 (1943)(merely because a girl was too nervous and excited does not defeat defendant's right to confront his accusers).

73. This whole argument hinges on the semantics of the words "unavailable" and "out-of-court." Most courts would most likely assume that although the child is not physically present in the courtroom, his testimony is still "in-court" as compared to "out-of-court" testimony, such as a deposition or statements at the scene. However, even assuming that out-of-court means anything not actually in the courtroom proper, by combining *Roberts* and *Altmeyer*, the child's testimony should be admissible regardless.

74. This is a compilation of all the states that have a law or laws providing for the use of closed-circuit television in some type of criminal prosecution for a crime against a child, specifically, whether the state requires the child to see or hear the defendant while the child is testifying, whether the child will be made aware that the defendant is watching from somewhere else, or whether the child will not see or hear the defendant at all. For specific statutory cites, *see supra* note 52.

Ariz. Child will not see or hear the defendant.
Cal. Defendant's image transmitted live to the child.
Conn. Child will not see or hear the defendant.
Fla. Child will not see or hear the defendant.
Ga. Child may see the defendant, as proceedings are held in the courtroom with the audience and jury removed.
Haw. Defendant's presence in room should not be unduly emphasized to the child.
Iowa Court will tell the child that the defendant can hear and see him.
Ky. Child will not see or hear the defendant.
La. Child will not see or hear the defendant.
Md. Silent on the issue.
Mass. Child will not see or hear the defendant.

cept that the image of the questioner be transmitted to the child.[75]

In comparing the similarities and differences of the Indiana statute with other states' statutes, except for a few minor deviations, Indiana is well within the constitutional parameters established by other states. Although not binding on Indiana courts, these parameters are certainly persuasive, given the similarity between these states' statutes and Indiana's statute. Since a majority of states that have addressed their law have found it to be constitutional, it would certainly take a creative and innovative argument to strike down the Indiana law as unconstitutional.

B. Case Law Comparisons

Although an Indiana appellate court has yet to review the use of the statute's provisions, a number of other states have interpreted the constitutionality of the concept of televised testimony and the specifics of their statutes.[76] By balancing the state's interest in protecting the child against the infringement of the defendant's confrontation rights, a majority of the states that have addressed the issue have held such procedures to be constitutional.[77] There are, of course, a few cases holding otherwise, some attack-

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Minn. At the court's discretion, the child may hear and see defendant via closed-circuit television.
Miss. Silent on the issue.
N.J. Silent on the issue.
N.Y. Defendant's image transmitted live to the child.
Ohio Defendant's image transmitted live to the child.
Okla. Child will not hear or see the defendant.
Pa. Child will not hear or see the defendant.
R.I. Child will not hear or see the defendant.
Tenn. Silent on the issue.
Tex. Child will not hear or see the defendant.
Utah Child will not hear or see the defendant.
Vt. At the court's discretion, the defendant's image may be transmitted to the child via closed-circuit television.

75. Obviously, this provision could include the defendant if he is part of the camera's view, or appearing *pro se*.

76. *See infra* notes 77-78 and accompanying text.

77. State v. Chisholm, 243 Kan. 270, 755 P.2d 547 (1988)(use of closed-circuit television to present testimony of child witness did not violate defendant's constitutional rights to confront his accuser, or to a fair trial); Commonwealth v. Willis, 716 S.W.2d 224 (Ky. 1986)(discussed *infra* note 90); State v. Racca, 525 So.2d 1229 (La. Ct. App. 1988)(permitting six-year-old molestation victim to testify by way of closed-circuit television did not deny defendant his right to confront victim; all elements of confrontation were preserved except ability of victim to see defendant and jury); People v. Kasben, 158 Mich. App. 252, 404 N.W.2d 723 (1987)(defendant's right to confrontation or right to effective assistance of counsel was not violated when four-year-old victim was allowed to testify at a preliminary examination over closed-circuit television transmissions, which defendant was allowed to view from a separate room); State v. Sheppard, 197 N.J. Super. 411, 484 A.2d 1330 (1984); People v.

ing the concept of closed-circuit television in the courtroom and some the trial court's discretion in using closed-circuit television without statutory authorization.[78]

The leading opinion in favor of the use of simultaneous video transmission is found in a 1984 New Jersey appellate court decision.[79] In that case, the court discussed the problems associated with prosecution of child abuse cases,[80] as well as the disadvantages faced by the defendant.[81] More impor-

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Algarin, 129 Misc. 2d 1016, 498 N.Y.S.2d 977 (N.Y. Sup. Ct. 1986)(discussed *infra* notes 84 & 90); State v. Jones, 89 N.C. App. 584, 367 S.E.2d 139 (1988)(excluding defendant from courtroom during questioning of four-year-old victim to determine competence did not violate defendant's sixth amendment confrontation rights where defendant was allowed to view the proceedings via closed-circuit television); Commonwealth v. Lohman, ___ Pa. Super. ___, 536 A.2d 809 (1988)(defendant charged with rape of minor was not denied his right of confrontation under State Constitution when victim was permitted to testify via closed-circuit television). *See also* Kansas City v. McCoy, 525 S.W.2d 336 (Mo. 1975)(4-3 decision). This decision did not involve a child's testimony but rather an expert testifying from his drug lab several miles from the courtroom via closed-circuit television. The court held such procedures to be constitutional. Three judges dissented saying that one's demeanor comes across differently over television and hence the trier of fact could not adequately judge the witness' demeanor. *Id.*

78. State v. Vess, 157 Ariz. 236, 756 P.2d 333 (1988)(Absent showing of compelling reasons, statute authorizing use of closed-circuit television in child abuse case violated defendant's Federal and State confrontation right); Hochheiser v. Superior Court, 161 Cal. App. 3d 777, 208 Cal. Rptr. 273 (1984)(discussed *infra* note 99); State v. Warford, 223 Neb. 368, 389 N.W.2d 575 (1986)(discussed *infra* note 99-104 and accompanying text); *Ex rel.* Borden, ___ Pa. Super. ___, 546 A.2d 123 (1988)(juvenile denied due process in delinquency adjudicatory hearing when trial court ordered juvenile to be removed from courtroom during testimony of victim, even though juvenile was provided with closed-circuit television by which he could hear and see the proceedings and communicate with his counsel).

79. State v. Sheppard, 197 N.J. Super. 411, 484 A.2d 1330 (1984). In its comprehensive opinion, a New Jersey appellate court held that use of the television at the trial level would not violate the defendant's confrontation rights. *Id.* at 442, 484 A.2d at 1348-49. The facts indicate that a ten-year-old girl had been sexually molested by her stepfather over a period of several years. *Id.* The state moved to present the child's testimony via closed-circuit testimony and the defendant objected claiming a violation of his confrontation rights. *Id.* Extensive testimony was given by psychiatrists and attorneys familiar with the problems of prosecuting child abuse cases because of the victim's reluctance to testify in open court. *Id.* at 415-18, 484 A.2d at 1332-33. A video expert was called to show how such a system would operate. *Id.* at 418, 484 A.2d at 1333.

80. The court stated:

> Great harm befalls the victims of child abuse. It destroys lives and damages our society. Known abusers are not being prosecuted because evidence against them cannot be presented. Children who are prevailed upon to testify may be more damaged by their traumatic role in the court proceedings than they were by their abuse.

Id. at 431, 484 A.2d at 1342.

81. In describing these disadvantages, the court stated:

> Any zeal for the prosecution of these cases, however, cannot be permitted to override the constitutional rights of the defendants involved. They are at great disadvantage in these cases. The testimony of a small child can be very winsome. . . . The difficulty of cross-examining a young child may prevent the exposure of inaccuracies. The charge of child

tantly, the court discussed the meaning of the sixth amendment and how the rights provided for in the amendment would be affected by such proceedings. The court held further that the primary right afforded by the sixth amendment, the opportunity for cross-examination, was not abridged by the use of the cameras.[82] The court specifically provided for eighteen conditions which must be followed in order for the trial court to use the television, all focusing on making the testimony via closed-circuit television similar to regular in-court testimony.[83]

Two years later, a New York appellate court case of first impression[84] upheld a New York statute which provided for similar proceedings.[85] In this case, the indictment contained over eighty counts of rape, sodomy, and sexual abuse of fifteen children at a day care center.[86] The court held that examination of the child outside of the defendant's physical presence did

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abuse carries its own significant stigma. Defendants in these cases may find themselves ostracized, whether they are guilty or not. Like children, they too have ambivalent feelings and may decide, even though they believe they will be acquitted, that it is better for the child, the family, and themselves to accept a plea agreement than to subject everyone involved to a trial.

Id. at 432, 484 A.2d at 1342.

82. *Id.* at 435, 484 A.2d at 1344-45.

83. These eighteen conditions include in part:

. . .

(2) The persons present in the room from which the child victim will testify shall consist, in addition to the child, only of the prosecuting attorney and defense attorneys together with the camera man. [apparently no provisions left for the *pro se* defendant]

. . .

(6) No bright lights shall be employed in the testimonial room.

(7) Color images shall be projected to the courtroom by the video camera.

(8) The video camera shall be equipped with a zoom lens to be used only on notice to counsel who shall have an opportunity to object.

(9) . . . The face of the witness shall be visible on the monitor at all times, absent an agreement by counsel or direction by the court for some other arrangement. . . .

(10) The defendant and his attorney shall be provided by the state with a video system which will permit constant private communication between them during the testimony of the child witness.

. . .

(17) The trial court, before the child victim testifies, shall provide the jury with appropriate instructions concerning the videotape presentation.

Id. at 442-43, 484 A.2d at 1349-50. One distinguishing factor in *Sheppard* is that the defendant had threatened the child/victim/witness' life were she to testify; hence, the court concluded that the defendant had waived his confrontation rights. It is unclear whether the court would have allowed the cameras were it not for this threat.

84. People v. Algarin, 129 Misc. 2d 1016, 498 N.Y.S.2d 977 (N.Y. Sup. Ct. 1986).

85. N.Y. CRIM. PROC. LAW §§ 65.00-65.30 (McKinney Supp. 1987). One differing aspect of the New York law is that it requires that in addition to the child's image being transmitted to the courtroom, the image of the defendant must be transmitted to the child's room so that the child is aware that the defendant is watching. *See also infra* notes 138-41.

86. *Algarin*, 129 Misc. at 1016-17, 498 N.Y.S.2d at 978.

not violate the defendant's right to confront the witnesses against him.[87] Similar to the previously discussed New Jersey case, the New York court stated that the compelling state interest in protecting the emotional well-being of the child/sex abuse victim and the need for his testimony to successfully prosecute, more than outweighed any infringement of the defendant's right to confront.[88]

The court stated that the "historical purpose of the Confrontation Clause is the advancement of the search for truth by guaranteeing the reliability of the evidence admitted against a criminal defendant."[89] The court further held that the closed-circuit television procedure preserved the "essential elements of confrontation: the opportunity to observe the witness' demeanor, to impress the witness with the seriousness of the matter to ensure truthfulness, and the right to cross-examine."[90]

The most recent decision on the use of closed-circuit television and child testimony is from the Court of Special Appeals of Maryland.[91] *Craig v. State* was handed down several weeks after *Coy*[92] and contains a detailed analysis of the *Coy* majority's decision,[93] as well as an analysis of Justice

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87. *Id.* at 1021-28, 498 N.Y.S.2d at 981-85.

88. *Id.* at 1024, 498 N.Y.S.2d at 983.

89. *Id.* at 1027, 498 N.Y.S.2d at 985.

90. *Id.* at 1028, 498 N.Y.S.2d at 985; *see also* Commonwealth v. Willis, 716 S.W.2d 224 (Ky. 1986). Using a balancing test similar to *Algarin*, the Kentucky Supreme Court held their state's statute to be constitutional. *Id.* at 232; KY. REV. STAT. ANN. 421.350 (Baldwin Supp. 1986). In a close decision, the court stated that the statute afforded the defendant with an opportunity to view and hear the victim while maintaining continuous audio contact with his attorney. *Willis*, 716 S.W.2d at 231. Therefore, the court concluded that the statute achieved an appropriate balance between the right of confrontation and the right of the victim to be free from intimidation. *Id.* at 228. The dissent, taking a more literal and conservative view of "face-to-face," dwelt on the logistical problems involved in such procedures and concluded that use of the television would be a substantial limitation on the right of the defendant to cross-examine. *Id.* at 235.

91. Craig v. State, 76 Md. App. 250, 544 A.2d 784 (1988). In *Craig*, the judge, defendant,

> one of her attorneys, and a prosecutor remained in the courtroom with the jury. The [child] witness testified from the judge's chambers in the presence of a prosecutor, [the defendant's] lead counsel, and a technician. The testimony was broadcast through closed-circuit television to the courtroom where everyone there could see and hear it on one or more monitors. There was a private telephone line allowing two-way communication between the defendant (and the attorney with her) and her attorney in the judge's chambers.

Id. at 281, 544 A.2d at 799. It should also be noted that there were no provisions in the Maryland statute or in the procedures used at that time which allowed the child to see or hear the defendant via a television monitor during the child's testimony. *Id.* at 275, 544 A.2d at 796.

92. 108 S. Ct. 2798 (1988); *see supra* notes 36-38 and accompanying text.

93. *Craig*, 76 Md. App. at 275-83, 544 A.2d at 796-800.

O'Connor's concurring opinion.[94] Based in large part on *Coy*, *Craig* held that the defendant's right of confrontation had not been denied by the use of closed-circuit television.

Craig interpreted *Coy* as having said three things. First, *Coy* did not firmly conclude that the face-to-face requirement embodied in the sixth amendment was absolute, but simply left that question "for another day."[95] Second, *Coy* did not rule out the possibility that protecting a child witness from courtroom trauma would be such an exception.[96] Finally, to the extent that Justice Scalia's majority opinion in *Coy* might suggest that the use of closed-circuit television would be constitutionally impermissible, this view was shared by no more than four Justices.[97]

Although a majority of jurisdictions which have addressed the issue have held in favor of the use of closed-circuit television, there are a few cases which hold otherwise.[98] Recently, the Supreme Court of Nebraska held that the use of such televised procedure at the trial level denied the defendant his rights under the Due Process and Confrontation Clauses.[99] In a brief but thorough examination of the sixth amendment, the Supreme Court of Nebraska stressed the importance of the need for face-to-face confrontation.[100] The court clearly noted, however, that the right to confrontation is not absolute and must occasionally give way to considerations of public policy.[101] The state must show a compelling interest in order to limit

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94. *Id.* at 278-80. 544 A.2d at 797-98.

95. *Id.* at 280, 544 A.2d at 798.

96. *Id.*

97. *Id.*

98. *See also* Coy v. Iowa, 108 S. Ct. 2798 (1988), discussed *supra* notes 36-38 (screen placed so as to shield child from having to look at defendant held unconstitutional).

99. State v. Warford, 223 Neb. 368, 376, 389 N.W.2d 575, 581 (1986). *See also* Hochheiser v. People, 161 Cal. App. 3d 94, 208 Cal. Rptr. 273 (1984)(facts similar to *Warford* in that it was decided in the absence of statutory authority). In *Hochheiser*, the court's primary reason for disallowing the use of the technique was the court's desire not to infringe on what it saw as legislative territory. In discussing the merits of the technique, the court stated:

> The use of closed-circuit television for the main complaining witness in a criminal trial encompasses a drastic change in our system of jurisprudence. It, among other things, may impinge upon cross examination, the very heart of the tools used for truth finding and described by the United States Supreme Court in California v. Green [citations omitted] as the "greatest legal engine ever invented for the discovery of truth." [citations omitted] Such a major step should be taken, if at all, only upon the considered judgement of the Legislature.

Hochheiser, 161 Cal. App. 3d at 794, 208 Cal. Rptr. at 284. In 1985, the California legislature passed a law providing for the use of closed-circuit television in child abuse cases. CAL. PENAL CODE § 1347 (West Supp. 1987). Although *Hochheiser* was statutorily mooted, its analysis of the use of closed-circuit television is still valid for the present discussion.

100. *Warford*, at 374-75, 389 N.W.2d at 580.

101. *Id.* at 375, 389 N.W.2d at 580.

the defendant's right and the procedure which affects his right to confront his accusers must be as minimally obtrusive as possible.[102] The court left open the possibility that such procedures could be used if the state meets its burden. In laying down some guidelines for the trial court on remand, the Nebraska Supreme Court directed that the trial court provide for a more courtroom-like atmosphere in its use of closed-circuit television, including provisions for communication between the defendant and his counsel, better camera facilities, and questioning of the child by the prosecutor and counsel for the defendant, not social workers or parents.[103] These safeguards were not present at the trial level. The court concluded by suggesting ways that the audio and video equipment could be arranged in the event that, on remand, the state met its now heavier burden and again moved for use of the closed-circuit television broadcast.[104]

One of the more widely cited cases regarding a defendant's right of confrontation where *previously* recorded televised testimony is concerned is an Eighth Circuit decision, *United States v. Benfield*.[105] In that case, the defendant was convicted of misprision of felony for his failure to report an abduction by others.[106] The government requested that the adult victim not be required to endure actual courtroom procedure or face the defendant due to psychiatric problems directly related to her abduction.[107] Instead, a videotape deposition of the victim's testimony was admitted into evidence.[108] The defendant was excluded from the room in which the deposition took place, but could observe the victim through one-way glass, and could communicate with his attorney through an audio device.[109] The adult deponent, however, was unaware of the defendant's presence in the build-

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102. *Id.* at 375, 389 N.W.2d at 581. *See also* Globe Newspaper Co. v. Superior Ct., 457 U.S. 596 (1982)(a state has a compelling interest in protecting minor victims of sex crimes from further embarrassment; however, this interest does not justify excluding the press and audience from the trial proceedings); People v. Kahan, 15 N.Y.2d 311, 312, 258 N.Y.S.2d 391, 392, 206 N.E.2d 333, 334 (1965)(characterizing society's interest in protecting the welfare of children as "transcendent").

103. *Warford*, 223 Neb. at 377-78, 389 N.W.2d at 581-82. The court stated that "[a]t the very least, the defendant must at all times have a means of communicating with his attorney, and the court must be able to control the examination by interrupting the questioning to rule on objections." *Id.* at 377, 389 N.W.2d at 581.

104. *Id.* at 377-78, 389 N.W.2d at 582. "The camera should be so situated that persons viewing the examination in the courtroom will be able to see the witness, the examiner, and any other person[s] . . . present in the room where the examination is being conducted." *Id.* at 377, 389 N.W.2d at 582.

105. 593 F.2d 815 (8th Cir. 1979).

106. *Id.* at 816.

107. *Id.* at 817. The government based its motion on findings by the witness' psychiatrist, who stated that the witness should not testify, or that circumstances less stressful than a courtroom be arranged. *Id.*

108. *Id.*

109. *Id.*

ing; in fact, the trial court ordered the defendant not to be visible to the witness.[110]

The *Benfield* court stated its preference for face-to-face confrontation and held that the use of video under those circumstances did not sufficiently protect the defendant's rights.[111] The court went on to say in dicta, however, that this "decision should not be regarded as prohibiting the development of electronic video technology in litigation [for example] where the procedure more nearly approximates the traditional court room setting. . . ."[112]

III. Improving The Indiana Statute

Indiana's statute is similar to other states' statutes in structure and intent.[113] A majority of the states with such a law, whose courts have addressed the issue, have concluded that provisions allowing for the use of closed-circuit television in child abuse cases do not conflict with the Confrontation Clause in a manner significant enough to render the law unconstitutional on its face.[114] Given this precedent, it is difficult to suggest that Indiana courts will nullify the statute if faced with its challenge. Although

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110. *Id. See also* Herbert v. Superior Ct., 172 Cal. Rptr. 850, 117 Cal. App. 3d 661 (1981). The court held that screening the defendant from the child in the courtroom so that the defendant could hear but not see the child and the child could neither see nor hear the defendant was a violation of the defendant's constitutional rights. *Id.* at 855, 117 Cal. App. 3d at 671. The court said, "By allowing the child to testify against defendant without having to look at him or be looked at by him, the trial court not only denied defendant the right of confrontation but also foreclosed an effective method for determining veracity." *Id.* at 853, 117 Cal. App. 3d at 669. *See also* Coy v. Iowa, 108 S. Ct. 2798 (1988).

111. In holding that this procedure violated the defendant's sixth amendment right of confrontation, the Eighth Circuit stated,

> Normally the right of confrontation includes a face-to-face meeting at trial at which time cross examination takes place . . . . While some recent cases use other language, none denies that confrontation required a face-to-face meeting in 1791 and none lessens the force of the sixth amendment. Of course, confrontation requires cross-examination in addition to a face-to-face meeting [citations omitted]. The right of cross-examination reinforces the importance of physical confrontation. Most believe that in some undefined but real way, recollection, veracity, and communication are influenced by face-to-face challenge. This feature is a part of the sixth amendment right additional to the right of cold, logical cross-examination by one's counsel.

United States v. Benfield, 593 F.2d 815, 821 (8th Cir. 1979).

112. *Id.* at 821. Several state courts have, with some merit, attempted to distinguish *Benfield* from the child abuse cases. *See* State v. Sheppard, 197 N.J. Super. 411, 484 A.2d 1330 (1984)(discussed *supra* notes 79-83); People v. Algarin, 129 Misc. 2d 1016, 498 N.Y.S.2d 977 (N.Y. Sup. Ct. 1986)(discussed *supra* notes 84-90). *Benfield*, however, will continue to be oft-cited by defense attorneys attempting to challenge such procedures, as it offers a more strict interpretation of face-to-face confrontation.

113. *See supra* section II and accompanying notes.

114. *See supra* notes 79-97.

Indiana's statute apparently passes constitutional muster,[115] improvements are necessary to better protect the child witness and to lessen the infringement of the defendant's constitutional rights.[116] Because of its sixth amendment implications,[117] closed-circuit television should be used only where the degree of obvious and excessive trauma clearly indicates that the child should not testify in court, not merely that the child would be somewhat humiliated or upset by the courtroom proceedings. Testifying in court is often traumatizing even to adults. The fact that the witness is a child should not weigh against the defendant's confrontation rights unless it is clear that the child witness will be substantially traumatized by having to testify in court. The Indiana statute should be amended to restrict its use to such cases where the special procedures are actually necessary to prevent grievous and undue harm to the child.

Instead of allowing the provisions to apply to all felonies,[118] the statute should apply only to those felonies which would naturally and expectedly cause severe trauma to an average child. Although Indiana attempts to protect the child in more instances than other states, the fact that these procedures may impinge on the defendant's right of confrontation should mandate that they be used only in those situations where the trauma to the child is great. Most likely, cases involving sexual abuse and physical abuse meet this test. The judge, in deciding whether to allow the use of the closed-circuit television, should take a close look at situations involving crimes which conceivably could involve less trauma to the child, such as robbery, non-abusive battery,[119] or homicide,[120] in order to make sure that

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115. *See* Miller v. State, 517 N.E.2d 64 (Ind. 1987)(holding that a statute, which allowed into evidence the videotaped testimony of a child, was constitutional, in contrast to live, simultaneous transmission via closed-circuit television).

116. This assumes, of course, that a statute can be constitutional and still have some serious flaws.

117. *See supra* section I and accompanying notes.

118. As listed in IND. CODE ANN. § 35-37-4-8(a)(West Supp. 1986). *See supra* notes 54-57 and accompanying text.

119. In using the words "non-abusive battery," the author intends to exclude those types of actions commonly referred to as "child abuse," both physical and emotional. The words "non-abusive battery" are meant to describe a certain kind of conduct not generally associated with the connotative meaning of "child abuse," an example being a child attacked non-sexually, similar to a simple action in tort.

120. Although robbery and homicide may be very frightening, these crimes arguably may lack the intense and reoccurring trauma that is associated with sexual abuse of a child, as well as the repercussions that often follow such abuse. *See* Libai, *The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System*, 15 WAYNE L. REV. 977 (1969) [hereinafter Libai]. If use of closed-circuit television is allowed for prosecutions for homicide or robbery, or where the child is merely a witness to a felony, the level of trauma to the child should be shown to be as high as that of sexual abuse, for example, where a child witnessed the brutal killing of his parents. *See* Note, *The Constitutionality of the Use of Two-Way Closed-Circuit Television to Take the Testimony of Child Victims of Sex Crimes*, 53 FORD-

the child will definitely be traumatized as a result of having to testify in court.

Rather than simply categorizing alleged crimes into classes of "traumatizing" and "non-traumatizing," though, the need for the use of closed-circuit television should be examined on a case-by-case basis, with the state having to prove that these special procedures are really necessary.[121] To impinge on a defendant's fundamental constitutional right,[122] the state's interest in protecting the child should be closely examined.[123]

In keeping with the intent that the procedures only be used where the child will be substantially traumatized by having to relive the alleged crime on the witness stand, the child should be required to have been at least an "eye witness" to the alleged offense, including being near enough to the crime in time and space to have felt threatened. Preferably, the child should be required to have been a victim of the alleged crime, although realistically, a child witnessing an attack on his parents, or something similar, is as likely to have been traumatized by viewing the crime as had the child been a victim.[124]

Although any age requirement is somewhat arbitrary,[125] the age should be raised from children "under ten"[126] to "up to and including thirteen years old."[127] Children from the ages of ten through thirteen are still very susceptible to courtroom trauma and the state's interest in protecting its witnesses does not end on a child's tenth birthday.[128] The thirteen year-old

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HAM L. REV. 995, 1018 (1985)(authored by Maria H. Bainor) for an excellent analysis of the problems of child testimony as well as some proposed solutions.

121. *See infra* note 135.

122. *See supra* section I and accompanying notes.

123. Ohio v. Roberts, 448 U.S. 56, 65 (1980)(quoting Chambers v. Mississippi, 410 U.S. 284, 295 (1973))("The Court, however, has recognized that competing interests, if closely examined [citation omitted] may warrant disposing with confrontation at trial.").

124. Most states have seen fit to only allow these special procedures where the child was a victim of sexual abuse or physical abuse. *See supra* note 56. *See also* Libai, *supra* note 120, at 979-81 (author suggests that the child victims of sex crimes suffer a special and substantial type of trauma).

125. *See* Wheeler v. United States, 159 U.S. 523, 524 (1895)("[T]here is no precise age which determines the question of competency.").

126. IND. CODE ANN. § 35-37-4-8(d)(l)(A)(West 1986). Currently, Indiana and Minnesota have the lowest age requirement of any other state with similar laws. *See supra* note 56.

127. *See* Libai, *supra* note 120. "The age of fourteen is often considered to be the dividing line between children who have not reached puberty and adolescents, and it is assumed that children under fourteen years of age are emotionally immature and incapable of making reasonable judgments concerning sexual relations with adults." *Id.* at 979-80. The *Libai* article is cited in nearly every article on the topic, as well as by several cases on the issue.

128. This naturally begs the question of why the interest stops at thirteen. States have long had arbitrary age distinctions, such as a drinking age, a driving age, an age at which people can get married without their parent's consent or see "R-rated" movies. Common law suggests that the age of thirteen to fourteen is a dividing line between competence and incom-

age limit is also more in line with the other states' statutes.[129]

Because the use of closed-circuit television is left to the trial judge's discretion,[130] the procedure may be somewhat arbitrarily imposed.[131] The defendant should have a chance to present evidence that the child would not be traumatized and that the child should testify from the stand. Although the Indiana statute attempts to define that which the other states merely label "good cause,"[132] the vagaries which exist concerning when and under what circumstances closed-circuit television may be used should be eliminated. This would remove some of the broad discretion that the trial judge has in limiting a constitutional right. By limiting the court's discretion, or at least allowing the defendant the chance to challenge the use of the procedure, the statute will better protect the defendant's rights.

The problem becomes how to curtail a judge's traditional discretion in the area of courtroom procedure and logistics. Instead of allowing a finding that the child would be traumatized based on a doctor's or psychiatrist's report, or based on other unspecified evidence which the court might find,[133] the court should hold a separate hearing designed to ascertain whether the child will, in fact, be traumatized by testifying in court.

The hearing should include the judge, prosecuting attorney, defense attorney, defendant, and any doctors, psychiatrists, nurses, or social workers who have treated or been exposed to the child as a result of the alleged crime.[134] The prosecution must prove by clear and convincing evidence[135]

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petence of a witness (obviously with case-to-case exceptions). *See* 97 C.J.S. *Witnesses* § 119 (1957):

> Apart from statutory provisions on the subject, a child over fourteen is presumed to understand the nature and obligation of an oath, and to possess sufficient mental capacity to qualify him as a witness; under that age no presumption of competency prevails, and the party offering an infant under fourteen has the burden of proving capacity and competency.

Id.

129. *See supra* note 56.

130. *See supra* note 65 and accompanying text.

131. Discretionary choices by the trial judge are usually only reversible by showing an abuse of discretion. *See* 5A C.J.S. *Appeal & Error* § 1583 (1958). "As a general rule, an appellate court will not review the action of the trial court with reference to matters resting in the latter's judicial discretion, unless such discretion has been clearly and prejudicially abused. . . ." *Id.* Practically speaking, once made at the trial level, such decisions are seldom reversed by an appellate court. *Id.*

132. *See* IND. CODE ANN. § 35-37-4-8(d)(l)(C)(i-iii)(West 1986). Many states allow the use of closed-circuit television on motion by the prosecution (Arizona, Connecticut, Massachusetts, Ohio, Pennsylvania, and Utah, *see supra* note 41), and many other states allow the use of such procedures on the motion of any party.

133. IND. CODE ANN. § 35-37-4-8(d)(l)(C)(iii)(West 1986).

134. *See* Eatman & Bulkley, *Protecting Child Victim/Witnesses: Sample Laws and Materials*, A.B.A. Young Lawyers Division Production (1986) at 23 (suggestions on how the hearing could be arranged and who should attend). In addition to guidelines for the hearing,

that the child would be severely traumatized by having to testify in court and that testimony via closed-circuit television would be substantially less traumatizing. In this fashion, the defense could offer rebutting evidence that in fact the child would not be traumatized. The judge will make findings of fact[136] as to the child's condition and unavailability, to be included in any materials reviewed by an appellate court if appeal is taken, and decide whether to invoke the provisions of the statute. These proceedings should be out of the presence of the jury, and none of the testimony given during the hearing should be presented to the jury.

In deciding whether the child would be traumatized,[137] the court should consider the following circumstances which tend to add to, or to create, the child's trauma:

1. The child's life or safety was or is being threatened by the defendant were the child to testify.

2. The defendant occupied or occupies a position of authority over the child.

3. The defendant is or was a member of the child's household, or someone who visits or visited the child's house on a regular basis.

4. The defendant is alleged to have inflicted serious bodily injury on the child.

5. The nature of the crime alleged to have been perpetrated on the child.

The Indiana statute should also provide that the image of the defendant be simultaneously transmitted to the child's room. The absence of any language in the Indiana statute as to whether the child is able to see the defendant again raises the problem that, at least according to *Coy v. Iowa*,

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the article gives a good general overview of the whole problem of closed-circuit television.

135. This standard has been chosen to put the burden of production and persuasion on the prosecution and to make sure that the prosecution can show that the child will obviously be traumatized by having to testify in-court.

136. *Coy* suggests that the use of any type of procedure which tends to infringe on a defendant's right to confront must be accompanied by specific case-by-case findings, that is, something more than the type of generalized findings that accompanied the use of the screen in *Coy*. Coy v. Iowa, 108 S. Ct. 2798 (1988).

137. *See* Warren v. United States, 436 A.2d 821, 830, n.18 (D.C. 1981). There the court stated that the following criterion are relevant to deciding whether an adult witness was unavailable due to psychological problems:

1. probability of psychological injury as a result of testifying;
2. degree of anticipated injury;
3. expected duration of injury; and
4. whether expected psychological injury is substantially greater than the reaction of the average victim of a similar crime. *Id.*

the Confrontation Clause requires that both the defendant and the witness must be able to see each other.[138] It is reasonable to assume, given the severity of the potential results of one's testimony, that one is more likely to tell the truth if the accused is present than if he is separated by time and space.[139] There is undoubtedly a certain intimidation factor present in any courtroom, created primarily by the potential severity of the results, but augmented by the judge, jury, accused, and audience, as well as the high ceilings, oak panelling, and leather chairs. Although the oath may no longer be a very trustworthy indicia of reliability,[140] the courtroom setting probably is an inducement to reliability.[141]

Intimidation in the usual sense of the word may result in the dilution of some testimony. However, the fact that the witness must look at the defendant and publicly accuse him of a crime arguably tends to elicit the truth better than not having to look at the defendant or being able to present evidence *ex parte* without the witness present, as concerned the drafters of the sixth amendment.[142] Although the child is removed from the courtroom primarily to avoid those sometimes frightening features of the judicial system, placing the child in a type of vacuum, immune from the presence of the accused, converts the testimony into a type of "TV show" where the child neither hears nor sees the person whose fate he may control.[143] The implications of such "television justice" may vary from child to child and case to case. In all cases however, the child is being asked to relate facts and occurrences via a mode of communication which in his eyes normally conveys fantasy and fiction.[144]

The statute should also provide guidance as to the logistics involved

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

139. *See* Coy v. Iowa, 108 S. Ct. 2798, 2802 (1988)("A witness may feel differently when he has to repeat his story looking at the man whom he will harm greatly by distorting or mistaking the facts.")(quoting Z. CHAFEE, THE BLESSINGS OF LIBERTY 35 (1956). *See also* United States v. Benfield, 593 F.2d 815, 821 (8th Cir. 1979). "Most believe that in some undefined but real way recollection, veracity, and communications are influenced by face-to-face challenge. This feature is a part of the sixth amendment right *additional* to the right of cold, logical cross-examination by one's counsel." (footnote omitted)(emphasis added) *Id.* at 821. *See also* 4 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE § 800[01], at 800-10 (1988)("The requirement of personal presence also undoubtedly makes it more difficult to lie against someone, particularly if that person is an accused and present at trial.").

140. *See* E. CLEARY, MCCORMICK ON EVIDENCE, § 245, at 727 (3d ed. 1984)(Although the oath "may have diminished in significance with the passage of time," it does not mean that the oath is without significance.).

141. *See id.*, § 245, at 727 ("The solemnity of the occasion and possibility of public disgrace can scarcely fail to impress the witness and falsehood no doubt becomes more difficult if the person against whom directed is present.").

142. *Id.*; Mattox v. United States, 156 U.S. 237, 242-43 (1895); *see also supra* note 139.

143. *See supra* notes 47-51 and accompanying text.

144. *See supra* note 47.

with the camera placement.[145] The cameras should be situated such that the jury sees essentially the same view of the child as they would see were the child to testify in court, that is, the television should show the child's upper body and facial expressions in color. Video cameras should also televise the image of the other persons allowed in the room,[146] to ascertain whether any "coaching" takes place.

One of the most important additions to the statute should be some requirements and guidelines for jury instructions.[147] The jury may not be aware of the problems which arise from the use of television cameras. For example, the lens or camera angle may make the witness look small and weak or large and strong, or the camera may fail to carry the subtle nuances of the witness, including changes in the child's demeanor.[148] The child's credibility may also be subconsciously enhanced by the television as often the media gives an aura of credibility and authority to those it portrays.[149]

More importantly, the testimony of a child via closed-circuit television may conflict with the defendant's presumption of innocence,[150] similar to

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145. *See supra* notes 82, 83, & 99 and accompanying text.

146. IND. CODE ANN. § 35-37-4-8(e)(2)(West 1986). This section allows the judge to allow anyone in the room who, at the judge's discretion, would be comforting to the child.

147. *Hochheiser v. People*, 161 Cal. App. 3d 777, 788, 208 Cal. Rptr. 273, 278-79 (1984). The court stated:

> Moreover, there are serious questions about the effects on the jury of using closed-circuit television to present the testimony of an absent witness since the camera becomes the jurors' eyes, selecting and commenting upon what is seen. First, there may be significant differences between testimony by closed-circuit television and testimony face-to-face with the jury because of distortion and exclusion of evidence. For example, the lens or camera angle chosen can make a witness look small and weak or large and strong. Lighting can alter demeanor in a number of ways. Variation in lens or angle, may result in failure to convey subtle nuances, including changes in witness demeanor and credibility. Also, it is quite conceivable that the credibility of a witness whose testimony is presented via closed-circuit television may be enhanced by the phenomenon called status-conferral; it is recognized that the media bestows prestige and enhances the authority of an individual by legitimizing his status.

Id. at 788, 208 Cal. Rptr. at 278-79.

148. *Id.*

149. *Id.* at 788, 208 Cal. Rptr. at 279.

150. *See* Graham, *Indicia of Reliability and Face to Face Confrontation: Emerging Issues in Child Sexual Abuse Prosecutions*, 40 U. MIAMI L. REV. 19, 75 (1985). A majority of this issue is devoted to analyzing the problems faced in child sex abuse prosecutions. The Graham article is a good discussion on the use of closed-circuit television and the defendant's presumption of innocence. *See also* Hochheiser v. People, 161 Cal. App. 3d 777, 788, 208 Cal. Rptr. 273, 279 (1984)("[t]he presentation of a witness' testimony via closed-circuit television may affect the presumption of innocence by creating prejudice in the minds of the jurors towards the defendant . . ."). For an interesting twist on the use of limiting instructions in a similar situation, see Lakeside v. Oregon, 435 U.S. 333 (1978)(no error when trial judge ignored defendant's wish that the judge not tell the jury that they should not presume anything

the physical restraints placed on defendants while they were in the courtroom in earlier times.[151] Great lengths should be taken by the trial judge to instruct the jury to place no greater value in the televised testimony than they would were it in-court testimony.[152] Merely because the child is being allowed to testify out of court does not necessarily mean that the child fears the defendant because of any past encounter, but rather because the child is too nervous and excited to testify in a courtroom setting.

Counsel for the defendant should also be given the choice whether the judge gives any instructions concerning the use of the television. Counsel may wish that the judge not mention the use of the closed-circuit television in his instructions to the jury, to avoid pointing any more attention to the fact that the child needed to testify out of the courtroom. In the alternative, an instruction to the effect that "all children testify in this manner" may also be appropriate. Any mention by the prosecutor as to why these special proceedings were necessary, or insinuations that the child is terrified of the defendant because of a past experience, should be prohibited, so as not to further prejudice the jury against the defendant.

IV. CONCLUSION

Indiana has enacted a statute which, barring radical and unexpected interpretation by its appellate courts, is constitutional on its face. Merely because the statute passes constitutional muster, however, should not insulate it from criticism or isolate it from improvements.

Given the reprehensible nature of child abuse, a person charged with such a crime is often subject to a highly emotional and well publicized trial. Cases involving an injured child tear at everyone's heart and often one's

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from the defendant's use of his Constitutional right not to testify on his own behalf).

151. *Hochheiser*, 161 Cal. App. 3d 777, 788, 208 Cal. Rpt. 273, 279 (1984). *See also* Illinois v. Allen, 397 U.S. 337 (1970)(use of physical restraints on the unruly defendant does not constitute reversible error).

152. *See* State v. Sheppard, 197 N.J. Super. 411, 484 A.2d 1330 (1984)(providing for many conditions that should be present in order for the trial court to use closed-circuit television, several of which concern jury instructions). *See also* Duffitt v. State, 525 N.E.2d 607 (Ind. 1988). In *Duffitt*, the defendant had been convicted of child molesting. *Id.* at 607. On appeal to the Indiana Supreme Court, the defendant argued that the placement of child's drawings and pictures in the courtroom, apparently to lessen the anxiety of the young child witness, was reversible error. *Id.* at 608. In affirming the conviction, the Supreme Court, however, took a dim view of the decorations, stating that "such decorations unduly emphasize the testimony of one witness over another and may convey to some jurors that the testimony of young children is more important or credible than that of others. . . . Other methods may be available to address the anxiety of young witnesses." *Id.* At this point, the court cited to Miller v. State, 517 N.E.2d. 64 (Ind. 1987)(discussed *supra* note 2, which held that an Indiana statute allowing for the admissibility of previously recorded video statements by children was constitutional). *Duffitt*, 525 N.E.2d at 608 n.1.

first inclination is to protect the child and "hang the defendant from the nearest tree." American jurisprudence is not a system of emotions, however, and a defendant's constitutional rights must not be unnecessarily abridged merely because of the type of alleged crime or the age of the alleged victim. Indiana has taken commendable strides in protecting the child/victim from further trauma by allowing the child to testify away from the stares of those who may have harmed the child. But the child's further protection must not come at the complete expense of the accused's cherished constitutional right to confront those who would accuse him. By amending the statute, the competing interests of the traumatized child and the defendant accused of a very serious crime will be better balanced and protected.

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