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The Criminal Courtroom: Is It Child Proof?

Barbara Gilleran Johnson Hon.
Assoc. Judge, Nineteenth Judicial Circuit Court, Lake County, IL.

Timothy R. Evans
Staff Attorney, Nineteenth Judicial Circuit Court, Lake County, IL.

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Hon. Barbara Gilleran-Johnson[*] *&*
Timothy R. Evans[**]

I. INTRODUCTION

Consider the following hypothetical: While a divorce was pending between *Mr.* and *Mrs. X*, *Mrs. X* retained custody of their three-year-old daughter. After weekend visitation with *Mr. X*, the child returned home and told *Mrs. X* that *Mr. X* had hurt her "pee pee." *Mrs. X* took the child to an emergency room, where the examining physician determined that slight redness and slight swelling occurred in the vaginal area. The physician could not emphatically state, however, that sexual abuse caused the redness and swelling. Subsequently, prosecutors brought charges against *Mr. X* in criminal court, and the juvenile court held a hearing to consider an action based on the best interests of the child.

The juvenile court found the child, then three-and-one-half years old, competent to testify and determined that the father assaulted the child.[1] The criminal court, however, found the child, then four years

* Associate Judge, Nineteenth Judicial Circuit Court, Lake County, Waukegan, Illinois, 1987; B.A., DePaul University, 1974; J.D., Chicago-Kent College of Law, 1978. Judge Gilleran-Johnson worked as an Assistant Attorney General and as an Assistant State's Attorney, specializing in juvenile law and crimes against minors. She helped establish the first Child Protection Team in Lake County and was appointed to the Governor's Citizen's Committee for Abused Children. The Illinois Supreme Court appointed Judge Gilleran-Johnson on three occasions to the Illinois Judicial Conference concerning juvenile law, where she held the positions of chairperson and vice-chairperson. Judge Gilleran-Johnson also teaches classes in the areas of Criminal Justice and Juvenile Law.

** Staff Attorney, Nineteenth Judicial Circuit Court, Lake County, Waukegan, Illinois, 1994; B.S., Illinois State University, 1984; J.D., with honors, John Marshall Law School, 1994. Mr. Evans has a background in law enforcement, has taught in the areas of Criminal Law and Search and Seizure, and is admitted to practice law in both Illinois and Florida.

1. Although the scope of this Essay is limited to alternative means of testifying for child witnesses, a cursory discussion of the procedural requirements in child welfare proceedings is warranted. Notwithstanding the finding of responsibility by the hypothetical juvenile court, federal law still requires that the juvenile court make "reasonable efforts" to prevent or to eliminate the need for removal of a dependent, neglected, or abused child from the home, and to reunify the family, if possible, when a lower court has removed the child. 42 U.S.C. § 671(15) (1988). Moreover, when the case involves Native American children, the court must find that "active efforts have

old, incompetent to testify and dismissed the matter. Subsequent to the juvenile proceeding, the divorce court granted *Mr. X* supervised visitation, but after the criminal charges were dismissed, it amended its order to provide for unsupervised visitation.[2] Believing that her role as a parent required her to protect her daughter, *Mrs. X* sought shelter underground when the divorce court refused to modify the unsupervised visitation order.[3] No one has heard from or seen *Mrs. X* and her daughter since *Mrs. X* allegedly changed her name, her social security number, and her daughter's name.

This hypothetical case exemplifies the problems which result in today's courts from the application of differing standards to determine the competency of child witnesses. While the trend is to protect and nurture children,[4] the criminal courts must still weigh the defendant's rights against the tenderness of a child witness.[5] If the criminal court in the above hypothetical had presumed the child to be competent, and had allowed her to testify in chambers via closed-circuit television, the outcome of the case may have been dramatically different.

When a minor is required to testify, judges, prosecutors, and attorneys have always faced the difficult task of weighing the interests of justice against the best interests of the child. The myriad of statutes that pertain to children as witnesses, as victims, or as perpetrators, compounds the difficulty of this task.[6] Thus, while courts often deal

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been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful." Indian Child Welfare Act, 25 U.S.C. § 1912(d) (1988). For a discussion of the "reasonable efforts" standards in several different states, see DEBRA RATTERMAN ET AL., REASONABLE EFFORTS TO PREVENT FOSTER PLACEMENT: A GUIDE TO IMPLEMENTATION app. C (2d ed. 1987).

2. This result is consistent with the constitutional right to family integrity that the United States Supreme Court has recognized as a parent's right to raise children free of state intervention, unless a compelling reason regarding the child's safety or welfare justifies intervention. *E.g.*, Santosky v. Kramer, 455 U.S. 745 (1982); Stanley v. Illinois, 405 U.S. 645 (1972); *see also Developments in the Law: The Constitution and the Family*, 93 HARV. L. REV. 1156 (1980); Michael Wald, *State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards*, 27 STAN. L. REV. 985 (1975).

3. States are required to provide procedural safeguards for parents when visitation arrangements are to be changed. 42 U.S.C. § 675(5)(c) (Supp. V 1993).

4. *See infra* notes 52-90 and accompanying text.

5. *See infra* notes 58-72 and accompanying text.

6. In Illinois, these statutes include the Children and Family Services Act, ILL. COMP. STAT. ANN. ch. 20, §§ 505/1 to 505/41 (West 1993 & Supp. 1995); the Abused and Neglected Child Reporting Act, ILL. COMP. STAT. ANN. ch. 325, §§ 5/1 to 5/11.7 (West 1993 & Supp. 1995); the Juvenile Court Act of 1987, ILL. COMP. STAT. ANN. ch. 705, §§ 405/1-1 to 405/7-1 (West 1992 & Supp. 1995); the Illinois Code of Criminal Procedure of 1963, ILL. COMP. STAT. ANN. ch. 725, §§ 5/100-1 to 5/126-1 (West 1992 & Supp. 1995); the Illinois Marriage and Dissolution of Marriage Act, ILL. COMP. STAT.

with the same parties and child witnesses in both civil and criminal proceedings, courts must apply different statutes which result in contrasting decisions. These contrasting results should sound an alarm for legislative action, especially as the number of child abuse[7] and neglect cases continues to rise.

From 1985 to 1990, reports of child abuse increased by thirty-one percent nationally.[8] In Illinois, the number of child abuse and neglect cases reported each year in urban counties nearly doubled between 1983 and 1992.[9] In rural counties, the number of reported cases increased by seventy-one percent.[10] In 1995 alone, the Illinois Department of Children and Family Services projects that there will be 45,000 cases concerning abused or victimized children.[11]

This Essay first traces Illinois's role as a pioneer and advocate for children's rights.[12] It then discusses the standards that different courts apply in determining whether a child is competent to testify.[13] Next, this Essay outlines recent constitutional challenges to child shield statutes, including the Illinois Supreme Court's decision in *People v. Fitzpatrick*.[14] The Essay then analyzes Illinois's new child shield law, which the Illinois General Assembly passed in response to *Fitzpatrick*.[15] Finally, this Essay challenges the General Assembly to

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ANN. ch. 750, §§ 5/101 to 5/802 (West 1993 & Supp. 1995); the Adoption Act, ILL. COMP. STAT. ANN. ch. 750, §§ 50/0.01 to 50/24 (West 1993 & Supp. 1995); and the Illinois Domestic Violence Act of 1986, ILL. COMP. STAT. ANN. ch. 750, §§ 60/101 to 60/401 (West 1993 & Supp. 1995).

7. "Child abuse" is defined as "[a]ny form of cruelty to a child's physical, moral or mental well-being. Also used to describe form of sexual attack which may or may not amount to rape . . . ." BLACK'S LAW DICTIONARY 239 (6th ed. 1990).

8. SUBCOMMITTEE ON CHILD WELFARE, ILLINOIS HOUSE OF REPRESENTATIVES, PRELIMINARY 1993 LEGISLATIVE FINDINGS & RECOMMENDATIONS 12 (1993).

9. ILLINOIS CRIMINAL JUSTICE INFORMATION AUTHORITY, OVERVIEW OF JUVENILE CRIME AND THE JUSTICE SYSTEM'S RESPONSE IN ILLINOIS 82 (October 1994) [hereinafter OVERVIEW]. Verified cases of abuse increased by 60% during that same period. *Id.* Of the total number of abuse cases reported to the Illinois Department of Children and Family Services in 1992, credible evidence supported 5,346 of those claims. ILLINOIS DEP'T OF CHILDREN & FAMILY SERVS., CHILD ABUSE & NEGLECT STATISTICS: ANNUAL REPORT—FISCAL YEAR 1992 19 (1993) [hereinafter ANNUAL REPORT]. The total number of cases reported in Illinois nearly tripled between 1982 and 1992 from 111,736 to 322,748 reports. *Id.* at 7. See U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 214 (1994), for a summary of the increasing number of reported cases across the nation.

10. OVERVIEW, *supra* note 9, 96-97 & fig. 52.

11. ANNUAL REPORT, *supra* note 9.

12. *See infra* part II.

13. *See infra* part III.

14. *See infra* part IV.

15. *See infra* part V.

create a unified statute to encompass all laws pertaining to child welfare.[16]

II. HISTORICAL BACKGROUND

Illinois has historically pioneered the cause of children and the law. The first juvenile court in the country was established in Chicago in 1899.[17] Dr. William Healy created the first Child Guidance Clinic in 1909.[18] By 1925, only two states had not yet joined Illinois in enacting juvenile justice legislation.[19] The federal government did not enact juvenile justice legislation until the 1938 Federal Juvenile Delinquency Act.[20]

In more recent times, the Illinois General Assembly, in 1987, revised the Juvenile Court Act to expand the child welfare laws in existence.[21] Furthermore, the Loyola University Chicago School of Law established the first ChildLaw Center, CIVITAS, to train future attorneys who will specialize in representing children.[22] Additionally, in 1991, the Illinois General Assembly, although not the first to establish a statute to protect child-victims, enacted the Illinois Child Shield Act of 1991 (the "Child Shield Act").[23]

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16. *See infra* part VI.

17. SAMUEL M. DAVIS, RIGHTS OF JUVENILES § 1.1, at 1-1 (2d ed. 1980); ROBERT M. REGOLI & JOHN D. HEWITT, DELINQUENCY IN SOCIETY 381 (1991).

18. SUBCOMMITTEE ON CHILD WELFARE, *supra* note 8, at 9.

19. VICTOR L. STREIB, JUVENILE JUSTICE IN AMERICA 6 (1978).

20. Pub. L. No. 666, 52 Stat. 764 (1938) (current version at 18 U.S.C. §§ 5031-5037 (1988)). For a short overview of the origins of the juvenile justice system, see SOL RUBIN, LAW OF JUVENILE JUSTICE 1-8 (1976).

21. Juvenile Court Act of 1987, Pub. Act No. 85-601, 1987 Ill. Laws 2578 (codified as amended at ILL. COMP. STAT. ANN. ch. 705, §§ 405/1-1 to 405/7-1 (West 1992 & Supp. 1995)).

22. The ChildLaw Center was established in the Spring of 1993 at Loyola University Chicago School of Law. Originating in Latin, "Civitas" is defined as: "In the Roman law, any body of people living under the same laws; a state." BLACK'S LAW DICTIONARY 247 (6th ed. 1990).

For a greater discussion of Loyola's ChildLaw Center, see Diane C. Geraghty, *The Role of Legal Education in the Emerging Specialty of Pediatric Law*, 26 LOY. U. CHI. L.J. 131 (1995).

23. ILL. COMP. STAT. ANN. ch. 725, § 106B-1 (West 1992), *amended by* Act of Dec. 14, 1994, Pub. Act No. 88-674, 1994 Ill. Legis. Serv. 2664 (West) (repealing § 5/106B-1 and replacing it with § 5/106B-5). For the full text of the current version of the statute, see *infra* note 89.

The Child Shield Act was actually the General Assembly's second attempt to protect child-victim witnesses. In 1987, the General Assembly passed its first child shield law, which created a hearsay exception allowing videotaped testimony. ILL. COMP. STAT. ANN. ch. 725, §§ 5/106A-1 to 5/106A-5 (1992), *repealed by* Act of Sept. 9, 1991, Pub. Act No. 87-345, § 2, 1991 Ill. Laws 1893, 1894. In People v. Bastien, 541 N.E.2d 670, 676 (Ill. 1989), the Illinois Supreme Court found a portion of the law unconstitutional

III. COMPETENCY OF CHILD WITNESSES

A court must find all witnesses, whether adults or children, competent in order to allow them to testify in court.[24] To find a witness competent, the court must determine that the witness has: (1) a minimum capacity to observe, recollect, and recount the incident to which the witness will testify;[25] (2) the understanding of the importance to tell the truth;[26] and (3) personal knowledge of the events about which the witness will testify.[27] While criminal courts do not distinguish between adult and child witnesses in competency determinations,[28] Illinois juvenile courts presume that children involved in abuse cases are competent.[29] Even with this rebuttable presumption, the juvenile court must, nevertheless, find the child competent by using the same criteria used for adults in criminal court.[30] The rebuttable presumption simply gives the benefit of any doubt to the competency of the child.[31]

Before a child may testify in court, the court must first find that the child was capable of observing the events of the particular matter in question and can now recall and truthfully relate those events to the court.[32] The court will examine the child's intelligence and the child's ability to receive correct impressions as controlling factors for competency.[33] For purposes of determining competency, the court will not

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because the law did not provide for the opportunity to cross-examine the witness during videotaping.

24. *See* People v. Brown, 285 N.E.2d 1, 7 (Ill. 1992).

25. People v. Jones, 528 N.E.2d 648, 656 (Ill. 1988), *cert. denied*, 489 U.S. 1040 (1989); People v. Ballinger, 225 N.E.2d 10, 11-12 (Ill.), *cert. denied*, 38 U.S. 920 (1967).

26. *Ballinger*, 225 N.E.2d at 11-12; People v. Karpovich, 123 N.E. 324, 325 (Ill. 1919) (requiring determination as to eight-year-old's ability to appreciate the moral duty to tell the truth); People v. Luigs, 421 N.E.2d 961, 966 (Ill. App. 5th Dist. 1981).

27. *See Jones*, 528 N.E.2d at 648; *see also* CLEARY & GRAHAM'S HANDBOOK ON ILLINOIS EVIDENCE § 601 (6th ed. 1994) (discussing the determination of competency of witnesses generally).

28. *See Jones*, 528 N.E.2d at 656; *Karpovich*, 123 N.E. at 325.

29. ILL. COMP. STAT. ANN. ch. 705, § 405/2-18(4)(d) (West Supp. 1995); *see also In re* M.B., 609 N.E.2d 731, 739 (Ill. App. 1st Dist. 1992) (ruling that the fourteen-year-old witness was competent by virtue of his age). *But see Karpovich*, 123 N.E. at 325 (finding that presumptions in criminal court only apply to witnesses over the age of fourteen).

30. *Brown*, 285 N.E.2d at 8 (finding a twelve-year-old to be competent based on intelligence, not on age); *Ballinger*, 225 N.E.2d at 11-12 (finding a nine-year-old boy competent based on intelligence, not on age).

31. CLEARY & GRAHAM, *supra* note 27, § 601.

32. People v. Dempsey, 610 N.E.2d 208, 218 (Ill. App. 5th Dist. 1993); *In re M.B.*, 609 N.E.2d at 739.

33. In attempting to establish the competency of a child witness, courts will weigh

use age as the sole determinant of competency, but will use it as one factor in such a determination.[34] Once the court finds a child competent to testify, any confusion during the child's subsequent testimony reflects solely on the child's credibility and not on the child's competency.[35]

Judges must understand that, especially with young children, the circumstances surrounding the competency hearing do not always allow the child to properly adapt to the legal environment.[36] For example, is it proper for a judge to find a four-year-old child incompetent to testify in a criminal trial when that child identifies an item on the judge's desk as a cow when it was actually a bull? Is it proper for a judge to find a three-year-old child incompetent, when the child

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how the child responds against the facts in a given case. This balancing often takes place after questioning the child about colors, numbers, locations, the identity of relatives, the school which the child attends, the days of the week, and the difference between the truth and a lie. *See, e.g.*, People v. Mack, 576 N.E.2d 1023, 1024 (Ill. App. 1st Dist. 1991) (noting that the trial judge found the child "plainly competent" after the child correctly identified the color of a book). Each trial court, however, has different standards. Some courts may find a child competent simply if the child can correctly identify the color of the trial judge's robe, while other courts require additional information. See also *supra* notes 24-32 and accompanying text for examples of what various Illinois trial courts have required to establish the competency of child witnesses.

34. *See In re M.B.*, 609 N.E.2d at 739; *supra* note 30 and accompanying text. The issue of age as a distinguishing factor between children and adults arises in many court settings. It is interesting to note that state legislatures differ on the minimum age necessary to transfer a juvenile defendant to adult courts. *See* ALA. CODE § 12-15-34 (1986) (setting the minimum age at fourteen); ARK. CODE. ANN. § 9-27-318 (Michie 1991) (setting the minimum age at fourteen for capital murder offenses); LA. CHILDREN'S CODE ANN. art. 305 (West 1984), *amended by* Act of July 6, 1994, 1994 La. Sess. Law Serv. 15 (West) (setting the minimum age at fifteen with a finding of probable cause as to first or second degree murder); MISS. CODE ANN. § 43-21-157(1) (Supp. 1994) (setting the minimum age at thirteen); OKLA. STAT. ANN. tit. 10, § 1104.2(A) (West Supp. 1995) (setting the minimum age at sixteen on a murder charge); VA. CODE ANN. § 16.1-269.1 (Michie Supp. 1994) (setting the minimum age at fourteen).

The drafters of the Uniform Rules of Evidence recognized the issue of age inherent in proposed child shield statutes, and stated:

> [T]he balance between protecting the minor from the trauma of live testimony in open court on the one hand, and affording the defendant the protections of the law's preference for live testimony on the other, begins to tilt in favor of the defendant as the minor reaches an age at which he or she can more adequately cope with the pressures of trial.

UNIF. R. EVID. 807, cmt. to 1986 amendment, 13B U.L.A. 604 (1994).

35. *In re* A.M.C., 500 N.E.2d 104, 107 (Ill. App. 2d Dist. 1986) (holding that inconsistencies in the five-year-old victim's testimony go only to her credibility as a witness and not to the competency issue).

36. *Dempsey*, 610 N.E.2d at 218 (noting the difficult circumstances under which children must testify, especially when confronting family members); *see also In re* N.S., 627 N.E.2d 1178, 1184-85 (Ill. App. 4th Dist.) (discussing a trial court's finding that the child witness was credible), *appeal denied*, 627 N.E.2d 1178 (Ill. 1994).

waited patiently for three hours in the waiting room, but sucked her thumb periodically during the competency examination because it was hours past her nap? Finally, how about a four-year-old girl, who answered "Yes" when asked if she had a sister, but answered "No" when asked if her sister had a sister?

Children most often become confused in cases when they are testifying as victims of a crime,[37] and unfortunately, this confusion often hides emotional trauma. The psychological impact on a child from testifying against a defendant can be devastating,[38] and may be debilitating when the defendant is a parent or a family member.[39] Moreover, this devastating effect may occur in all cases in which a child testifies, but may be more pronounced in cases of abuse, battery, kidnapping, and domestic relation disputes.[40] Safeguards are needed, therefore, to protect children who are testifying.

It is well established that the Illinois Constitution protects minors, as well as adults.[41] The extent of that protection for minors in the justice

37. The child who witnesses crime or violence in the home, however, may also be emotionally affected. *See generally* Alan J. Tomkins et al., *The Plight of Children Who Witness Woman Battering: Psychological Knowledge and Policy Implications*, 18 LAW & PSYCHOL. REV. 137 (1994) (discussing the psychological consequences for a child who witnesses battering in the home).

38. Brief for Amicus Curiae, American Psychological Association in Support of Neither Party at 7, Maryland v. Craig, 497 U.S. 836 (1990) (No. 89-478) [hereinafter APA Brief].

39. If the accused is someone that the child trusted, the child may feel an overwhelming sense of betrayal if forced to testify against that person. APA Brief, *supra* note 38, at 15-16; *see also* L. Christine Brannon, Comment, *The Trauma of Testifying in Court for Child Victims of Sexual Assault v. The Accused's Right to Confrontation*, 18 LAW & PSYCHOL. REV. 439, 440-42 (1994) (describing the emotional impact on child-victim witnesses of testifying against the accused).

While some studies have been conducted on the effects of the justice system on sexually abused children, see, *e.g.*, Paula E. Hill & Samuel M. Hill, Note, *Videotaping Children's Testimony: An Empirical View*, 85 MICH. L. REV. 809 (1987), more studies have been done on preparing a child for surgery than preparing a child to testify, see John F. Tedesco & Steven V. Schnell, *Children's Reactions to Sex Abuse Investigation and Litigation*, 11 CHILD ABUSE & NEGLECT 267, 271 (1987).

40. For a discussion of the effect of fear on children's testimony, see Gail S. Goodman, *Understanding and Improving Children's Testimony*, 22 CHILDREN TODAY 13 (1993); Tedesco & Schnell, *supra* note 39. For a brief discussion of the potential beneficial effects on sexually abused children from testifying in court, see Brannon, *supra* note 39, at 440-42.

41. *See* People *ex rel.* Goelzer v. Crawford, 141 N.E. 725, 727 (Ill. 1923) (holding that the Illinois Constitution requires that school districts be sufficiently compact to allow "the children to reach the school with a reasonable degree of convenience"); People *ex rel.* Leighty v. Young, 139 N.E. 894, 895 (Ill. 1923) (discussing the Illinois Constitution's requirement that all children have access to free public schools). *See generally* Homer H. Clark, Jr., *Children and the Constitution*, 1992 U. ILL. L. REV. 1 (discussing various constitutional and statutory protections available to children).

system, however, has recently made the headlines of the Chicago news.[42] As a result, Illinois legislators have scrambled to enact protective laws.[43] With the advent of hastily drafted child protection laws,

42. *See, e.g.*, Mary Dixon, *Don't End Accused's Right to Face Accuser*, CHI. SUN TIMES, Nov. 3, 1994, at 38; David Heckelman, *Deadline Looms for Video Testimony Measure*, CHI. DAILY L. BULL., Apr. 28, 1994, at 1; David Heckelman, *Edgar Signs Bill to Allow Closed Circuit TV Testimony of Abused Children*, CHI. DAILY L. BULL., Sept. 10, 1991, at 3; *A Shield for Children is Pierced*, CHI. TRIB., Feb. 26, 1994, § 1, at 16 (Editorial); Michelle Stevens, *Child Witness Law Imperils Rights*, CHI. SUN TIMES, Nov. 14, 1994, at 31.

For a look at national headlines, see, *e.g.*, Clare Dyer, *The Child-Video Horror Story*, GUARDIAN, Feb. 15, 1994, at 19; Sandra Evans & Robert O'Harrow, Jr., *Young Victims of Sex Abuse Go Unheard: Civil Suits Become Increasingly Common*, WASH. POST, Mar. 15, 1992, at B1; Michael Granberry, *Case Illustrates Flaws in Child Abuse Trials*, L.A. TIMES, Nov. 29, 1993, at A3; Allan Levy, *Witness to Cruelty*, GUARDIAN, Apr. 26, 1994, at 17.

See generally John E.B. Myers, *The Child Sexual Abuse Literature: A Call for Greater Objectivity*, 88 MICH. L. REV. 1709, 1723-32 (1990) (discussing certain commentators' unfair criticism and mischaracterization of the judiciary's handling of child sexual abuse cases).

43. Recent legislation declares that the law furthers "the best interests of the child" and was passed in response to the decision in *In re* Doe, 638 N.E.2d 181 (Ill.), *cert. denied*, 115 S. Ct. 499 (1994) (better known as the "*Baby Richard* case"). See Uniform Interstate Family Support Act, Pub. Act No. 88-550, 1994 Ill. Legis. Serv. 381 (West), adding The Children and Family Services Act, ILL. COMP. STAT. ANN. ch. 20, § 505/7.2 (West 1994), as well as amending portions of the Adoption Act, ILL. COMP. STAT. ANN. ch. 750, §§ 50/8, 50/11, 50/20, and 50/20(a), among others.

Although the *Baby Richard* case involved an adoption dispute, the case forced child welfare issues into the spotlight and, thus, affected every area of child welfare law. Recognizing the importance of children and the law, the appellate court in the *Baby Richard* case stated:

> [T]he time has long past [*sic*] when children in our society were considered the property of their parents. Slowly, but finally, when it comes to children even the law has rid itself of the *Dred Scott* mentality that a human being can be considered a piece of property "belonging" to another human being. To hold that a child is the property of his parents is to deny the humanity of the child.
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> . . . *In an adoption, custody or abuse case, however, the child is the real party in interest.*

In re Doe, 627 N.E.2d 648, 651-52 (Ill. App. 1st Dist. 1993), *rev'd*, 638 N.E.2d 181 (Ill.), *cert. denied*, 115 S. Ct. 499 (1994) (emphasis added). The appellate court further noted that "[c]ourts are here to protect children—not victimize them." *Id.* at 654. For a detailed discussion of the *Baby Richard* case and the amendments to the Illinois Adoption Act passed by the General Assembly in response to the case, see Susan Swingle, Comment, *Rights of Unwed Fathers and the Best Interests of the Child: Can These Competing Interests be Harmonized? Illinois' Putative Father Registry Provides an Answer*, 26 LOY. U. CHI. L.J. 703 (1995). *See generally* JOSEPH GOLDSTEIN ET AL., BEFORE THE BEST INTERESTS OF THE CHILD (1979) (discussing what the law should require before the State decides a child's best interests); JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD (1973) (discussing the law of child placement); Clark, *supra* note 41, at 24.

courts have recently been challenged to decide the constitutionality of these statutes.

IV. CONSTITUTIONAL CHALLENGES TO CHILD PROTECTION LEGISLATION

The traditional right of confrontation dates back to at least Roman times.[44] After the fall of the Roman Empire, however, the conceptual right to confrontation disappeared until the jury system was established in sixteenth-century England.[45] The right to confront an accuser played a role in the United States' common law, but the right did not extend to face-to-face confrontation.[46] Instead, the right to confrontation was virtually indistinguishable from the right to cross-examination of a witness.[47]

The Sixth Amendment of the United States Constitution grants accused persons the right to confront their accusers and to cross-examine any witnesses against them.[48] Although the law prefers face-to-face confrontation, the United States Supreme Court posited that the primary purpose of the Sixth Amendment's Confrontation Clause is to guarantee the opportunity to cross-examine witnesses.[49] The Supreme Court recognizes that the right to face-to-face confrontation is not absolute,[50] and has, for instance, allowed hearsay statements made by

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44. For example, the Roman Emperor Trojan told the Governor of Bithynia that """anonymous accusations must not be admitted in evidence as against anyone, as it is introducing a dangerous precedent, and out of accord with the spirit of our times."'" Daniel J. Politt, *The Right of Confrontation: Its History and Modern Dress*, 8 J. Pub. L. 381, 384 (1959) (quoting JOHN L. O'BRIEN, NATIONAL SECURITY AND INDIVIDUAL FREEDOM 62 (1955) (quoting the Emperor)); *see also* Coy v. Iowa, 487 U.S. 1012, 1015-16 (1988) (tracing the Sixth Amendment right to confrontation back to Roman and English law).

45. 1 SIR WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 334 (7th ed. rev. 1956); *see also* Sir James F. Stephen, *Criminal Procedure from the Thirteenth to the Eighteenth Century*, *in* 2 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 485-528 (1908) (discussing the evolution of the jury system in England from 1554 to 1760).

46. *See* JOHN H. WIGMORE, 5 EVIDENCE § 1397, at 158 (J. Chadbourn rev. 1974), where Dean Wigmore stated:

> There was never at common law any recognized right to an indispensable thing called confrontation *as distinguished from cross-examination.* There *was* a right to cross-examination as indispensable, and that right was involved in and secured by confrontation; it was the same right under different names.

Id. For an analysis of this statement, see *Coy*, 487 U.S. at 1018 n.2.

47. *Coy*, 487 U.S. at 1018 n.2 (citing WIGMORE, *supra* note 46, § 1397, at 158).

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

49. Ohio v. Roberts, 448 U.S. 56, 63 (1980) (deciding the scope of the Confrontation Clause).

50. Dowdell v. United States, 221 U.S. 325, 330 (1911) (holding that accused need not be present when court issues order correcting the trial record).

unavailable declarants admitted into evidence.[51]

Recently, child shield statutes designed to protect child-victims from the trauma of testifying in court while facing the accused have been challenged in court. In the 1988 case of *Coy v. Iowa*,[52] the United States Supreme Court found unconstitutional a statute[53] which provided for a screen to shield a child-victim from her alleged abuser.[54] Troubled by the absence of a trial court hearing to determine the necessity of such a screen,[55] the Court held that the use of this screen violated the defendant's right to encounter the accuser face-to-face under the Confrontation Clause of the Sixth Amendment.[56] Nevertheless, the Court again refused to declare the right to face-to-face confrontation absolute.[57]

Two years later, in *Maryland v. Craig*,[58] the Court again faced the issue of the constitutionality of a child shield statute. This time, however, the Court expressly created an exception to face-to-face confrontation under the Sixth Amendment.[59] In *Craig*, a six-year-old

51. *Roberts*, 448 U.S. at 77.

52. 487 U.S. 1012 (1988).

53. The Iowa statute provided in pertinent part: "'The court may require a party be confined *[sic]* to an adjacent room or behind a screen or mirror that permits the party to see and hear the child during the child's testimony, but does not allow the child to see or hear the party.'" *Id.* at 1014 n.1 (alteration in original) (quoting IOWA CODE § 910A.14 (1987) (amended 1993)).

54. *Id.* at 1014-15. In *Coy*, the defendant sexually assaulted two teenage girls, who were camping in a tent. *Id.* During the attack, the defendant shined a flashlight in the girls' eyes and wore a stocking over his head. *Id.* At trial, the court allowed the prosecution to use a screen which, when lighted properly, would allow the defendant to dimly view the witness, but the witness would be unable to view the defendant. *Id.* The defendant objected. *Id.* The defendant was subsequently found guilty. *Id.* at 1015.

55. *Id.* at 1021.

56. *Id.* at 1015-22. While *Coy* originated in state court, the Sixth Amendment was implicated because of the Supreme Court's decision in Pointer v. Texas, which held that the accused's right to confront the witnesses against him was a fundamental right, and therefore applied to the States through the Fourteenth Amendment. 380 U.S. 400, 406 (1965).

57. *Coy*, 487 U.S. at 1021. The Court stated: "We leave for another day, however, the question whether any exceptions exist." *Id.* In a concurring opinion, Justice O'Connor furthered her support for child-witness protection, stating: "I wish to make clear that nothing in today's decision necessarily dooms such efforts by state legislatures to protect child witnesses." *Id.* at 1023 (O'Connor, J., concurring).

In fact, the Court implied that an exception to face-to-face confrontation would be created only if: (1) state legislation provided for an individualized determination that the child would be harmed if required to testify in the defendant's presence; (2) the legislation furthered an important public policy; and (3) the State did not abrogate the defendant's right to cross-examine the witness. *Id.* at 1023-25 (O'Connor, J., concurring).

58. 497 U.S. 836 (1990).

59. *Id.* at 860.

child-victim testified via a one-way closed-circuit television camera.[60] This method of testimony was authorized by a Maryland statute, which permitted shielded testimony in cases where courtroom testimony would result in "serious emotional distress such that the child cannot reasonably communicate."[61]

Reiterating the purpose of the Confrontation Clause, the Court stressed that it was designed to ensure the reliability of evidence against a criminal defendant by subjecting the evidence to rigorous

60. *Id.* at 840-43. The prosecutor charged the defendant with child abuse, first and second degree sexual offenses, perverted sexual practices, and assault and battery, which took place during the operation of a kindergarten and pre-kindergarten center owned by the defendant. *Id.* at 840. The State sought to use the methods prescribed in the state's child-victim protection statute. *Id.*

61. *Id.* at 842 (quoting MD. CODE ANN., CTS. & JUD. PROC. § 9-102(a)(1)(ii) (1989) (amended 1992)). The Maryland statute provided:

> (a)(1) In a case of abuse of a child as defined in § 5-701 of the Family Law Article or Article 27, § 35A of the Code, a court may order that the testimony of a child victim be taken outside the courtroom and shown in the courtroom by means of a closed circuit television if:
>
> (i) The testimony is taken during the proceeding; and
>
> (ii) The judge determines that testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate.
>
> (2) Only the prosecuting attorney, the attorney for the defendant, and the judge may question the child.
>
> (3) The operators of the closed circuit television shall make every effort to be unobtrusive.
>
> (b)(1) Only the following persons may be in the room with the child when the child testifies by closed circuit television:
>
> (i) The prosecuting attorney;
>
> (ii) The attorney for the defendant;
>
> (iii) The operators of the closed circuit television equipment; and
>
> (iv) Unless the defendant objects, any person whose presence, in the opinion of the court, contributes to the well-being of the child, including a person who has dealt with the child in a therapeutic setting concerning the abuse.
>
> (2) During the child's testimony by closed circuit television, the judge and the defendant shall be in the courtroom.
>
> (3) The judge and the defendant shall be allowed to communicate with the persons in the room where the child is testifying by any appropriate electronic method.
>
> (c) The provisions of this section do not apply if the defendant is an attorney pro se.
>
> (d) This section may not be interpreted to preclude, for purposes of identification of a defendant, the presence of both the victim and the defendant in the courtroom at the same time.

MD. CODE ANN., CTS. & JUD. PROC. § 9-102 (1989) (amended 1992). For a detailed description of the § 9-102 procedure, see Wildermuth v. State, 530 A.2d 275, 278-79 (Md. 1987), which was overruled by the 1992 amendment.

testing in the context of an adversary proceeding before the trier of fact.[62] The Court found that the statute conformed with the majority of the component parts of the Confrontation Clause, which include: (1) face-to-face confrontation; (2) testimony under oath; (3) cross-examination; and (4) observation of the witness' demeanor while testifying.[63] While face-to-face confrontation is preferred, the Court recognized that it may be denied where it is "'necessary to further an important public policy.'"[64] The Court recognized that states have a compelling interest in protecting minor victims of sex crimes from further embarrassment and trauma.[65] Accordingly, the Court found that the physical and psychological well-being of a child-abuse victim was important enough to create an exception to a defendant's right to face-to-face confrontation.[66]

Congress capitalized on the opportunity afforded by the *Craig* Court by enacting the Child Victims' and Child Witnesses' Rights (the "CVCWR") statute.[67] The CVCWR statute provides for testimony of a child witness to be taken via two-way closed-circuit television or videotaped depositions.[68] In addition to providing that a child is to be presumed competent,[69] the CVCWR statute protects the child's privacy, keeps all information concerning the child confidential, and allows judges to close their courtrooms at their discretion.[70]

By setting certain guidelines for the future, the Court's decision in *Craig* also opened the door for states to enact child shield laws to

62. *Craig*, 497 U.S. at 846. For other comments by the Court on the purpose of the Confrontation Clause, see, *e.g.*, *Roberts*, 448 U.S. at 64-65; *Dowdell*, 221 U.S. at 330; Kirby v. United States, 174 U.S. 47, 55 (1899); *Mattox*, 156 U.S. at 242-43.

63. *Craig*, 497 U.S. at 845-46. The Court's opinion rests on the reliability of the statute in protecting the defendant's rights under the component parts of the Confrontation Clause, while recognizing that both the defendant's rights and the protection of the child comprise important public policy issues.

64. *Id.* at 845 (quoting *Coy*, 487 U.S. at 1021).

65. *Id.* at 856-57; *see supra* notes 37-40 and accompanying text.

66. *Craig*, 497 U.S. at 853.

67. 18 U.S.C.A. § 3509 (Supp. 1995).

68. *Id.* § 3509(b).

69. *Id.* § 3509(c)(2). For the differences on this presumption among lower courts, see *supra* part III.

70. 18 U.S.C.A. § 3509(d), (e). For constitutional challenges to the CVCWR statute, see United States v. Garcia, 7 F.3d 885, 888 (9th Cir. 1993) (holding that the intent of Congress in enacting the CVCWR statute is consistent with the constitutional standard approved by the *Craig* Court, regardless of minor distinctions in the language); United States v. Carrier, 9 F.3d 867, 870 (10th Cir. 1993) (noting the differences between the CVCWR statute and the *Craig* requirements), *cert. denied*, 114 S. Ct. 1571 (1994); United States v. Farley, 992 F.2d 1122, 1124-25 (10th Cir. 1993) (finding that the trial court satisfied the procedural requirements of the statute and the constitutional requirements of *Craig*).

protect minor witnesses. Post-*Craig* statutes must provide that the State show the following: (1) that the use of one-way closed-circuit television is required to protect the welfare of the child witness;[71] (2) that the defendant, and not the courtroom, would be the cause of any trauma to the child; and (3) that the State is furthering an important public policy.[72]

Approximately one year after the Court's decision in *Craig*, the Illinois General Assembly enacted the Illinois Child Shield Act of 1991.[73] This law protected child-victim witnesses in sexual abuse cases by providing for the use of closed-circuit television and for contemporaneous cross-examination outside of the defendant's presence; thus appearing almost identical to the law upheld in *Craig*.[74] In 1994,

71. *Craig*, 497 U.S. at 856. This guideline was developed in 1987 by the Maryland Supreme Court, when it suggested that "testimony about the likely impact on the child testifying must be definite, related to the statutory standard, and specific to the potential child witness him or herself." *Wildermuth*, 530 A.2d at 289. *See generally* Kimberly Seals Bressler, *Balancing the Right to Confrontation and the Need to Protect Child Sexual Abuse Victims: Are Statutes Authorizing Televised Testimony Serving Their Purpose?*, 12 U. PUGET SOUND L. REV. 109, 114-20 (1988) (discussing *Wildermuth* and the relationship between televised testimony and hearsay).

72. *Craig*, 497 U.S. at 855-56. It should be noted that the Court solely focused on the emotional trauma and not the inability of the child to reasonably communicate at trial. *Id.* By not including this as a prerequisite necessary for the procedure, the Court gave trial courts the flexibility necessary to protect child-victims under a lesser showing of facts. *Id.* at 856.

The drafters of the Uniform Rules of Evidence also focused only on the emotional trauma of the child, by requiring that the court make a preliminary finding of a substantial likelihood that the child would suffer severe harm if required to testify in open court. UNIF. R. EVID. 807(d), 13B U.L.A. 602-03 (1994). In an explanation of this requirement, the drafters stated:

> This standard is intended to require more than a showing of mere distress on the part of a child who is faced with the prospect of testifying. . . . The court is in an adequate position to assess the surrounding circumstances and to form a judgment concerning the likely effect of live testimony in open court on the minor without expert assistance. . . .
>
> . . . [T]he court should consider such factors as the age of the minor, the minor's physical and mental condition, the relationship between the minor and the parties, the nature of the acts about which the minor is to testify, [and] the nature of the proceeding . . . .

UNIF. R. EVID. 807, cmt. to 1986 amendment, 13B U.L.A. 603-04 (1994) (citations omitted).

73. ILL. COMP. STAT. ANN. ch. 725, § 5/106B-1 (West 1992) (repealed 1994) (replaced by ILL. COMP. STAT. ANN. ch. 725, § 5/106B-5 (West Supp. 1995)).

74. *See supra* notes 58-66 and accompanying text.

however, the Illinois Supreme Court held in *People v. Fitzpatrick*[75] that the Child Shield Act violated the Illinois Constitution.

In *Fitzpatrick*, prosecutors charged the defendant with seven counts of aggravated criminal sexual assault against his four minor grandchildren.[76] The State moved to have the children testify via closed-circuit television, pursuant to the Child Shield Act.[77] The defense challenged the constitutionality of the statute, which permitted testimony by closed-circuit television, because the Act would not allow the defendant to meet the witnesses face-to-face.[78] The trial court barred the use of the closed-circuit television,[79] and the Illinois Supreme

75. 633 N.E.2d 685, 688-89 (Ill. 1994). For a thorough discussion of the facts of People v. Fitzpatrick and the Illinois General Assembly's response, see Thomas Conklin, Note, People v. Fitzpatrick: *The Path to Amending the Illinois Constitution to Protect Child Witnesses in Criminal Sexual Abuse Cases*, 26 LOY. U. CHI. L.J. 321 (1995).

76. *Fitzpatrick*, 633 N.E.2d at 686.

77. *Id.* The State argued that the children "would suffer serious emotional or other severe adverse effects, or might be unable to reasonably communicate, absent an order allowing their testimony to be presented solely by closed-circuit television." *Id.*

Alternatively, the State could have moved for the court to allow the admission of the children's hearsay statements without requiring the children to testify. A child may be considered unavailable under Illinois rules of evidence, when the child would suffer sufficient trauma to render him unable to speak or communicate. People v. Rocha, 547 N.E.2d 1335, 1340 (Ill. App. 2d Dist. 1989) (discussing the application of ILL. REV. STAT. ch. 38, para. 115-10 (1987) (current version at ILL. COMP. STAT. ANN. ch. 725, § 5/115-10 (West 1992 & Supp. 1994))).

Just 15 years ago, only four states admitted child hearsay testimony outside of the spontaneous declaration exception in Rule 803(2) of the Federal Rules of Evidence. Robert G. Marks, Note, *Should We Believe the People Who Believe the Children?: The Need for a New Sexual Abuse Tender Years Hearsay Exception Statute*, 32 HARV. J. ON LEGIS. 207, 212 n.21 (1995); *see* FED. R. EVID. 803(2) (allowing statements "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."); *see also* KAN. STAT. ANN. § 60-460(dd) (1994) (creating an exception for children of tender years); WASH. REV. CODE ANN. § 9A.44.120 (West 1988 & Supp. 1995) (creating an exception for children under ten years of age); WIS. STAT. ANN. §§ 908.03(24), 908.045(6) (West 1993) (using residual hearsay exceptions); MICH. COMP. LAWS ANN. § 600.2163 (West 1986) (creating exception for children under ten years of age who are describing a sexual act). *See generally* Marks, *supra* (analyzing the state rules which admit hearsay in child sexual abuse cases).

In 1986, the drafters of the Uniform Rules of Evidence adopted a hearsay exception designed to allow the admittance of statements by minors under age twelve who were physically or sexually assaulted, if the State shows that: "(i) there is a substantial likelihood that the minor will suffer severe emotional or psychological harm if required to testify in open court; [and] (ii) the time, content, and circumstances of the statement provide sufficient circumstantial guarantees of trustworthiness . . . ." UNIF. R. EVID. 807(a), 13B U.L.A. 602 (1994). As of the date of the 1986 amendment, more than twenty states had adopted special hearsay exceptions similar to the Model rule. *Id.* R. 807 cmt. to 1986 amendment, 13B U.L.A. at 603.

78. *Fitzpatrick*, 633 N.E.2d at 686.

79. *Id.*

Court upheld the trial court's finding that the Child Shield Act violated the defendant's constitutional right to meet the witnesses face-to-face.[80] Essentially, the *Fitzpatrick* court held that the Illinois Constitution[81] provided defendants with greater rights than the Federal Confrontation Clause,[82] and thus the defendant had the express and unqualified right to face-to-face confrontation.[83]

Enraged legislators quickly drafted an amendment to negate the effects of *Fitzpatrick*,[84] and to bring the Illinois Constitution in line with the Federal Constitution.[85] The amendment sparked debates over whether the need to protect child-victim witnesses was so great as to

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80. *Id.* at 688-89. In reaching this conclusion, the *Fitzpatrick* court found the result reached by the United States Supreme Court in Maryland v. Craig to be inapplicable, because the Illinois Constitution expressly mandated face-to-face confrontation while the Federal Constitution made no such guarantees. *Id.*

The face-to-face language had been part of the Bill of Rights section of the Illinois Constitution since its adoption in 1818. *See* ILL. CONST. of 1818, art. VIII, § 9, *reprinted in* STATUTES OF ILLINOIS 27 (Eugene L. Gross ed., 3d ed. 1871). Although the exact words contained in the Illinois and Federal Confrontation Clauses are different, the delegates at the Constitutional Convention of 1970 discussed the differences and at least expressed the belief that the two clauses were meant to protect the same interests. 3 RECORD OF PROCEEDINGS OF THE SIXTH ILLINOIS CONSTITUTIONAL CONVENTION 1373 (1972) [hereinafter 3 RECORD].

81. ILL. CONST. of 1970, art. I, § 8 (amended 1994). The Constitution provided in pertinent part:

> In criminal prosecutions, the accused shall have the right to appear and defend in person and by counsel; to demand the nature and cause of the accusation and have a copy thereof; *to meet the witnesses face to face* . . . .

Id. (emphasis added).

82. The United States Constitution provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . *to be confronted with the witnesses against him* . . . ." U.S. CONST. amend. VI (emphasis added).

83. *Fitzpatrick*, 633 N.E.2d at 687-88. A few states have held that their state constitutions provide no greater protection than the Federal Constitution. *See, e.g.*, Hill v. State, 366 So. 2d 318-22 (Ala. 1979) (discussing the federal and state constitutional rights against self-incrimination); McCrory v. State, 342 So. 2d 897, 900-01 (Miss. 1977) (interpreting the federal and state rights against self-incrimination). The majority of states posit that their state constitutions can provide greater protection of civil liberties than the United States Constitution. *See, e.g.*, Bierkamp v. Rogers, 293 N.W.2d 577, 577-79 (Iowa 1980) (discussing the federal and state equal protection clauses); People v. Hoshowski, 310 N.W.2d 228, 229-30 (Mich. Ct. App. 1981) (extending *Miranda* rights); State v. Flores, 570 P.2d 965, 968 (Or. 1977) (en banc) (holding that Oregon may adopt stricter constitutional protections than the Federal Constitution provides). For a list of states with the majority view, see People v. Tisler, 469 N.E.2d 147, 164 (Ill. 1984) (Clark, J., concurring).

84. GEORGE H. RYAN, SECRETARY OF STATE, STATE OF ILLINOIS, PROPOSED AMENDMENTS TO THE CONSTITUTION OF ILLINOIS (1994).

85. In fact, the delegates to the 1970 Convention proposed an amendment to bring the Illinois Confrontation Clause in line with the Federal Confrontation Clause, but voted to retain the original wording simply because they "liked" it. 3 RECORD, *supra* note 80, at 1373.

warrant a change in the state constitution.[86] On November 8, 1994, popular opinion prevailed as Illinois voters ratified the constitutional amendment.[87] The amendment changed the "face to face" language in the Illinois Constitution to the "right to be confronted" by a witness language of the United States Constitution.[88] One month later, the Illinois General Assembly amended the portion of the code of criminal procedure which provides protection for child witnesses,[89] by adding a

86. *See supra* note 42.

87. For a criticism of these types of statutes, see Jacqueline M. Beckett, *The True Value of the Confrontation Clause, A Study of Child Sex Abuse Trials*, 82 GEO. L.J. 1605 (1994). *See also Craig*, 497 U.S. at 868 (Scalia, J., dissenting) (noting that studies indicate that "children are substantially more vulnerable to suggestion than adults, and often unable to separate recollected fantasy (or suggestion) from reality.").

88. *See* Michelle Stevens, *Child Witness Law Imperils Rights*, CHI. SUN TIMES, Nov. 14, 1994, at 31.

89. ILL. COMP. STAT. ANN. ch. 725, § 5/106B-5 (West Supp. 1995). In 1994, the General Assembly repealed the earlier version of the statute, § 5/106B-1, and replaced it with § 5/106B-5. Act of Dec. 14, 1994, Pub. Act No. 88-674, 1994 Ill. Legis. Serv. 2664 (West). Section 5/106B-5 provides:

> (a) In a proceeding in the prosecution of an offense of criminal sexual assault, aggravated criminal sexual assault, criminal sexual abuse, or aggravated criminal sexual abuse, a court may order that the testimony of a child victim under the age of 18 years be taken outside the courtroom and shown in the courtroom by means of a closed circuit television if:
>
> (1) the testimony is taken during the proceeding; and
>
> (2) the judge determines that testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate or that the child will suffer severe emotional distress that is likely to cause the child to suffer severe adverse effects.
>
> (b) Only the prosecuting attorney, the attorney for the defendant, and the judge may question the child.
>
> (c) The operators of the closed circuit television shall make every effort to be unobtrusive.
>
> (d) Only the following persons may be in the room with the child when the child testifies by closed circuit television:
>
> (1) the prosecuting attorney;
>
> (2) the attorney for the defendant;
>
> (3) the judge;
>
> (4) the operators of the closed circuit television equipment; and
>
> (5) any person or persons whose presence, in the opinion of the court, contributes to the well-being of the child, including a person who has dealt with the child in a therapeutic setting concerning the abuse, a parent or guardian of the child, and court security personnel.
>
> (e) During the child's testimony by closed circuit television, the defendant shall be in the courtroom and shall not communicate with the jury if the cause is being heard before a jury.
>
> (f) The defendant shall be allowed to communicate with the persons in the room where the child is testifying by any appropriate electronic method.
>
> (g) The provisions of this Section do not apply if the defendant represents

paragraph to make the statute applicable to all prosecutions pending or commenced after the effective date of the amendment.[90] The protection for child-victims who are required to testify was thus reinstated.

V. EFFECTS OF THE NEW LAW

Although intended to protect child witnesses, the new Illinois law is narrowly drafted and its effectiveness is diminished in many ways. Most importantly, the law limits protection to child-victims in sexual assault or abuse cases.[91] Although the statute is designed to protect sexually assaulted or abused children from the devastating effects of facing the accused while testifying, a number of other offenses, such as aggravated battery, kidnapping, cruelty to children, and domestic battery, can be just as damaging to a testifying child.[92] Thus, if a father is being prosecuted for domestic battery of the child's mother and the child is called to testify, the child does not receive any consideration under the statute, even though the child witness in the domestic battery case may be just as emotionally traumatized as a child-victim in a sexual assault or abuse case.

Additionally, the new law limits the method of protection for the child witness to the use of a closed-circuit television and restricts the manner of use of the television.[93] Some states permit one-way screens as an alternative to closed-circuit television,[94] while others use two-

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himself pro se.

(h) This Section may not be interpreted to preclude, for purposes of identification of a defendant, the presence of both the victim and the defendant in the courtroom at the same time.

(i) This Section applies to prosecutions pending on or commenced on or after the effective date of this amendatory Act of 1994.

ILL. COMP. STAT. ANN. ch. 725, § 5/106B-5.

90. *Id.* § 5/106B-5(i).

91. *See id.* § 5/106B-5(a).

92. *See supra* notes 37-40 and accompanying text. By way of contrast, Indiana is one state which allows the use of closed-circuit testimony in cases extending beyond sex crimes to include battery upon a child, kidnapping and confinement, incest, and neglect of a dependant. *See* IND. CODE ANN. § 35-37-4-8 (West 1986 & Supp. 1994). For a discussion of Indiana's child shield statute, see John P. Serketich, *A Conflict of Interests: The Constitutionality of Closed-Circuit Television in Child Sexual Abuse Cases*, 27 VAL. U. L. REV. 217 (1992). The Uniform Rules of Evidence extend even further to allow closed-circuit testimony of not only minor victims but also minor witnesses of sexual conduct or physical violence. UNIF. R. EVID. 807(d), 13B U.L.A. 602-03 (1994).

93. *See* ILL. COMP. STAT. ANN. ch. 725, § 5/106B-5(a)-(e).

94. In her concurring opinion in Coy v. Iowa, Justice O'Connor suggested that a screen might have been appropriate had the trial court held a hearing to determine the necessity of the procedure to protect the welfare of the child. 487 U.S. 1012, 1022-25 (1988) (O'Connor, J., concurring).

way closed-circuit television and video taped depositions.[95] Alternatively, some defense attorneys suggest that the court remove the defendant to a separate room instead of the child, thus allowing the jury to observe the child testifying. This suggestion should be seriously considered, because a child testifying in chambers in front of a closed-circuit television may not exhibit certain body language that the jury would otherwise observe. The lack of body language may add to the credibility of the child's testimony, because the child appears relaxed. On the other hand, the child may exhibit a false sense of confidence, which the jury could misinterpret as a lack of credibility. The presence of the child in front of the jury, outside the presence of the defendant, probably provides the most realistic conditions for the fact-finding process.

Next, the new law requires that the child face the accused in court for purposes of identification.[96] Many child advocates and victims' groups posit that the most devastating effect on the child often occurs when the child simply sees the accused in person for the first time in court. In many cases, however, the most devastating effect occurs when the child must point the final finger to identify the defendant, who is often a parent or caretaker.[97] The identification process thus adds to the feeling of helplessness that a child experiences in court.

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95. *See* ALA. CODE § 15-25-3 (Supp. 1994) (closed-circuit equipment); ALASKA STAT. § 12.45.046 (Supp. 1994) (allowing the use of one-way mirrors or closed-circuit television); ARIZ. REV. STAT. ANN. § 13-4253 (1989) (allowing use of one-way mirror, screen or videotape); CONN. GEN. STAT. ANN. § 54-86g (West 1994) (screen or closed-circuit television); FLA. STAT. ANN. § 92.54 (West Supp. 1995) (closed-circuit television); GA. CODE ANN. § 17-8-55 (1990 & Supp. 1994) (closed-circuit television); IND. CODE ANN. § 35-37-4-8 (West 1986 & Supp. 1994) (closed-circuit television or videotape); IOWA CODE ANN. § 910A.14 (West 1994 & Supp. 1994) (closed-circuit television or videotape); KAN. STAT. ANN. § 38-1558 (1993) (closed-circuit television or recording); KY. REV. STAT. ANN. § 421.350 (Baldwin 1992) (closed-circuit television or recording); LA. REV. STAT. ANN. § 15:283 (West 1992) (closed-circuit television); MD. CODE ANN., CTS. & JUD. PROC. § 9-102 (1989 & Supp. 1994) (closed-circuit television); MASS. ANN. LAWS ch. 278, § 16D (Law Co-op 1992) (film, videotape, or simultaneous transmission); MINN. STAT. ANN. § 595.02 (West 1988 & Supp. 1995) (closed-circuit television or videotape); MISS. CODE ANN. § 13-1-405 (Supp. 1994) (closed-circuit television); N.J. STAT. ANN. § 2A:84A-32.4 (West 1994) (closed-circuit television); OKLA. STAT. ANN. tit. 10, § 1148 (West 1987) (closed-circuit television or recording); OR. REV. STAT. § 40.460(24) (1988 & Supp. 1994) (closed-circuit television); 42 PA. CONS. STAT. §§ 5984, 5985 (Supp. 1994) (videotaped deposition and closed-circuit television); R.I. GEN. LAWS § 11-37-13.2 (1994) (videotape or closed-circuit television); TEX. CRIM. PROC. CODE ANN. art. 38.071, § 3 (West Supp. 1995) (closed-circuit television); UTAH R. CRIM. P. 15.5 (closed-circuit television); VT. R. EVID. 807(d), (e) (closed-circuit television or recording).

96. *See* ILL. COMP. STAT. ANN. ch. 725, § 5/106B-5(h).

97. *See supra* notes 37-40 and accompanying text.

While testifying, the child will frequently focus on the attorney, a friendly face, or an object in the courtroom. This focus allows the child to relate his or her entire testimony, albeit nervously. As soon as the need arises for the testifying child to focus on and to identify the defendant, however, the child transforms into complete helplessness. The child may revert to infantile behavior, such as thumb-sucking or sitting in the fetal position, and will display an intense vulnerability. While the identification of the accused is a necessary part of the State's case, some other method of identification must be developed to adequately safeguard the child's emotional well-being. Otherwise, it appears that a court may have to emotionally devastate a child to obtain the child's testimony. Accordingly, courts and legislators must carefully scrutinize the alternative identification issue in the future.

Moreover, if a defendant decides to proceed pro se, the new law renders the entire closed-circuit television procedure inapplicable.[98] Thus, a defendant may attempt to become pro se in order to influence the manner in which the child will testify. This provision begs an equal protection[99] challenge. For example, a defendant who exercises the right to an attorney under the Sixth Amendment is not allowed to confront a child witness face-to-face, yet a pro se litigant will be allowed to confront a child witness face-to-face.

Finally, a case involving criminal sexual assault or abuse will likely be heard in both a juvenile and a criminal court. The two courts differ, however, on the standard used to determine the competency of a child witness. In juvenile court, the child is presumed competent to testify, although this presumption is rebuttable.[100] A criminal court will, however, make a de novo determination as to whether the child is competent, which is the same as a competency determination for an adult witness.[101] As a consequence, a child in juvenile court may testify regarding sexual abuse and thus show the need for intervention, while a criminal court may prevent that same child from testifying and thus allow the defendant to go free. With the shift in Illinois law towards an emphasis on the best interests of the child, such discrepancies should not prevent the child from testifying in criminal court. While the burdens of proof are different, perhaps the transcript

98. ILL. COMP. STAT. ANN. ch. 725, § 5/106B-5(g). This section provides: "The provisions of this Section do not apply if the defendant represents himself pro se." *Id.*

99. The United States Constitution provides in pertinent part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

100. ILL. COMP. STAT. ANN. ch. 705, § 405/2-18(4)(d).

101. *See supra* notes 24-28 and accompanying text.

of the proceeding in juvenile court should be used in the criminal case. This alternative method of testimony would protect the child-victim from facing the accused, while preserving the right to cross-examine the witness in the juvenile proceeding. While many other factors come into play, Illinois courts and legislators need to further examine these issues.

VI. CONCLUSION

As the number of child witnesses increase in direct correlation to the rising number of child abuse reports, emphasis must be placed on the unified treatment of all minor witnesses.[102] A definite need exists for a unified code of Illinois juvenile and child welfare laws that pertain to children as victims or as witnesses. As we approach the centennial of the Illinois Juvenile Court Act,[103] all the laws affecting children need and deserve a close and thorough examination by the Illinois General Assembly. In the process, lawmakers must work to maintain the delicate balance between protecting the child and protecting the substantive and procedural due process rights of the defendant.

Courts, too, must take an active role in matters concerning child witnesses. Trial judges must carefully exercise their discretion and consider a defendant's Sixth Amendment rights when deciding the competency of child witnesses and when permitting testimony via closed-circuit television. All parties are entitled to due process, but it is the judge's role to protect and to promote the welfare of children in the courtroom. Accordingly, whether it means removing their robes and sitting cross-legged on the floor with the child, or permitting testimony via closed-circuit television, judges must focus on "parent" and "defendant" through the eyes of a child. Judges could more effectively carry out this awesome responsibility if the child welfare laws comprised one unified and consistent body.[104]

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102. Recognizing this need in creating Rule 807, the drafters of the Uniform Rules of Evidence stated: "This rule takes the broad approach of extending the hearsay exception and alternative means of testifying (1) to minors who are witnesses as well as those who are victims of sexual conduct or physical violence, and (2) to those who are called to testify in civil as well as criminal proceedings." UNIF. R. EVID. 807 cmt. to 1986 amendment, 13B U.L.A. 604 (1994).

103. ILL. COMP. STAT. ANN. ch. 705, §§ 405/1-1 to 405/7-1 (West 1992 & Supp. 1995).

104. One commentator suggested that all delinquency cases should be tried in criminal court instead of juvenile court, and abuse and neglect cases should be tried in family courts along with domestic relation disputes. Jill S. Chanen, *Judging the Juvenile Justice System: Is Our Legal System Guilty of Not Putting Children First?*, BARRISTER, Winter 1995, at 15, 17-18.

If Illinois is truly concerned with the best interests of the child, the General Assembly must devise additional protections and safeguards within the written law. Courts, attorneys, and legislators must understand that they hold the power to make these changes a reality for the children who need these changes the most.