Indiana's Statutory Provisions for Alternative Testimony in Child Sexual Abuse Cases: Is It Live or Is It Memorex?

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I. Introduction

At least one legal scholar believes that sexual abuse of children has provided the subject matter for the witch hunt of the eighties.[1] Whether this is true or not, the subject of sexual crimes against children has prompted numerous attempts at legislative reform within the last five years.[2] Just as hurried responses to perceived crises in other areas have sometimes caused an overreaction or backlash, there is concern that the outpouring of publicity about sex crimes against children has caused legislative reforms to go too far too fast.[3] Many of the highly publicized cases, especially those involving allegations of mass abuse, have been shown to be wholly or partially unsubstantiated.[4] Furthermore, horror stories of defendants who have been falsely accused have recently surfaced.[5] While no one wants to see children sexually abused, almost everyone would agree that there have been problems even with the warranted prosecution of individuals in cases involving the sexual abuse of children.

Troublesome questions have arisen. In our zest to protect children, is it possible that we have been too willing to sacrifice the rights of those accused of these crimes? Where should society strike the balance between protecting children and protecting those accused? Should we narrowly interpret defendants' constitutional rights to insure that our children are rigorously protected? Is a narrow interpretation necessary,

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[1]Graham, *Difficult Times for the Constitution: Child Testimony Absent Face-To-Face Confrontation*, Champion, Aug. 1985, at 18.

[2]Bulkley, *Evidentiary and Procedural Trends in State Legislation and Other Emerging Legal Issues in Child Sexual Abuse Cases*, 89 Dick. L. Rev. 645 (1985).

[3]*See, e.g.*, Graham, *supra* note 1, at 18-19.

[4]*See* Kinsley, *Civic Virtuosity and Child Abuse Chic*, Champion, Jan./Feb. 1986, at 7; *see also* Renshaw, *When Sex Abuse Is Falsely Charged*, Champion, Jan./Feb. 1986, at 8-10.

[5]*See* Renshaw, *supra* note 4, at 8-9.

or do the legal reforms enacted already fit comfortably within our constitutional framework? Although answering all of these questions is beyond the scope of this Article, these are the questions that the legislature and the judiciary have been faced with and have recently attempted to answer.

Indiana is one of many states that have adopted recent legislation aimed primarily at making it easier to bring to justice those who commit sexual crimes against children.[6] In 1984, the legislature enacted Indiana Code section 35-37-4-6.[7] This statute creates a hearsay exception that

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[6]*See* Bulkley, *supra* note 2, at 666-68. Although Indiana's new statutory provisions could apply to some non-sexual offenses, it appears that they were enacted largely to remedy problems with testimony in sex crimes. They will therefore be discussed only as they concern those crimes.

[7]IND. CODE § 35-37-4-6 (Supp. 1986). This statute provides:

Sec. 6. (a) This section applies to criminal actions for the following:
(1) Child molesting (IC 35-42-4-3).
(2) Battery upon a child (IC 35-42-2-1(2)(B)).
(3) Kidnapping (IC 35-42-3-2).
(4) Confinement (IC 35-42-3-3).
(5) Rape (IC 35-42-4-1).
(6) Criminal deviate conduct (IC 35-42-4-2).

(b) A statement or videotape that:
(1) is made by a child who was under ten (10) years of age at the time of the statement or videotape;
(2) concerns an act that is a material element of an offense listed in subsection (a) that was allegedly committed against the child; and
(3) is not otherwise admissible in evidence under statute or court rule;
is admissible in evidence in a criminal action for an offense listed in subsection (a) if the requirements of subsection (c) are met.

(c) A statement or videotape described in subsection (b) is admissible in evidence in a criminal action listed in subsection (a) if, after notice to the defendant of a hearing and of his right to be present:
(1) the court finds, in a hearing:
(A) conducted outside the presence of the jury; and
(B) attended by the child;
that the time, content, and circumstances of the statement or videotape provide sufficient indications of reliability; and
(2) the child:
(A) testifies at the trial; or
(B) is found by the court to be unavailable as a witness because:
(i) a psychiatrist has certified that the child's participation in the trial would be a traumatic experience for the child;
(ii) a physician has certified that the child cannot participate in the trial for medical reasons; or
(iii) the court has determined that the child is incapable of understanding the nature and obligation of an oath.

(d) If a child is unavailable to testify at the trial for a reason listed in subsection (c)(2)(B), a statement or videotape may be admitted in evidence under this section only if there is corroborative evidence of the act that was allegedly committed against the child.

allows the admission at trial of an extrajudicial statement or videotape of a child victim under ten years of age if certain conditions are met. Although the Indiana Court of Appeals has recently ruled that there is no facial constitutional infirmity in section 35-37-4-6,[8] interesting constitutional questions remain.

More recently, in 1986, Indiana Code section 35-37-4-8 was enacted.[9] This statute establishes alternative forms of testimony for children during

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(e) A statement or videotape may not be admitted in evidence under this section unless the prosecuting attorney informs the defendant and the defendant's attorney of:

(1) his intention to introduce the statement or videotape in evidence; and

(2) the content of the statement or videotape;

within a time that will give the defendant a fair opportunity to prepare a response to the statement or videotape before the trial.

[8]Hopper v. State, 489 N.E.2d 1209 (Ind. Ct. App. 1986), *transfer denied*, Aug. 16, 1986.

[9]IND. CODE § 35-37-4-8 (Supp. 1986). This statute provides:

Sec. 8. (a) This section applies to criminal actions for felonies under IC 35-42 and for neglect of a dependent (IC 35-36-1-4) 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) On the motion of the prosecuting attorney, the court may order that the testimony of a child be videotaped for use at trial.

(d) The court may not make an order under subsection (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 attorney's motion to permit the child to testify outside the courtroom.

the trial of certain criminal actions if specific conditions are met. Because this statute was so recently enacted, it has yet to be interpreted by an Indiana appellate court.[10]

This Article will analyze both of these statutes in light of the constitutional and practical questions that arise when they are utilized in the prosecution of sexual crimes against children. The Article will focus on possible infringement of defendants' rights, while hopefully not losing sight of the rights of the victims.

II. The Problem

The difficulties in investigating cases involving sexual abuse of children, bringing these cases to trial, and gaining convictions are well documented.[11] The state has faced numerous problems in proving every element of these sexual offenses.[12] Initially, direct evidence or other circumstantial evidence may be minimal.[13] Second, the child allegedly involved is often the only witness available.[14] Third, the child-victim

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(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) If the court makes an order under subsection (c), only the following persons may be in the same room as the child during the child's videotaped testimony:
(1) The judge.
(2) The prosecuting attorney.
(3) The defendant's attorney (or the defendant, if the defendant is not represented by an attorney).
(4) Persons necessary to operate the electronic equipment.
(5) The court reporter.
(6) Persons whose presence the court finds will contribute to the child's well-being.
(7) The defendant, who can observe and hear the testimony of the child without the child being able to observe or hear the defendant. However, if the defendant is not represented by an attorney, the defendant may question the child.
(g) If the court makes an order under subsection (b) or (c), 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.

[10]Ind. Code § 35-37-4-8 (Supp. 1986) had an effective date of Sept. 1, 1986.

[11]*See* Note, *The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations*, 98 Harv. L. Rev. 806 (1985).

[12]*See id.* at 806-07.

[13]*See, e.g.*, Bulkley, *supra* note 2, at 646; Note, *supra* note 11, at 806-07.

[14]*See, e.g.*, Bulkley, *supra* note 2, at 646; Note, *supra* note 11, at 806-07.

may be found incompetent to testify.[15] Fourth, even if the child is competent to testify, there are several obstacles that a proponent of a child's testimony faces. A child may be unable to recall crucial details of what occured.[16] And, if a child does have adequate recall, the child may have difficulty relating what occurred to the jury. Furthermore, a child may be easily confused by cross-examination.[17]

Although there have been attempts to improve the investigatory process, such as special training for personnel and the development of anatomically correct dolls,[18] the legislative reforms have dealt primarily with the testimonial problems. Underlying these attempts at reform have been certain assumptions about the psychological development and functioning of children. It is important briefly to examine some of these assumptions, for if some of them are erroneous, the proper balance between the preservation of defendants' rights and the protection of children has not been and will not be achieved.[19]

Two assumptions appear to underlie recent statutory changes establishing alternative methods for a child's testimony. The first is that children are more traumatized when testifying in court about sexual abuse than when testifying about other subjects.[20] The second assumption is that this trauma is greater in a child than in an adult.[21] Although these assumptions appear plausible, it is debatable whether there has been adequate research to back them up. Possibly adults are transferring their own fears and anxieties onto the children faced with this admittedly unpleasant experience.

According to a leading article on the protection of child victims in the criminal justice system:

> The fact is that psychiatrists all over the world repeatedly warn that legal proceedings are not geared to protect the [child] victim's emotions and may be exceptionally traumatic[22] . . . [However,] the

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[15]*See* Note, *supra* note 11, at 807; *see also* IND. CODE § 34-1-14-5 (1982), which states, in relevant part: "The following persons shall not be competent witnesses: . . . Children under ten (10) years of age, unless it appears that they understand the nature and obligation of an oath."

[16]*See* Note, *supra* note 11, at 807 and authorities cited therein.

[17]*Id.*

[18]Although a discussion of changes in the investigation of child sex abuse and attendant problems is not within the scope of this Article, they are addressed in general in Frost, *"Weird Science" and Child Sexual Abuse Cases*, CHAMPION, Jan./Feb. 1986, at 17-18; Libai, *The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System*, 15 WAYNE L. REV. 977 (1969); McIver, *The Case for a Therapeutic Interview in Situations of Alleged Sexual Molestation*, CHAMPION, Jan./Feb. 1986, at 11-12.

[19]*See* Libai, *supra* note 18, at 1003-05.

[20]*Id.* at 979-86.

[21]*Id.*

[22]*Id.* at 1015.

> studies do not as yet demonstrate a clear causal link between the legal proceedings and the child victim's mental disturbances; but no psychiatric study has attempted to prove, or is likely to attempt to prove in the future, such a causal link. Psychiatrists agree that they cannot isolate the effects of the "crime trauma" from the "prior personality damage" or either of the foregoing from the "environment reaction trauma" or the "legal process trauma." But psychiatrists do agree that when some victims encounter the law enforcement system, for one reason or another, the child requires special care and treatment.[23]

Although this article was published in 1969, it is still often cited and was used to substantiate a decision of the New Jersey Superior Court as recently as 1984.[24] In sum, although children may be traumatized by legal proceedings, the causal link between the legal proceedings and the trauma suffered by a crime victim has not been established, and any adverse effect of the legal proceedings cannot be isolated.

Studies of adults who were sexually abused as children have shown that a significant portion of these individuals suffered permanant emotional harm as a result of such abuse.[25] Although this result does not seem surprising, the question of what portion of the emotional harm was due to the victim's involvement in the legal system, especially court procedures, remains unanswered. One study, which compared victims who had been involved in court proceedings with a random sample of victims, found that a larger percentage of those not involved in the legal system were able to recover more quickly than their legally involved counterparts.[26] The differences, however, could not be attributed solely to court involvement.[27]

Psychiatrists often testify to the damage that will be done to children forced to testify in a courtroom proceeding.[28] Until empirical studies are performed, however, establishing that demonstrable harm to children is specifically caused by the court experience itself, it may be prudent not to abridge defendants' rights under the guise of protecting children from emotional trauma.

Furthermore, children are not born with an innate knowledge that sexual matters are "bad," "nasty," or embarrassing.[29] Information about

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[23]*Id.*

[24]*See* State v. Sheppard, 197 N.J. Super. 411, 484 A.2d 1330 (1984).

[25]*See* Libai, *supra* note 18, at 981-82.

[26]*Id.* at 982.

[27]*Id.* at n.22.

[28]*See* State v. Sheppard, 197 N.J. Super. 411, 416, 484 A.2d 1330, 1334 (1984); Libai, *supra* note 18, at 1015.

[29]E. Fantino & G. Reynolds, Introduction to Contemporary Psychology 363-66 (1975).

society's sexual taboos must instead be learned.[30] It is possible, therefore, that adults are transferring their own concerns to children regarding sexually-oriented testimony. Moreover, an adult's reaction to the initial report of sexual abuse may negatively color the experience for the child and induce part of the trauma the child experiences.[31]

Without demonstrable evidence that special trauma attributable to the courtroom experience itself is more likely to occur in child-victims of sexual abuse than in adult-victims of sexual crimes, the reforms in this area will meet with strong and valid opposition.[32] Is a young teenager or adult-victim of a sexual crime truly better prepared to withstand the trauma of testifying in open court than a child-victim of such a crime? The answer may be yes, but until there is supporting empirical evidence, caution would be wise when enacting reforms that may place defendants in these crimes in special jeopardy or narrow their constitutional protections.

III. Indiana's Legislative Solutions

A. Indiana Code Section 35-37-4-6

Indiana's child-victim hearsay exception, Indiana Code section 35-37-4-6, allows the hearsay statement of a child-victim to be admissible at trial if the court determines that the time, content, and circumstances of the hearsay statement provide sufficient indications of reliability and if the child either testifies at trial or is found to be "unavailable" as a witness.[33] The statute also provides that if the child is unavailable as a witness, there must be corroborating evidence of the act allegedly committed against the child.[34] When the child testifies at trial, the provision for the admission of the hearsay statement appears to go no farther than the *Patterson* rule, a well-established principle of Indiana law.[35]

When the hearsay statement is admitted at trial and the child-victim never testifies in open court, however, the admission represents a departure from established laws of evidence.[36] The obvious question this

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[30]*Id.* at 118-20; E. Hetherington & R. Porke, Child Psychology: A Contemporary Viewpoint 566-75 (2d ed. 1979).

[31]*See* Libai, *supra* note 18, at 980-81.

[32]*See, e.g.*, Long v. State, 694 S.W.2d 185, 191 (Tex. Ct. App. 1985).

[33]Ind. Code § 35-37-4-6 (Supp. 1986). For full text of this statute, see *supra* note 7.

[34]*Id.* § 35-37-4-6(d).

[35]The *Patterson* rule, announced in Patterson v. State, 263 Ind. 55, 324 N.E.2d 482 (1975), basically allows the admission of an otherwise excludable prior hearsay statement as substantive evidence if the declarant testifies at trial and is available for cross-examination.

[36]As a general rule, hearsay testimony is inadmissible at trial unless it falls within certain exceptions. *See generally* McCormick on Evidence §§ 244-53 (E. Cleary 2d ed. 1972).

situation raises is whether such admission violates the defendant's right of confrontation guaranteed by both the United States[37] and Indiana Constitutions.[38] In *Hopper v. State*,[39] the defendant raised just such an objection to the admission of a child-victim's hearsay statement, and the Indiana Court of Appeals found that the admission of the statement did not deny the defendant his right of confrontation.[40] In determining the constitutionality of section 35-37-4-6, the court relied on the United States Supreme Court's decision in *Ohio v. Roberts*.[41] In *Roberts*, the Court held that an extrajudicial statement may be admitted when the witness has been shown to be unavailable if the statement possesses "sufficient indicia of reliability."[42] Furthermore, no additional showing of reliability need be made if the evidence falls within a firmly rooted hearsay exception.[43]

In *Hopper*, the Indiana court noted section 35-37-4-6 required "that the time, content, and circumstances of the statement provide sufficient indications of reliability" and therefore was fully in compliance with the mandates of *Roberts*.[44] The court found that the witness in *Hopper* satisfied the requirement of unavailability because she was found to be incapable of understanding the nature and obligation of an oath.[45] Moreover, the witness's statement fell within the excited utterance or spontaneous exclamation exception to the traditional hearsay rule, thus satisfying the reliability requirement.[46] In addition, the statute appears to go even farther than the requirements of *Roberts*, because it requires that when a statement is to be admitted because of unavailability, there must be corroborative evidence of the act allegedly committed.[47]

Ohio v. Roberts, however, did not involve the extrajudicial statement of a child and, therefore, did not address the controversial issue of finding a child witness to be unavailable because of psychiatric testimony

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[37]U.S. CONST. amend. VI provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." This amendment is often referred to as the confrontation clause. *See* Ohio v. Roberts, 448 U.S. 56, 62 (1980).

[38]IND. CONST. art. 1, § 13 states: "In all criminal prosecutions, the accused shall have the right . . . to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his favor."

[39]489 N.E.2d 1209 (Ind. Ct. App. 1986).

[40]*Id.* at 1212-13.

[41]448 U.S. 56 (1980).

[42]*Id.* at 66.

[43]*Id.*

[44]489 N.E.2d at 1212.

[45]*Id.*

[46]*Id.*

[47]IND. CODE § 35-37-4-6(d) (Supp. 1986) provides that "If a child is unavailable to testify at the trial for a reason listed in subsection (c)(2)(B), a statement or videotape may be admitted in evidence under this section only if there is corroborative evidence of the act that was allegedly committed against the child."

that testifying would be traumatic, or because the child is incapable of understanding the nature and obligation of an oath.[48] At first glance, incompetency as a basis for unavailability would seem to be a logical anomaly—allowing the hearsay statement of an incompetent witness to be admitted for the very reason that the witness is incompetent. When the defendant in *Hopper* raised this argument, however, the court noted that the incompetence of children under ten who are unable to understand the nature and obligation of an oath pertains only to in-court testimony, not to out-of-court statements.[49] In addition, however logically inconsistent this position may seem, finding child witnesses to be unavailable because they are incompetent to testify, in order to admit their statements, appears to be an increasingly accepted position.[50]

The opposite position is not without its adherents, however. In *State v. Ryan*,[51] the Supreme Court of Washington found that statements admitted under a child hearsay statute very similar in its procedure to Indiana's were inadmissible.[52] Although part of the problem in *Ryan* was a stipulation to incompetence, the court noted that if the judge had examined the witnesses and found them incompetent based on their inability to receive a just impression of the facts, then their testimony would be too unreliable for admission.[53] The *Ryan* court held that the declarant's competency is a precondition to the admission of his hearsay statements, with the exception of res gestae utterances.[54] Under this strict standard for admissibility, however, *Hopper* is not inconsistent with *Ryan*, because the child's testimony in *Hopper* fell under the traditional hearsay exception of excited utterance or spontaneous exclamation.[55]

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[48]IND. CODE § 35-37-4-6(c)(2)(B) (Supp. 1986) provides for a finding of unavailability on either of these grounds.

[49]489 N.E.2d at 1212 n.4 (citing Jarrett v. State, 465 N.E.2d 1097 (Ind. 1984)).

[50]For a discussion of child-victim hearsay statutes in general, see Bulkley, *supra* note 2, at 649-52, 666-67.

[51]103 Wash. 2d 165, 691 P.2d 197 (1984).

[52]Washington's statute, WASH. REV. CODE § 9A.44.120 (Supp. 1986), provides for the admission of the extrajudicial statement of a child under the age of ten which concerns an act of sexual conduct if:

> (1) The court finds, in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and
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> (2) The child either:
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> (a) Testifies at the proceedings; or
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> (b) Is unavailable as a witness: *Provided*, That when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

Although this statute does not specify the grounds for unavailability, the issue in the case was the child's incompetence.

[53]103 Wash. 2d at 177, 691 P.2d at 204.

[54]*Id.*, 691 P.2d at 203-04.

[55]489 N.E.2d at 1212.

Given the number of states that have enacted similar statutes, the child hearsay exception as enacted in Indiana seems here to stay.[56] The United States Supreme Court, however, has yet to rule on the constitutionality of any of these statutes.

A second basis for a court to find a child unavailable as a witness, provided in section 35-37-4-6, is that a physician has certified that the child cannot participate in the trial for medical reasons.[57] A finding of medical unavailability under this subpart should receive little opposition because it reflects a traditional basis for the unavailability of any witness.[58]

The third basis upon which a court may find a child unavailable as a witness, provided by section 35-37-4-6, is that a psychiatrist has certified that the child's participation in the trial would be a traumatic experience for the child.[59] This basis of unavailability raises the issue of whether defendants' rights are being narrowed based on unsupported assumptions about child-witnesses. No Indiana appellate court has addressed the constitutionality of this specific subpart of section 35-37-4-6.

In *Long v. State*,[60] however, the Court of Appeals of Texas delineated and balanced the competing interests involved when it scrutinized a state statute allowing a videotaped statement of a child to be admitted at trial.[61] The court recognized the state's legitimate and substantial interest

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[56]*See* Bulkley, *supra* note 2, at 666-67.

[57]IND. CODE § 35-37-4-6(c)(2)(B)(ii) (Supp. 1986).

[58]*See* MCCORMICK ON EVIDENCE § 253 (E. Cleary 2d ed. 1972).

[59]IND. CODE § 35-37-4-6(c)(2)(B)(i) (Supp. 1986).

[60]694 S.W.2d 185 (Tex. Ct. App. 1985).

[61]The Texas statute involved was TEX. CODE CRIM. PROC. ANN. art. 38.071, § 2 (Vernon Supp. 1985), which states:

> Sec.2. (a) The recording of an oral statement of the child made before the proceeding begins is admissible into evidence if:
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> (1) no attorney for either party was present when the statement was made;
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> (2) the recording is both visual and aural and is recorded on film or videotape or by other electronic means;
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> (3) the recording equipment was capable of making an accurate recording, the operator of the equipment was competent, and the recording is accurate and has not been altered;
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> (4) the statement was not made in response to questioning calculated to lead the child to make a particular statement;
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> (5) every voice on the recording is identified;
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> (6) the person conducting the interview of the child in the recording is present at the proceeding and available to testify or be cross-examined by either party;
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> (7) the defendant or the attorney for the defendant is afforded an opportunity to view the recording before it is offered into evidence; and
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> (8) the child is available to testify.
>
> (b) If the electronic recording of the oral statement of a child is admitted into evidence under this section, either party may call the child to testify, and the opposing party may cross-examine the child.

in protecting a child from emotional harm[62] and even acknowledged that children who testify may be more damaged by their traumatic role in the court proceedings than they were by their abuse.[63] Nevertheless, when these concerns were pitted against a defendant's constitutional rights, the balance struck was in favor of the defendant and his right of confrontation.[64]

Notably, the statute at issue in *Long* required several procedures not required by Indiana Code section 35-37-4-6. For example, the Texas statute required that the declarant be available to testify at trial and provided that either party could call the declarant for examination and cross-examination.[65] In this respect, therefore, the statute seemed to present no more than a videotaped version of Indiana's *Patterson* rule.[66] Nevertheless, the court found that the tape was hearsay with no indicia of reliability;[67] the interposition of a camera might distort the evidence;[68] the evidence of reduced trauma during videotaping was insufficient;[69] a belated opportunity to cross-examine a witness was not sufficient to protect confrontation rights;[70] and the statute compelled the defendant to forgo either his right to confrontation or his right to remain silent.[71] The court also expressed concern over the lack of empirical evidence that in-court testimony traumatizes children, especially in light of possible abridgement of the defendant's rights.[72]

While the decisions in *Long* and *Ryan* have no direct precedential value in Indiana, they do reflect the lack of uniformity in this area of the law. In addition, the decisions to date have not addressed all of the grounds for unavailability contained within section 35-37-4-6. The Indiana appellate court in *Hopper*, while upholding the facial constitutionality of section 35-37-4-6, did not address all of the issues raised above, nor did it preclude future findings of unconstitutional application of the statute. It therefore remains to be seen just how far Indiana courts will go in upholding the constitutionality of section 35-37-4-6.

B. Indiana Code Section 35-37-4-8

Indiana's alternative testimony for children provision, code section 35-37-4-8, provides two methods by which a child may testify at trial

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[62]*Long*, 694 S.W.2d at 190.

[63]*Id.* (citing State v. Sheppard, 197 N.J. Super. 411, 484 A.2d 1330 (1984)).

[64]*Id.* at 192-93.

[65]TEX. CODE CRIM. PROC. ANN. art. 38.071, § 2(a)(8), 2(b) (Vernon Supp. 1985). See the full text of these subsections *supra* note 61.

[66]*See supra* note 35.

[67]*Long*, 694 S.W.2d at 189.

[68]*Id.*

[69]*Id.* at 190-91.

[70]*Id.* at 191-92.

[71]*Id.* at 192.

[72]*Id.* at 191-92.

while the child is separated from the trial by either time, or space, or both.[73] The first allows the child to be in a room separated from the courtroom.[74] Questions by the defense and the prosecution are transmitted to the child via closed circuit television.[75] The child's testimony is transmitted to the courtroom via the same closed circuit connection.[76] The second method entails having the child's testimony videotaped and later presented at trial.[77] The defendant, the defendant's attorney, the prosecuting attorney, and the judge are all in the same room as the child.[78] The defendant is allowed to see and hear the child without the child being able to observe or hear the defendant.[79] As with the previously discussed hearsay exception statute,[80] this "alternative testimony for children" statute raises constitutional questions regarding the confrontation clauses of the United States Constitution[81] and the Indiana Constitution.[82] Notably, the statute, while allowing the defendant's attorney[83] to question the child,[84] does not specifically preserve for the defendant's attorney the right to *cross-examine* the child.[85] The right specifically to cross-examine the child will most likely be read into the statute to avoid confrontation clause problems.

Section 35-37-4-8 is interesting in that a court does not need to find that a child is "unavailable" as a prerequisite to use of the alternative procedures. The court merely must find that the child "should be permitted to testify outside the courtroom" because of certain specific reasons.[86] This lack of a requirement of unavailability appears to place

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[73]IND. CODE § 35-37-4-8 (Supp. 1986). For the entire text of the statute, see *supra* note 9.

[74]IND. CODE § 35-37-4-8(b)(1) (Supp. 1986).

[75]*Id.* § 35-37-4-8(b)(2).

[76]*Id.* § 35-37-4-8(b)(1).

[77]*Id.* § 35-37-4-8(c).

[78]*Id.* § 35-37-4-8(f).

[79]*Id.* § 35-37-4-8(f)(7). If the defendant is not represented by an attorney, however, the defendant may question the child. *Id.*

[80]*Id.* § 35-37-4-6.

[81]U.S. CONST. amend. VI.

[82]IND. CONST. art. 1, § 13.

[83]If the defendant is not represented by an attorney, the defendant may question the child. IND. CODE § 35-37-4-8(f)(7) (Supp. 1986).

[84]The child may be the victim of or a witness to one of the applicable offenses.

[85]IND. CODE § 35-37-4-8(g) (Supp. 1986) states that certain persons may question the child.

[86]IND. CODE § 35-37-4-8(d)(1)(C) (Supp. 1986) states the following reasons:

> (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

section 35-37-4-8 in conflict with the requirements of *Ohio v. Roberts*[87] and, therefore, lay the groundwork for a constitutional challenge unless the lower courts consistently read this requirement into the statute.

Although Indiana Code section 35-37-4-8 has received no judicial interpretation, caselaw from other jurisdictions is helpful in its analysis. In *McGuire v. State*,[88] the Arkansas Supreme Court found that the admission of a previously videotaped deposition of a child victim as a substitute for the child's in-court testimony did not violate the defendant's constitutional right to confrontation.[89] The deposition was admitted in a rape prosecution solely because the child's grandparents testified that her appearance before a jury might cause serious harm.[90] The defendant had the right to confront and cross-examine the witness at the deposition.[91] The court distinguished such cases as *United States v. Benfield*,[92] a case that involved an adult witness and a non-sexual offense. The court in *Benfield* had held the witness's deposition was inadmissible because the defendant had not been allowed to participate actively in the deposition.[93] The witness's unavailability was due to a psychiatric impairment so severe that it required hospitalization.[94] The defendant's inability to participate in the deposition was the primary impediment to its admissibility.[95]

A statute very similar to Indiana Code section 35-37-4-8(c) was under constitutional attack in *Powell v. State*.[96] The Texas statute[97] at issue

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> 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; . . .

[87]448 U.S. 56 (1980).

[88]288 Ark. 388, 706 S.W.2d 360 (1986).

[89]*Id.* at 393, 706 S.W.2d at 362.

[90]*Id.* at 391, 706 S.W.2d at 361.

[91]*Id.* at 393, 706 S.W.2d at 362.

[92]593 F.2d 815 (8th Cir. 1979).

[93]*Id.* at 821-22.

[94]*Id.* at 817.

[95]*Id.* at 821-22.

[96]694 S.W.2d 416 (Tex. Ct. App. 1985).

[97]TEX. CODE CRIM. PROC. ANN. art. 38.071, §§ 4, 5 (Vernon Supp. 1985). These sections read as follows:

> Sec. 4. The court may, on the motion of the attorney for any party, order that the testimony of the child be taken outside the courtroom and be recorded for showing in the courtroom before the court and the finder of fact in the proceeding. Only those persons permitted to be present at the taking of testimony under Section 3 of this article may be present during the taking of the child's testimony, and the persons operating the equipment shall be confined from the child's sight and hearing as provided by Section 3. The court shall permit the defendant to observe and hear the testimony of the child in person, but shall ensure that the child cannot hear or see the defendant. The court shall also ensure that:

provided that upon the motion of the attorney for either party, the court could order that the child's testimony be taken outside the courtroom and recorded for admission at trial.[98] The statute provided that when this procedure was used, the child could not be required to testify in open court[99] and that while the defendant was entitled to see and hear the child giving testimony, the child must not see or hear the defendant.[100] In these respects, the Texas statute was almost identical to section 35-37-4-8.[101]

In reaching its decision that the statute was unconstitutional, the Texas court cited *Davis v. Alaska*[102] for the proposition that "[c]onfrontation means more than being allowed to confront the witness physically,"[103] and then surmised that this phrase "surely implied that confrontation means *at least* being allowed to confront the witness physically."[104] The Texas statute, in denying the defendant the right to be seen and heard by his accuser, violated this right to physical face-to-face confrontation.[105] Furthermore, the state's interest in the emotional well-being of its children did not outweigh this right to direct confrontation.[106] The court cited with approval a passage from *Vasquez v. State*,[107] a case dealing with child rape:

> The little girl was nervous and exited [sic] and this was relied upon as a reason for the State not offering her as a witness, though she was an unusually smart child. We do not believe that it is sufficient under the facts stated to defeat the right of the accused to be confronted by the witness against him. The

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(1) the recording is both visual and aural and is recorded on film or videotape or by other electronic means;
(2) the recording equipment was capable of making an accurate recording, the operator was competent, and the recording is accurate and is not altered;
(3) each voice on the recording is identified; and
(4) each party is afforded an opportunity to view the recording before it is shown in the courtroom.

Sec. 5. If the court orders the testimony of a child to be taken under Section 3 or 4 of this article, the child may not be required to testify in court at the proceeding for which the testimony was taken.

[98] *Id.*

[99] *Id.*

[100] *Id.*

[101] IND. CODE § 35-37-4-8 (Supp. 1986) does not provide for the additional in-court testimony of the child, and IND. CODE § 35-37-4-8(f)(7) (Supp. 1986) contains a provision for keeping the defendant hidden from the sight and sound of the witness.

[102] 415 U.S. 308 (1974).

[103] *Powell*, 694 S.W.2d at 419 (quoting Davis v. Alaska, 415 U.S. 308, 315 (1974)).

[104] *Id.*

[105] *Id.* at 420.

[106] *Id.*

[107] 145 Tex. Crim. App. 376, 167 S.W.2d 1030 (1942).

> writer shares all of the sympathy which the State and the jury may have had for the child in her unfortunate situation and would like to relieve her completely of the embarrassment, but it would set a precedent too dangerous to be sanctioned. It would be better that a guilty person may go unpunished than that this important provision of our Constitution should be ignored. The rights of the accused in the instant case, however important to him, are infinitesimal when compared to the rights of the millions which are protected by the constitutional provision involved.[108]

The court in *Powell* also found that the right of confrontation and cross-examination is personal to the accused and that the statute impermissibly required him to delegate to his attorney *entirely* this cross-examination.[109] While the same type of delegation appears to be present in Indiana Code section 35-37-4-8,[110] it is unlikely that Indiana courts would reach the same conclusion as the *Powell* court on this issue.[111] As to the other defects in the Texas statute noted by the court, how Indiana courts will rule on parallel provisions necessarily remains unclear.

A California case that squarely addressed the issue of physical face-to-face confrontation in a sex crime prosecution was *Herbert v. Superior Court*.[112] In *Herbert*, the trial court concluded that the child witness was disturbed by the courtroom and especially by the presence of the defendant and therefore ordered a seating arrangement where the defendant, although present in the courtroom, could not see or be seen by the witness.[113] The defendant was further instructed to raise his hand if he could not hear or if he wished to confer with his counsel.[114] Although the prosecution argued that the essential purpose of the confrontation clause was to provide for adequate cross-examination, the court found that this was not the only purpose. The court took note of a long line of United States Supreme Court decisions that stressed the face-to-face nature of confrontation[115] and stated that "[b]y allowing the child to

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[108]*Powell*, 694 S.W.2d at 420 (quoting Vasquez v. State, 145 Tex. Crim. App. 376, 380, 167 S.W.2d 1030, 1032 (1942)).

[109]*Id.* at 420-21.

[110]IND. CODE § 35-37-4-8(g)(2) (Supp. 1986) provides that the defendant is entitled to question the child only if he is not represented by an attorney.

[111]*See, e.g.*, Abner v. State, 479 N.E.2d 1254 (Ind. 1985); Gallagher v. State, 466 N.E.2d 1382 (Ind. Ct. App. 1984), where defense counsel's presence and participation at a deposition of prosecution witnesses were held to constitute a waiver of objection to admission of the depositions on the grounds of confrontation.

[112]117 Cal. App. 3d 661, 172 Cal. Rptr. 850 (1981).

[113]*Id.* at 664, 172 Cal. Rptr. at 851.

[114]*Id.* at 665, 172 Cal. Rptr. at 851.

[115]The court cited Dowdell v. United States, 221 U.S. 325 (1911); Kirby v. United

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."[116] Although the procedure in *Herbert* was court-initiated rather than statutory, the confrontation issues involved remain the same as those raised by the new statutory schemes.

In another California decision, *Hochheiser v. Superior Court*,[117] the court considered similar issues in relation to the use of closed circuit television for testimony. Although this television procedure was instituted by a court rather than provided for by statute, the procedure involved was very similar to the provisions for closed circuit testimony in Indiana Code section 35-37-4-8.[118] The court in *Hochheiser* did not reach the constitutional issues involved with closed circuit testimony because it held that the trial court did not have the inherent power to use it absent statutory authorization.[119] However, the court did note several reservations about the procedure. After considering several possible negative consequences of camera presentation of evidence, the court concluded that closed circuit television might affect a juror's impressions of the witness's credibility and demeanor.[120] The court also considered the possible adverse effect of the closed circuit procedure on the presumption of the defendant's innocence.[121] Finally, the court considered the insufficiency of the evidence that such a procedure was necessary.[122] The court noted that the United States Supreme Court, in *Globe Newspapers v. Superior Court*,[123] stated that when considering children's testimony, the measure of the state's interest in a procedure is not the extent to which minors are injured by testifying, but the increase in injury caused by testifying in front of the jury and the defendant.[124] The *Hochheiser* court then stated:

> In our research of the professional literature on the matter, we have not discovered any study, based on empirical data, which

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States, 174 U.S. 47 (1899); and Mattox v. United States, 156 U.S. 237 (1895). *Herbert*, 117 Cal. App. 3d at 667, 172 Cal. Rptr. at 853.

[116]*Herbert*, 117 Cal. App. 3d at 668, 172 Cal. Rptr. at 853.

[117]161 Cal. App. 3d 777, 208 Cal. Rptr. 273 (1985).

[118]The court conducted a hearing on the prosecutor's motion that two child witnesses be allowed to testify by closed circuit television and received testimony that the children would be psychologically stressed from testifying in open court. The proposed procedure provided for the witness being able to see the defendant and cross-examiner, and the defendant being able to see the witness. *Id.* at 781, 208 Cal. Rptr. at 275.

[119]*Id.* at 787, 208 Cal. Rptr. at 279.

[120]*Id.* at 786, 208 Cal. Rptr. at 278-79.

[121]*Id.* at 787, 208 Cal. Rptr. at 279; *see infra* notes 149-53 and accompanying text.

[122]*Hochheiser,* 161 Cal. App. 3d at 792-93, 208 Cal. Rptr. at 282-83.

[123]457 U.S. 596 (1982).

[124]*Id.* at 607 n.19.

> deals with the damaging psychological effect of giving testimony in the presence of the jury and the accused, on the sexually abused child. Rather, we found that such literature merely contains generalized statements to this effect.[125]

The viewpoints expressed by the California courts are not without their opponents, however. In *State v. Sheppard,*[126] the New Jersey Superior Court vigorously upheld the use of a closed circuit procedure. Because *Sheppard* is a leading case for proponents of these alternative methods of testimony, it will be examined at length. *Sheppard* involved a sexual offense against a ten year old child, and upon a motion by the state to allow the child to testify via closed circuit television, a hearing was held to consider the propriety of the procedure.[127] The chief testimony at the hearing was presented by a forensic psychiatrist who had interviewed the child witness. He testified that the witness had the capacity to testify truthfully, but that the use of the video equipment would improve the accuracy of her testimony.[128] The psychiatrist further stated that while the courtroom atmosphere makes an adult more likely to testify truthfully, the opposite was true of a child witness, especially when the alleged abuse was perpetrated by a relative.[129] He felt that the child's ambivalent feelings accompanied by the fear, guilt, and anxiety produced by the situation would mitigate the truth and result in inaccurate testimony.[130] The psychiatrist believed that the video arrangement would relieve these feelings and improve the accuracy of the testimony.[131] Furthermore, he testified that while the witness was basically psychologically-fit, probable long-range consequences of her in court testimony would include behavioral problems, nightmares, depression, and problems with eating, sleeping, and school.[132] Nothing in the published opinion, however, indicated just how the psychiatrist reached his prognosis.

There was also testimony in *Sheppard* from two attorneys who had prosecuted child abuse cases. They both testified primarily as to problems with the prosecution of such cases caused by difficulties with child-victim testimony.[133] The state's final witness was a video expert, who testified as to the proposed video arrangement and conducted a demonstration.[134]

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[125] 161 Cal. App. 3d at 793, 208 Cal. Rptr. at 283.
[126] 197 N.J. Super. 411, 484 A.2d 1330 (1984).
[127] *Id.* at 415, 484 A.2d at 1332-34.
[128] *Id.* at 416, 484 A.2d at 1332.
[129] *Id.*
[130] *Id.*
[131] *Id.*
[132] *Id.* at 416-17, 484 A.2d at 1332-33.
[133] *Id.* at 417, 484 A.2d at 1333.
[134] *Id.* at 418, 484 A.2d at 1333-34.

The defendant in *Sheppard* objected that his constitutional right to confrontation was violated, but the court noted that the right of confrontation was not absolute.[135] After an extensive discussion of the meaning of confrontation, the court appeared to conclude that the primary constitutional guarantee was that of cross-examination, not direct face-to-face confrontation.[136] The court also analogized the case at bar to an earlier New Jersey case[137] where the defendant was excluded from the judge's private interview with a child while being permitted to hear the interview in another room. In that case, there was found no abridgement of the defendant's right of confrontation. The earlier case, however, involved custody and was not a criminal trial.

The *Sheppard* court also addressed the defendant's due process contentions concerning possible technical distortions of the medium, as well as its failure accurately to present demeanor and dramatic components of testimony.[138] The court noted that the "filtering" effect of the medium would equally benefit both sides and found that videotaped testimony was sufficiently similar to live testimony that the jury could still properly perform its function.[139] The court also took judicial notice of the widespread availability of television in American households, and the resultant familiarity with its technical characteristics and distortions.[140] The court did not address, however, the idea that a large portion of what we view on television is fiction as opposed to real life presentations.[141] The court in *Sheppard* 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 (more winsome, perhaps, if she testifies in person than by videotape.) The difficulty of cross-examining a young child may prevent the exposure

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[135]*Id.* at 426, 484 A.2d at 1339.

[136]*Id.*

[137]New Jersey Youth & Family Servs. v. S.S., 185 N.J. Super. 3, 447 A.2d 183 (1982).

[138]197 N.J. Super. at 430, 484 A.2d at 1341.

[139]*Id.*

[140]*Id.*

[141]This point is crucial to the issues involved. People are accustomed to viewing horrible things on television while at the same time they are not always able to separate fictional characters from real life people. This is especially a concern with children. One need only view the cartoons on television to learn that a character can be killed in one scene and happily go about his business in the next. This indoctrination may make what is seen on the video screen in the courtroom less real to the viewer and thereby diminish the gravity of the situation. *See, e.g.*, Note, *The Criminal Videotape Trial: Serious Constitutional Questions*, 55 OR. L. REV. 567, 577-78 (1976).

> of inaccuracies. The charge of child 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. These problems must also be weighed in deciding the dimensions of the constitutional right of confrontation.[142]

The court found, however, that given all of the circumstances of the case at bar, any erosion of the defendant's rights would be modest and warranted by the protection of the child-victim.[143] The *Sheppard* decision reflects the crucial nature of the balancing of rights and protections; if the assumptions upon which the balancing is predicated are erroneous, an unwarranted and potentially dangerous modification of the legal system may occur.

Almost all of the cases and scholarly writings addressing the confrontation issue raised by statutory or judicial testimonial schemes similar to those in Indiana Code section 35-37-4-8 have been concerned with whether the defendant can see the witness's demeanor so that he can assist in his defense. Another element of confrontation, the witness being confronted by the one he is accusing, is an equally important consideration.[144]

When considered in light of social psychological theory, this second element takes on even greater significance. It has been well documented that guilt accompanying aggression toward another person is reduced when the target of that aggression is "dehumanized." In other words, if we conceive of another as not being human, the inhibitions against acting aggressively are reduced.[145] Also, inhibitions against injuring another are reduced when feedback from that other person is reduced.[146] In a classic study involving electric shocks, subjects in a position to observe personally the suffering of their victims were less likely to administer severe shocks.[147] Similar phenomena have been observed in modern warfare: because the enemy can be far away due to modern technology, there are diminished feelings of guilt and remorse in those inflicting the harm.[148] While this type of dehumanization might arguably be advantageous in time of war,

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[142] *Sheppard*, 197 N.J. Super. at 432, 484 A.2d at 1342.
[143] *Id.* at 431-32, 484 A.2d at 1342-43.
[144] *See, e.g.*, Mattox v. United States, 156 U.S. 237, 242-43 (1895).
[145] P. Middlebrook, Social Psychology and Modern Life 299-300 (1974).
[146] *Id.* at 299.
[147] *Id.*
[148] *Id.*

its possible role in a legal system founded on a presumption of innocence is questionable. When the unreality of a large portion of what people, especially children, view on television is coupled with this concept of dehumanization, the consequences could be severe for a defendant tried under the proposed closed circuit procedures. While we do not wish to upset unnecessarily a witness already facing a difficult experience, we also do not want to so distance a witness from the defendant that the witness fails to sense the seriousness of the accusations and the concomitant stimulus to be scrupulously honest.

An additional issue, not widely addressed by courts or scholars, is the effect of videotaped presentations and closed circuit television on the presumption of the defendant's innocence. The concept that a defendant is innocent until proven guilty is basic to the American system of jurisprudence.[149] If the proposed procedures impinge upon this presumption, the defendant will be denied his constitutional right to a fair and impartial trial.[150] As noted by the court in *Hochheiser v. Superior Court*,[151] "[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 similar to that created by the use of physical restraints on a defendant in the jury's presence."[152] Thus, the procedures at issue might violate the same type of proscription against bringing a defendant to trial in handcuffs or prison clothing.[153] Jurors involved in a trial using closed circuit testimony might conceivably wonder why the child has to be protected from even being in the defendant's presence. The presumption of innocence would then disappear.

Another consideration regarding videotape and closed-circuit procedures is the possibility of an abridgement of the defendant's right to a fair trial.[154] This concern is based on the possible distortion of evidence of the witness' demeanor and therefore of credibility.[155] As noted in *Hochheiser*, the video camera in essence becomes the jurors' eyes by selecting and commenting on what is seen.[156] In addition, the video

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[149]"The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." Coffin v. United States, 156 U.S. 432, 453 (1895).

[150]*See* U.S. CONST. amend. XIV, § 1.

[151]161 Cal. App. 3d 777, 208 Cal. Rptr. 273 (1985).

[152]*Id.* at 787, 208 Cal. Rptr. at 279.

[153]*See, e.g.*, Flowers v. State, 481 N.E.2d 100, 105 (Ind. 1985); *see also* Smith v. State, 475 N.E.2d 27 (Ind. 1985).

[154]*See* Bulkley, *supra* note 2, at 659.

[155]*Id.*

[156]161 Cal. App. 3d at 786, 208 Cal. Rptr. at 278.

equipment may make a witness look small and weak or large and strong, and off-camera evidence is necessarily excluded.[157]

This last criticism is especially relevant to Indiana Code section 35-37-4-8, because the statute provides for the presence in the videotaping room of "persons whose presence the court finds will contribute to the child's well-being."[158] However well intentioned such persons may be, their body language or non-verbal cues may affect the child's testimony, while the jury cannot see this influence.[159] Additionally, if the camera is focused primarily on the child's face to gain information about his or her expression, it may not portray the witness' overall demeanor, and vice versa. Also, the interposition of a screen between the viewer and the evidence may reduce a juror's attention span and lessen his concentration.[160] Finally, by legitimizing the status of the individual being televised, the medium may bestow prestige and enhance his authority.[161] This concept, termed "status-conferral,"[162] might be especially relevant where a child is involved, because under ordinary circumstances a child does not have a great deal of status.

Other concerns raised by alternative testimony procedures include possible infringement of a defendant's right to a jury trial[163] and interference with a jury's common-law right to question witnesses.[164] The defendant's right to a jury trial may be infringed upon because the factors discussed above may interfere with the jury's decisionmaking function[165] The jury's right to question the witness is obviously curtailed if the witness is removed from the courtroom.

IV. Conclusion

It is unquestioned that there have been problems with convicting persons who sexually abuse children. However, it is questionable whether modification of trial and evidentary procedures is the proper way to deal with these problems. Furthermore, once it is decided that modifications of trial and evidentiary procedures are necessary, the extent of such modifications must be determined. If a legislative modification of

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[157]*Id.*

[158]Ind. Code § 35-37-4-8(e)(2) (Supp. 1986).

[159]For example, the nod of a head or a smile by one outside the range of the camera is necessarily lost to the jury, and in fact the jury will probably not even know such a person is there.

[160]Note, *supra* note 141, at 577.

[161]*Hochheiser*, 161 Cal. App. 3d at 787, 208 Cal. Rptr. at 279.

[162]*Id.*

[163]*See* Bulkley, *supra* note 2, at 659.

[164]Although apparently not frequently exercised today, this common-law right of the jury to question witnesses is apparently still good law. *See* Note, *supra* note 141, at 580.

[165]*Id.* at 578-82.

trial and evidentiary procedures will possibly abridge a defendant's constitutional rights, the legislature should alter such procedures no more than is absolutely necessary.

The trial testimony of a child-victim can possibly be made less traumatic without resorting to drastic legislative measures. Reducing the number of interviews with the child, reducing the number of continuances, and preparing the child for the courtroom experience are examples of measures that have been proposed as alternatives to the extreme intervention of videotaped testimony or closed-circuit television.

Just how often the provisions of sections 35-37-4-6 and 35-37-4-8 will be invoked remains to be seen. Whether the provisions of the new Indiana Code section 35-37-4-8 will pass constitutional muster also remains to be seen. Given the constitutional implications of these procedures for the defendant, however, these statutes should be closely examined and any underlying assumptions should be adequately supported by empirical evidence.