Spring 1986

Abandoning Trial by Ordeal: Missouri’s New Videotaping Statute

Colly J. Frissell-Durley

Follow this and additional works at: https://scholarship.law.missouri.edu/mlr

Part of the Law Commons

Recommended Citation
Available at: https://scholarship.law.missouri.edu/mlr/vol51/iss2/4

This Comment is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Missouri Law Review by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact bassettcw@missouri.edu.
COMMENTS

ABANDONING TRIAL BY ORDEAL: MISSOURI'S NEW VIDEOTAPING STATUTE

'There oft are heard the tones of infant woe'
'The short thick sob, loud scream, and shriller squall.'

Alexander Pope

I. INTRODUCTION

The problem of child sexual abuse is one of alarming dimensions.¹ Media coverage has led not only to an increased awareness of the pervasive nature of the problem² but also to an understanding of the inherent difficulties in developing meaningful solutions.³ The tragedy of child abuse lies not only in the physical acts committed against the child, but also in the potential long term psychological harm which frequently occurs.⁴ Unfortunately, it is often the societal and legal responses to the abuse which create longer and

---

1. Statistical reports on the number of sexually abused children vary considerably. One weekly magazine estimated that the number of children who are sexually abused range from 100,000 to 500,000 per year. Watson, Lubenow, Greenberg, King & Junkin, A Hidden Epidemic, Newsweek, May 14, 1984, at 30. Most agree that incidents of child abuse are underreported. See Note, The Constitutionality of the Use of Two-Way Closed Circuit Television to Take Testimony of Child Victims of Sex Crimes, 53 FORDHAM L. REV. 995, 996 (1985). Recently, however, there has been a significant increase in the reporting of sexual abuse cases. According to a study by the National Committee for the Prevention of Child Abuse, Missouri had a 100% increase in reported cases. Child Abuse Reports Soar, L.A. Times, Feb. 17, 1985, at 2, col. 1.

2. The McMartin preschool case, which arose in the fall of 1983 in Manhattan Beach, California, is an example of the intense publicity which has recently surrounded child sexual abuse cases.


more severe psychological problems for these children than the abuse itself. frequently the criminal justice system is responsible for contributing to the trauma a child may experience. the young victim is asked to explain confusing, embarrassing, and terrifying details of the abuse perpetrated against her. in many cases the child must participate in numerous interrogations; in extreme cases the child may be interviewed and cross-examined up to fifteen times before reaching trial. many believe this repeated recollection of the abuse may cause significant harm. finally, the child must testify in an intimidating courtroom, face the accused, and again recite the events of the abuse.

described as “legal process trauma,” this additional stress can be devastating to both the child and the success of the prosecution. parents, for example, frequently withdraw their children from litigation to protect

5. psychologists agree that the victim’s treatment after the discovery of the offense may lead to more trauma than the offense itself. according to one study, the victims of sexual abuse who were involved in criminal proceedings had a much longer recovery time than those victims who were not so involved. see j. bulkley & h. davidson, child sexual abuse: legal issues and approaches 3-4 (1982); libai, the protection of the child victim of a sexual offense in the criminal justice system, 15 wayne l. rev. 977, 980-81 (1969); parker, the rights of child witnesses: is the court a protector or perpetrator?, 17 new eng. l. rev. 643, 643-53 (1982); comment, child witnesses in sexual abuse criminal proceedings: their capabilities, special problems and proposals for reform, 13 pepperdine l. rev. 157, 164 (1985).

6. in most jurisdictions, the youngster will be questioned by police and the prosecuting attorney and must testify at preliminary and grand jury hearings before ever reaching trial. see note, supra note 1, at 1001 n.25. in one case, a child was examined and cross-examined for over fourteen hours. j. bulkley & h. davidson, supra note 5, at 4. one solution used in seattle, washington is to interview the child in the attorney’s interviewing room which is filled with books, toys, and games. the idea is to make the child comfortable. parents and other interested parties can observe the interview through a two-way mirror. see meyers, little witnesses, student law., sept. 1982, at 14, 50.

7. see girdner, out of the mouths of babes, cal. law., june 1985, at 57, 59.

8. see haas, the use of videotape in child abuse cases, 8 nova l.j. 373, 373 (1984).

9. see libai, supra note 5, at 1014; parker, supra note 5, at 651-53; comment, confronting child victims of sex abuse: the unconstitutionality of the sexual abuse hearsay exception, 7 u. puget sound l. rev. 387, 387 (1984).

10. see libai, supra note 5, at 984; parker, supra note 5, at 651; note, supra note 1, at 1001.

11. psychologist david libai used the phrase “legal process trauma” to describe the impact on child victims of sexual abuse who participate in criminal proceedings. see libai, supra note 5, at 983.

12. not all agree that children suffer additional stress from testifying. see, berliner, the child witness: the progress and emerging limitations in papers from a national policy conference on legal reforms in child sexual abuse 93, 102 (1985). (“[t]here is no reliable evidence to conclude that children in general cannot testify effectively in court or that they are universally traumatized by the experience. in fact the opposite seems to be true.”).
them from further trauma. In cases where the parents and child agree to participate, the trauma of the abuse may heighten problems usually associated with child witnesses. Reliable, competent testimony of a child witness is often difficult to obtain, but in a sexual abuse case the child may become even more withdrawn and uncooperative, more forgetful, and more easily confused. This is a crucial problem in sexual abuse cases since the child is normally the only witness to the crime; consequently the child’s testimony may be the only basis for prosecution. Until recently the legal system was ill-equipped to deal with the special problem of children who were victims of sexual abuse. Recognition of this problem, however, has led to a host of reforms designed to facilitate prosecution and to protect the children who must testify at trial. These reforms include an expanded hearsay exception, a presumption of competency, use of closed circuit

14. See Meyers, supra note 6, at 16 (child may combine fact and imagination); Comment, Evidentiary Problems in Criminal Child Abuse Prosecutions, 63 GEO. L.J. 257, 267-68 (1974) (testimony by child may be influenced by parents); Note, supra note 1, at 997-98.
15. The problem of whether a child is competent to testify is a separate issue. Missouri, which normally applies the presumption that a child who is above the age of ten is competent, Mo. REV. STAT. § 491.060 (Supp. 1985), has recognized the need for a child’s testimony in sexual abuse cases by adopting an exception for these cases. See C.R.K. v. H.J.K., 672 S.W.2d 696, 699 (Mo. Ct. App. 1984). See generally Melton, Children’s Competency to Testify, 5 LAW AND HUM. BEHAV. 73 (1981) (discussion of competency).
16. See Note, supra note 3, at 807.
19. The following statutes set up the presumption of competency: Arizona: ARIZ. REV. STAT. ANN. § 12-2202 (1982); Arkansas: ARK. R. EVID. 601; Colorado:
television,²⁰ and provisions for videotaping.²¹ Missouri has joined in this


In addition to these statutes, a number of alternative proposals have been suggested. These include a tender years exception to the rule against hearsay, see Note, A Tender Years Doctrine for the Juvenile Courts: An Effective Way to Protect the Sexually Abused Child, 61 U. Det. J. Urb. L. 249 (1984); closure of the courtroom, see Parker, supra note 5; an integrated statutory scheme combining hearsay and videotaping statutes, see Note, supra note 3; exclusion of spectators, see Whitcomb, Assisting Child Victims in the Courts: The Practical Side of Legislative Reform in PAPERS FROM A NATIONAL POLICY CONFERENCE ON LEGAL REFORMS IN CHILD SEXUAL ABUSE CASES 13, 17 (1985) (at least twenty states have passed laws barring some portion of the audience from the courtroom during the testimony of a sexual abuse victim). Some courts allow the defendant to be hidden from the child's view, State v. Strable, 313 N.W.2d 497 (Iowa 1981); others have held such a procedure violates the defendant's right of confrontation. Herbert v. Superior Court, 117 Cal. App. 3d 661, 172
movement, and in July 1985 the 83rd General Assembly passed the "Child Victim Witness Protection Law" which permits the use of videotaped testimony.22

Cal. Rptr. 850 (1981). In Los Angeles County Dependency Court young victims of abuse are shown a short film entitled, "Hey, What Am I Doing Here?", which was designed to explain what happens during trial. Meyers, supra note 6, at 15.

22. Mo. Rev. Stat. § 491.675-693 (1986). The statute in full provides: 491.675. Citation of sections 491.675 to 491.693 The provisions of sections 491.675 to 491.693 shall be known and may be cited as the "Child Victim Witness Protection Law."

491.678. Child defined For purposes of sections 491.675 to 491.693, the term "child" means a person under seventeen years of age who is the alleged victim in any criminal prosecution under chapter 565, 566 or 568, RSMo.

491.680. Court may order video recording of alleged child victim, when—procedure—transcript of testimony—cross-examination

1. In any criminal prosecution under the provisions of chapter 565, 566 or 568, RSMo, involving an alleged child victim, upon the motion of the prosecuting attorney, the court may order that an in-camera videotaped recording of the testimony of the alleged child victim be made for use as substantive evidence at preliminary hearings and at trial.

2. In determining whether or not to allow such motion, the court shall consider the elements of the offense charged and the emotional or psychological trauma to the child if required to testify in open court or to be brought into the personal presence of the defendant. Such recording shall be retained by the prosecuting attorney and shall be admissible in lieu of the child's personal appearance and testimony at preliminary hearings and at trial, conflicting provisions of section 544.270, RSMo, notwithstanding.

A transcript of such testimony shall be made as soon as possible after the completion of such deposition and shall be provided to the defendant together with all other discoverable materials.

3. The court shall preside over the depositions, which shall be conducted in accordance with the rules of evidence applicable to criminal cases.

4. The attorney for the defendant shall have at least two opportunities to cross-examine the deposed alleged child victim; once prior to the preliminary hearing and at least one additional time prior to the trial.

5. Prior to the taking of the deposition which is to be used as substantive evidence at the trial pursuant to sections 491.675 to 491.693, the defendant's attorney shall be provided with such discoverable materials and information as the court may, on motion, direct; shall be afforded a reasonable time to examine such materials; and shall be permitted to cross-examine the child during the deposition.

6. If the defendant is not represented by counsel and if, upon inquiry, it appears to the court that the defendant will be unable to obtain counsel within a reasonable period of time, the court shall appoint the public defender or other counsel to represent the defendant at the deposition.

491.685. Defendant may be excluded from child victim deposition proceedings, when

1. On motion of the prosecuting attorney, the court may exclude the defendant from any or all deposition proceedings at which the child is to testify. However, where any such order of exclusion is entered, the child shall not be excused as a witness until the defendant has had a reasonable opportunity to review the videotape recording in private with his counsel and to consult
Missouri's statute provides that the court may order an in-camera videotaped recording\(^{23}\) of a child\(^{24}\) who is a victim of a crime.\(^{25}\) The statute instructs the court to look at the elements of the offense charged and the emotional or psychological trauma the child would suffer if required to testify in court or be brought in the presence of the defendant.\(^{26}\) The court has the power to exclude the defendant from the deposition proceedings\(^{27}\) and may sequester the child from the view of the defendant.\(^{28}\) The defendant's attorney is given two opportunities to cross-examine this witness,\(^{29}\) and before the videotaped

with his counsel; and until his counsel has been afforded the opportunity to cross-examine the child following such review and consultation.

2. The court may also order, on motion of the prosecuting attorney, during all predeposition procedures, recesses, and post-deposition matters that the child be sequestered from the view and presence of the defendant.

3. In no event shall the child's videotaped testimony be admitted into evidence until the defendant and his attorney have been afforded a reasonable opportunity to review the videotape in private in the presence of each other. 491.687. Court may order videotaped reexamination, when

At any time prior to trial, and for good cause shown, the court may, upon motion of any party, order a videotaped reexamination of the child where the interests of justice so require.

491.690. Provisions of sections 491.675 or 491.693 not to apply where defendant has waived right to counsel—exceptions

Where a defendant has waived the right to counsel and elected to represent himself, the provisions of sections 491.675 to 491.693 shall not apply, except in the discretion of the court, under such rules, procedures and restrictions as the court may, in the interests of justice, impose.

491.693. Testimony to be under oath

All testimony taken under sections 491.675 to 491.693 shall be under oath.

23. Id. § 491.680.1.

24. Id. § 491.678. "Child" for purposes of this act is defined as a person under seventeen years of age. Id. The age limit appears arbitrarily imposed and is higher than limits in most other states. According to one commentator, children under fourteen years of age are generally considered "immature and incapable of making reasonable judgments concerning sexual relations with adults." Libai, supra note 5, at 979-80.

25. The statute specifically applies only to criminal prosecutions under the provisions of Missouri Revised Statutes, Chapters 565, 566, and 568 (1978). Missouri Revised Statutes Chapter 565 includes murder, manslaughter, assault, and kidnapping. Missouri Revised Statutes Chapter 566 includes rape, sexual assault, sodomy, deviate sexual assault, sexual misconduct, and sexual abuse. Missouri Revised Statutes Chapter 568 includes bigamy, incest, abandonment, criminal nonsupport, endangering welfare, abuse, and unlawful transactions. The focus of this comment is on sexual offense crimes since this is the area in which the child victim/witness problem is most acute.

26. Mo. Rev. Stat. § 491.680.2. It is unclear whether the prosecution will have to show by a preponderance of evidence that videotaping is necessary or whether some other standard will apply. Since the statute requires a finding of emotional trauma before videotaping can be used, the child may face a battery of psychological tests by both the state and the defendant.

27. Id. § 491.685.1.

28. Id. § 491.685.2.

29. Id. § 491.680.4.
evidence is admitted in evidence, the defendant and his attorney are given an opportunity to review the tape. Missouri's response attempts to resolve some of the difficulties encountered in prosecuting crimes in which the only witness is a child who is often fearful, embarrassed, and confused. The legislation is designed to protect vulnerable children whose emotional well-being may suffer as a result of the ordeal of testifying in court. However, this protection may be in direct conflict with important, well-established rights which protect defendants in criminal proceedings. This Comment explores the parameters of the Child Victim Witness Protection Law by examining the tensions created between the need to protect the child from further trauma in the courtroom and the constitutional rights of the accused. Challenges to this law can be expected. In order to determine whether this legislation will survive a constitutional attack, it is necessary to first determine whether an accommodation of both the state's interests and the defendant's rights can be made, and if not, whose interests are paramount.

II. RIGHT TO CONFRONTATION

The most significant constitutional challenge will be based on the allegation that the statute violates the defendant's right to confront witnesses and be present at his trial. The sixth amendment right of confrontation protects three fundamental concerns. It ensures face-to-face confrontation, provides an opportunity for cross-examination, and places the demeanor of the witness before the jury. Closely associated with the right of confrontation is the right of the accused to be present during all stages of the trial. This allows the defendant to participate in his own defense and make certain his attorney conducts a vigorous defense. Unfortunately, it is these rights which create the most harm to the child victim/witness because the recital of details of the abuse and the accusation in the presence of the defendant cause the most emotional damage to the child.

30. Id. § 491.685.1.
31. U.S. Const. amend. VI. The Sixth Amendment provides "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." The Sixth Amendment right of confrontation was made binding on the states in Pointer v. Texas, 380 U.S. 400 (1965). See also Mo. Const. art. I, § 18 ("[I]n all criminal prosecutions the accused has the right . . . to meet the witnesses against him, face to face . . . .")
32. See Kirby v. United States, 174 U.S. 47 (1899) (physical confrontation is guaranteed by the Sixth Amendment).
34. See Hutchins v. Wainwright, 715 F.2d 512, 516 (11th Cir. 1983), cert. denied, 104 S. Ct. 1427 (1984); State v. Melendez, 135 Ariz. 390, ___, 661 P.2d 654, 657 (Ct. App. 1982) (defendant raised questions as to the ability of videotape to convey the victim's demeanor and reactions).
The Supreme Court has long recognized that the right of confrontation is not absolute and must occasionally give way to public policy considerations. Generally two exceptions to this right have been recognized. First, testimony has been permitted if the accused has waived or forfeited his confrontation rights. Second, a general hearsay exception exists: when a witness is actually unavailable, prior testimony may be admitted if sufficient indicia of reliability are present.

Courts may find a forfeiture of confrontation in some child sexual abuse cases because intimidations and threats are integral parts of the abuse syndrome. In most cases the perpetrator uses coercion, threats, and bribes to ensure secrecy. It may be difficult to remove from the child's psyche the force of prior coercion. The threats remain real to young children regardless of reassurances from adults. Certainly the legislature was concerned about this very issue since a specific provision of the statute provides for sequestration of the victim/witness. Although direct intimidation may be prevented after the accused is charged, the courts may find the lingering effect of past threats sufficient to warrant an exception to the right of confrontation given the vulnerability of the child.

A more likely interpretation is one which places Missouri's statute within the second general exception. In Ohio v. Roberts, the Court set forth a two prong test for determining when hearsay evidence should be admitted. The first prong requires the prosecutor to make a good faith effort to produce the witness. If read literally, Missouri's statute fails to meet this requirement

37. Taylor v. United States, 414 U.S. 17, 19 (1973) (per curiam) (defendant voluntarily absent from courtroom waived right to confrontation); United States v. Carlson, 547 F.2d 1346, 1358 (8th Cir. 1976), cert. denied, 431 U.S. 914 (1977) (defendant waived his confrontation right when he intimidated a witness prior to trial).
40. "Child victims are usually persuaded and tricked by known, often trusted or dependent on adults into going along with repeated sexual activity over extended periods of time." Berliner, supra note 12, at 95.
41. Mo. REV. STAT. § 491.685.2 (1986).
42. In United States v. Benfield, 593 F.2d 815 (8th Cir. 1979), the court rejected the notion that the defendant waived his right to be present through misconduct. According to the court, the facts of the case did not suggest that the defendant's conduct was so heinous as to prevent his physical presence. In Benfield, however, the victim was an adult victim of kidnapping. Benfield is discussed infra text accompanying notes 57-68.
43. 448 U.S. 56, 74 (1980).
44. A witness is considered unavailable only if the government is unable, despite a good faith effort, to produce his attendance at trial. Id. Missouri's statute,
since in most sexual abuse cases the witness is available. However, the Federal Rules of Evidence define witness unavailability to include situations in which the witness is unable to testify because of a physical or mental illness or infirmity.45 Although the young victim may be technically available to testify, he or she may be held to be psychologically "unavailable."46

No standard for determining when a child is "unavailable" is given in Missouri's statute. The statute provides only that "the court shall consider the elements of the offense charged and the emotional or psychological trauma to the child if required to testify in open court or to be brought into the personal presence of the defendant."47 In other states with videotaping statutes the standard for determining unavailability range from finding that the child would suffer "moderate emotional or mental harm,"48 or "unreasonable and unnecessary mental or emotional harm"49 if required to testify in open court. Since all participants suffer some emotional distress while testifying in court, unavailability should require more than merely establishing some possibility of psychological distress.50

A related issue is a timing question: when should unavailability be determined? Many state criminal procedure rules require two showings of unavailability—one at the time of taking the videotape and again when the tape is shown at trial, since the condition of the witness may have changed. In United States v. Benfield, the court stated that "an additional showing of the witness' mental condition and availability on the trial date would have been a much better practice."51 It is unclear from Missouri's statute when the videotaping will occur. If the videotape is used solely as a substitute for live testimony there is little danger of a change in the child's emotional condition since the court's decision to permit the videotaping and the taping

like most videotaping statutes, does not require a finding of unavailability. Only three videotaping statutes require the victim/witness be unavailable. CAL. PENAL CODE § 1346(d) (West Supp. 1986); COLO. REV. STAT. § 8-3-413(4) (Supp. 1985); S.D. CODED LAWS ANN. § 23A-12-9 (Supp. 1985); see also State v. Gettys, 49 Ohio App. 2d 241, 360 N.E.2d 735 (1976) (introduction of a videotaped deposition was unconstitutional unless a showing was made that the witness was unavailable to testify at trial).

46. See MCCORMICK ON EVIDENCE § 253, at 753-58 (E. Cleary ed. 3d ed. 1984); 5 J. WIGMORE, supra note 33, § 1411; Bulkley, supra note 18, at 663.
49. N.M. STAT. ANN. § 4-34.1 (Supp. 1982).
50. See Graham, Indicia of Reliability and Face to Face Confrontation: Emerging Issues in Child Sexual Abuse Prosecutions, 40 U. MIAMI L. REV. 19, 83 (1985). In Warren v. United States, 436 A.2d 821, 830 (D.C. Cir. 1981), the court outlined the following factors relevant in determining psychological unavailability: "(1) the probability of psychological injury as a result of testifying, (2) the degree of anticipated injury, (3) the expected duration of the injury, and (4) whether the expected psychological injury is substantially greater than the reaction of the average victim." Id.
51. 593 F.2d 815, 817 n.4 (8th Cir. 1979).
itself will occur in a relatively short period of time. If this is the case, however, the statute fails to address the problem of repeated interrogations. If, on the other hand, the videotaping does serve as a substitute not only for live testimony, but also as a device for allowing consolidation of interviews, there is the chance the child's mental state may drastically change from the time of the videotaping to the time of the actual trial.

Missouri's statute is flawed since it contains no standards for determining when and under what circumstances a child should be declared unavailable for purposes of permitting the videotaping. The vagueness of the statute is likely to result in inconsistent applications and may jeopardize the interests of either the child witness or the accused. Although a certain degree of flexibility is warranted in order to accommodate the individual needs of each child witness, the statute should be amended to specifically establish minimum standards and procedures for employing the videotape in order to protect the rights of the defendant and ensure the integrity of the process. In addition to showing the declarant is unavailable, the second prong of the Roberts test requires the evidence bear adequate "indicia of reliability." A statement is considered reliable if it falls within one of the recognized hearsay exceptions. Some may interpret Missouri's statute as implicitly creating a new hearsay exception because it permits the out of court statement of the child to prove the truth of the matter asserted. Unlike some states, however, the statute makes no mention of hearsay; instead the testimony is essentially treated as the functional equivalent of testimony at trial. Under either characterization, the videotaped testimony can be admitted only under the same constraints as other hearsay exceptions.

Since the act falls under no recognized constitutional exception, the "indicia of reliability" will be found in examining the extent to which the videotape provisions maintain the functions underlying the right to confrontation. To determine the constitutionality of Missouri's statute in this regard it is necessary to distinguish between those elements of confrontation which are central to defendant's ability to present and defend his case and those which are merely secondary.

A. Face-to-face confrontation

Early Supreme Court cases viewed physical confrontation as an essential

53. Id. Fed. R. Evid. 803(24) and 804(b)(5), the "catch all" exceptions to the hearsay rule, allow admission of evidence when there is a particularized guarantee of trustworthiness.
54. See Fed. R. Evid. 801(e). Children's statements in sexual abuse cases have frequently been admitted under traditional exceptions to hearsay. See Note, A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases, 83 Colum. L. Rev. 1745, 1756-63 (1983).
element of the sixth amendment.\textsuperscript{55} In Barber v. Page, the Supreme Court reaffirmed this view and held the right to confrontation includes a right to a face-to-face meeting.\textsuperscript{56} The belief is that face-to-face confrontation enhances recollection and promotes truthful communication.\textsuperscript{57} The crucial issue is whether it is constitutional to remove this truth eliciting factor which results from a face-to-face meeting. In United States v. Benfield, the witness, an adult woman who was a victim of a kidnapping, suffered psychological problems "which were directly related to her abduction."\textsuperscript{58} The trial court granted the government's request to take a videotape deposition and ordered that the defendant not be within her view. The defendant was permitted to watch the proceedings on a monitor and could interrupt the questioning by sounding a buzzer which would summon his attorney. The witness was unable to see the defendant and was unaware the defendant was watching her testimony.\textsuperscript{59} The court concluded these circumstances abridged the rights of the defendant.\textsuperscript{60} According to the court, "[T]he right of cross-examination reinforces the importance of physical confrontation."\textsuperscript{56} The "benign intimidation" theory which operates to elicit truth from an adult, however, may become malevolent intimidation when the witness is a young child. The stress of meeting the defendant may lessen the reliability and veracity of the testimony and in many cases a face-to-face meeting may do nothing more than frighten the witness into silence. If a face-to-face confrontation will not promote truth, the rationale for requiring such a confrontation is lost.\textsuperscript{62} The balance tips in favor of protecting the child.

B. Right to be Present

Entwined with the right of a face-to-face meeting is the right of the accused to be present at all stages of her trial.\textsuperscript{63} This right has long been

\textsuperscript{55} See, e.g., Dowdell v. United States, 221 U.S. 325 (1911); Kirby v. United States, 174 U.S. 47 (1899); Mattox v. United States, 156 U.S. 237 (1895).
\textsuperscript{56} 390 U.S. 719 (1968).
\textsuperscript{57} The court in United States v. Benfield, 593 F.2d at 815, 821 (8th Cir. 1979), implied that its concern over physical confrontation involved the belief that one is more likely to be truthful when confronted by the accused.
\textsuperscript{58} Id. at 817 n.3.
\textsuperscript{59} Id. at 817.
\textsuperscript{60} Id. at 821.
\textsuperscript{61} Id.
\textsuperscript{63} The right to be present has been interpreted both as a Sixth Amendment guarantee and as part of the Due Process Clause of the Fourteenth Amendment. Lewis v. United States, 146 U.S. 370 (1892) (right to be present part of the right to confront witnesses); Snyder v. Massachusetts, 291 U.S. 97, 128-29 (1934) ("privilege of the accused to be present throughout his trial is of the very essence of due process") (Roberts, J., dissenting); see Mlyniec & Dally, See No Evil? Can Insulation of Child
considered an integral part of the criminal justice process since it allows the defendant to aid in her own defense.64 The Supreme Court, in Farella v. California, emphasized that the sixth amendment "grants to the accused personally the right to make his defense."65 According to the court in Benfield, "the confrontation clause contemplates the active participation of the accused at all stages of the trial including the face-to-face meeting with the witness."66 The Benfield decision raises serious concern about the constitutionality of Missouri's new law since Missouri's statute specifically permits the child's testimony to be given outside the defendant's presence.67 Missouri's law is even more restrictive than the process employed in Benfield in which the defendant was provided with a contemporaneous visual and aural access to both the proceedings and his attorney. Under Missouri's statute, although the defendant is able to review the videotape, she is unable to directly assist her attorney at the time of the deposition.68 In light of Benfield, Missouri's statute may fall short of the degree of active participation envisioned by the courts.

C. Cross-examination

The right to cross-examine is generally recognized as an indispensable element of confrontation.69 The Missouri statute recognizes this fundamental right by providing at least two opportunities for cross-examination.70 At issue is whether cross-examination without physical confrontation of the child is sufficient to fulfill the trustworthiness requirement. The sixth amendment may be violated if restrictions on the defendant's right to cross-examination limit relevant inquiries into the defendant's guilt or innocence or the credibility of the witness.71 Recent decisions suggest that it is the right of cross-

---

64. See Mlyniec & Dally, supra note 63, at 118.
65. 422 U.S. 806, 819 (1975).
66. 593 F.2d 815, 821 (8th Cir. 1979).
67. See Mo. Rev. Stat. § 491.685.1 (1986); see also Long v. State, 694 S.W.2d 185 (Tex. Ct. App. 1985). In Long, a videotaped recording of an interview of a twelve year-old child conducted by a rape crisis therapist was introduced at trial. The therapist explained the videotaping procedures to the child in the presence of two persons from the district attorney's office, but during the videotaping only the child and the therapist were present. The court found this procedure violated the defendant's constitutional rights and held unconstitutional article 38.071, section two, of the Texas Criminal Procedure Code Annotated (Vernon 1986). Long, 694 S.W.2d 185.
68. Mo. Rev. Stat. § 491.685 (1986). Prior to Benfield, the Supreme Court of Missouri ruled that use of a closed circuit television to transmit the prosecution's expert witness was permissible. Kansas City v. McCoy, 525 S.W.2d 336 (Mo. 1975) (en banc).
examination which is at the heart of the confrontation clause—not the right to a face-to-face meeting. Thus it is likely a court would find that cross-examination alone is sufficient to satisfy the confrontation requirement without the defendant’s physical presence. According to Professor Wigmore, the right of cross-examination “disposes of any objection based on the so-called right of confrontation.” Wigmore suggests the confrontation clause does not require the witness and defendant meet face-to-face, rather the right requires the witness to be present before the tribunal. The court in Benfield, however, emphasized the dual nature of physical confrontation and the right of cross-examination. According to the court, the defendant should be allowed to “face the witness, assist his counsel, and participate in the questioning through his counsel.” The manner and degree of the defendant’s participation are important factors the courts must examine to determine whether the defendant has a meaningful opportunity to assist in his or her own defense. If the participation is too attenuated, Missouri courts may well find the statute violates the right to an effective cross-examination.

D. Demeanor

The final function of the right to confrontation enables the jury to evaluate the demeanor of the witness while being questioned. This is considered a fundamental part of the jury process. In the landmark case, Mattox v. United States; the Supreme Court held that the primary objective of the confrontation clause is to guarantee cross-examination in which the witness must “stand face-to-face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.” In Barber v. Page, the Court affirmed the holding of Mattox and further found the right to confrontation includes cross-examination and an “occasion for the jury to weigh

72. See Pointer v. Texas, 380 U.S. 400 (1965); accord Chambers v. Mississippi, 410 U.S. 284, 295 (1973) (The right to confront and cross-examine may in appropriate cases bow to accommodate other legitimate interests in the criminal trial process.).
73. Wigmore believed the “ordeal of face-to-face confrontation” merged with the principle of cross-examination. 5 J. Wigmore, supra note 33, § 1395, at 150-54. The Benfield court rejected this analysis and indicated both a face-to-face meeting and the right to cross-examine were necessary. Benfield, 593 F.2d 815 (8th Cir. 1979).
74. 593 F.2d at 821.
75. Id. But see Jolly v. State, 681 S.W.2d 689 (Tex. Ct. App. 1984). The Jolly court found the defendant’s rights to confrontation and cross-examination were not violated since the victim was available at trial. The defendant had the opportunity to call her to the stand and chose not to do so. This analysis was specifically rejected in Long v. State, 694 S.W.2d 185, 191 (Tex. Ct. App. 1985). Missouri’s statute has specific provision for this type of belated cross-examination. See supra note 22.
77. 156 U.S. 237 (1895).
78. Id. at 242-43.
the demeanor of the witness." 80 Decisions after Barber suggest the presence of the jury is not constitutionally required, but all agree that jury presence remains an important part of the confrontation right. 81 Under Missouri's statute the issue is whether videotaping can adequately convey the demeanor of the child witness. Although testimony presented on videotape is significantly different from live testimony, the concern is whether the videotape is sufficiently similar to live testimony to meet the requirements of the right to confrontation. The primary concern is that videotaping may not accurately reflect the witness' demeanor and may therefore impede the jury's determination of credibility. 82 Most of the evaluation of videotaping rests on technical considerations. Although the medium is not inherently infirm, videotaping may be unable to capture subtle movements and discrete nuances which often comprise an important aspect of the witness' demeanor. 83 In emotionally charged cases, such as sexual abuse prosecutions, 84 videotape may be ill-suited to reflect the emotional response which might otherwise be very telling in live testimony.

In State v. Melendez, which involved videotaping a six year-old child molestation victim, the defendant challenged the ability of the videotape to convey demeanor and reactions. 85 Although the court noted this argument, it found the defendant had not been prejudiced by the videotaped testimony. 86 Essentially the court engaged in a balancing of competing interests. The court balanced the age of the victim, her fear of testifying, and the likelihood of her becoming uncommunicative at trial with the fact the defendant and his counsel were present at the videotaping and were given the opportunity to cross-examine the witness. 87 Cases in which the defendant is not allowed to be personally present raise more serious questions.

80. Id. at 725.
81. See The Supreme Court, 1969 Term, 84 Harv. L. Rev. 1, 115 (1970) (in referring to California v. Green, 399 U.S. 149 (1970), stated that "the factfinder's observation of the witness' confrontation with the declarant is not constitutionally required").
82. See Note, supra note 3, at 823.
83. See Comment, supra note 35, at 576.
84. Id.
86. Id. at ____, 661 P.2d at 657. Missouri courts have approved the use of videotapes noting that there is nothing inherently prejudicial in the medium. See, e.g., State v. Lindsey, 507 S.W.2d 1 (Mo. 1974) (en banc) (allowed videotaped confession); State v. Mayhew, 653 S.W.2d 227 (Mo. Ct. App. 1983) (allowed videotape of witness identifying a suspect). But see Hochneiser v. Superior Court, 161 Cal. App. 3d 777, 208 Cal. Rptr. 273 (1984). Although declining to reach the constitutionality of a closed-circuit procedure, the court concluded closed-circuit television can affect the jury. The camera angle can make the witness look smaller, bigger, stronger or weaker; the use of lighting can alter demeanor; and the witness' credibility can be enhanced. Id. at 278; see also Graham, supra note 50, at 89 (jury may infer abuse occurred if witness too afraid to testify in open court).
87. 135 Ariz. at ____, 661 P.2d at 657.
III. DUE PROCESS

A. Right to a fair trial

In addition to serious questions concerning the defendant’s sixth amendment rights, Missouri’s videotaping statute may conflict with the fundamental right to a fair trial. In California v. Green, the Court noted that due process “wholly apart from the Confrontation Clause, might prevent convictions where a reliable evidentiary basis is totally lacking . . . .” The issues under Missouri’s law are two-fold: first, whether videotaping can convey the testimony with sufficient accuracy to enable a jury to function properly; and second, assuming this is possible, whether internal controls are present to ensure the videotape is an accurate representation of the witness’ testimony.

Due process prohibits the prosecutor from using any evidence against a defendant which cannot be rationally evaluated by the jury. Because of the ease with which videotape evidence may be distorted, courts may find the evidence inherently unreliable. It is axiomatic: the medium changes the message. The camera, as a substitute for the jurors’ eyes, does not necessarily reflect what might be observed in a live examination of a witness. A number of factors can alter the impressions a juror receives; lighting, camera angle, and color all affect the jurors’ impressions. The evidence is subject to both deliberate and unconscious manipulation. Lighting, for instance, can make the witness look smaller and paler and thus more vulnerable. The choice of color over black and white, multiple cameras over a single focus, and a fixed camera over changing angles may all have a dramatic effect on the jury’s ability to evaluate credibility. Other technical considerations such as using makeup on the witness, showing close-ups, employing zoom lenses, and focusing on both the defendant and the witness all may have an impact on the jury. The videotape may also have less obvious ramifications. The abstracting process may lessen the jury’s concentration and attention span, it may render the testimony less real, and it may reduce the jurors’ feeling of

88. The Fourteenth Amendment provides that no state shall “deprive any person of life, liberty, or property without due process of law . . . .” U.S. Const. amend. XIV, § 1. The due process requirement of a fair trial was extended to the states in Estes v. Texas, 381 U.S. 532 (1965).
90. See Comment, supra note 35, at 583.
92. See Comment, supra note 35, at 576.
94. See Comment, supra note 35, at 567-77.
involved or it may do the opposite. The impact of these factors on a jury's decision-making process has not yet been ascertained, but the distortion elements inherent in a videotape may prejudice an entire trial. Missouri's statute provides little guidance for preventing distortion. It mandates no procedure for the actual videotaping and sets no standard for the technical quality of the final product. Missouri is not alone in its failure to outline technical standards governing the production of videotapes for use at trial. Only two states have yet devised any comprehensive standards. According to the Supreme Court of Florida, the test regarding the type of acceptable equipment is whether the tape gives an accurate representation of what actually occurred. It may rest with the courts to articulate a more definitive standard and determine what technical factors will affect the defendant's right to a fair trial.

Another due process concern rests in the assumption that videotaped testimony may provide the prosecutor with unique advantages. These advantages may be essentially unrelated to the needs of protecting the child witness. If the videotape is made before the trial commences, the prosecutor has a potent weapon in plea negotiations. Furthermore, an early taping permits the prosecutor to plan trial strategy since she is aware of the precise nature of her chief witness' testimony. Under Missouri's statute, however, videotapes may be a double-edged sword. The defendant also has an opportunity to view the testimony and can also plan accordingly. In fact, prosecutors may be reluctant to use videotaping since the tape may later be used.


97. Missouri courts have held that the admissibility of videotapes should be determined by the same standard used for demonstrative evidence. E.g., State v. Mayhue, 653 S.W.2d 227, 236 (Mo. Ct. App. 1983); State v. Hudson, 521 S.W.2d 43, 47 (Mo. Ct. App. 1975). For admissibility standards of photographs and demonstrative evidence, see G. Lilly, An Introduction to the Laws of Evidence 416-25 (1978). One commentator has suggested that the video and audio components of the videotape should be considered separately for questions of admissibility. Note, Videotaped Prior Identification: Evidentiary Considerations for Admissibility, 50 Mo. L. REV. 157, 163, 172 (1985); see also, People v. Heading, 39 Mich. App. 126, 132, 197 N.W.2d 325, 329 (1972) (foundation requirements for both sound and video must be met).


100. See Note, supra note 3, at 824.

101. In Minneapolis, the police videotaped interviews with victims of child abuse to be shown in court. Sixty defendants pled guilty as soon as they saw the interviews, and the prosecution has not lost a single case. Videotaping: Device for Fighting Child Abuse, 70 A.B.A. J. 36 (April 1984); see also Note, supra note 3, at 824.

102. See Note, supra note 3, at 825.
to attack the credibility of the young witness. A more serious charge of prosecutorial advantage may be levied if the prosecutor has the option of calling the child witness to testify despite the existence of a videotape. Missouri's statute implicitly grants the prosecutor this power. This option undermines the very purposes of the act—to protect the child from testifying at trial and to prevent repeated interrogations. One solution may be that once the child has testified, neither party may call the child to testify in open court.

B. Right to Public Trial

A final due process issue is whether the statute impermissibly infringes on the right to a public trial. The right to a public trial is an important criminal right which protects against governmental persecution and secret proceedings. The rationale is basic: the state is less likely to unjustly prosecute if subject to public scrutiny. Exclusion of the public has been allowed under special circumstances which are based on compelling state interests. Missouri courts will likely find the existence of such special circumstances in the case of the young victim/witness. Furthermore, the right to a public trial is not seriously compromised by videotaping the testimony. Although the public is not present when testimony is given, the trial does not become more "secret" since the public has a chance to view the videotape.

103. See Berliner, supra note 12, at 101 (videotape is verbatim record which can be used to attack credibility); Graham, supra note 50, at 90 (tapes may be used to impeach children); Whitcomb, supra note 21, at 20 (tapes may be a liability if the child gives conflicting information).

104. See Note, supra note 3, at 824.

105. Id. Several commentators suggest that videotaping be taken only after trial begins to reduce the number of times a child must be questioned and lessen the charge of prosecutorial advantage. Such a delay, however, requires the child to remember the abuse and participate in the litigation for a longer time than pretrial videotaping. See Bulkley, supra note 18, at 664; Note, supra note 3, at 824.

106. "In all criminal prosecutions, the accused shall enjoy the right to a . . . public trial . . . ." U.S. CONSTR. amend. VI. Defendant's right to a public trial was extended to the states through the Fourteenth Amendment in In re Oliver, 333 U.S. 257 (1948).


110. See Note, supra note 3, at 819.

IV. Evaluation

The basic premise underlying Missouri's statute is protection of a young victim from a second victimization in the litigation process. Collective shock at instances of sexual abuse of young children has led to a desire to find pragmatic solutions. In cases where fundamental rights are involved the state may prevail only upon showing the statute is necessary for the accomplishment of a compelling state interest. As the preceding discussion reveals, Missouri's videotaping statute does address a compelling interest, but it is subject to charges that it is not narrowly drawn.

A. Overinclusive

The statute is arguably overinclusive since it may apply to a broader group of victims than is necessary. The statute provides for the videotaping of testimony of witnesses under seventeen years of age, and in light of the goal to protect children from the trauma of testifying in court, the age limitation appears to exceed the purpose of the legislation. This argument is unpersuasive since the act requires the court to evaluate each case and allows videotaping only in extraordinary circumstances. Age is only one factor the court must consider in assessing the psychological harm which may result from requiring live testimony. In balancing the rights of the defendant with the needs of the witness, the court must not only consider the biological age of the victim but must also consider a host of emotional and environmental factors which may influence the victim/witness' ability to face the accused and provide in-court testimony. An inexperienced, immature seventeen-year-old may suffer more emotional damage from testifying in open court than a victim who is considerably younger. The statute is drafted to protect specific members of the entire class of children. The legislature recognized that while not all members of the class need special protection, the same safeguards should be available to all members of the class.

B. Underinclusive

The converse is, of course, that the statute is underinclusive since it does not protect all the victims of crime who are shown to have special needs.

113. See Bulkley, supra note 18, at 649-50 (stressing the wisdom of limiting the use of evidentiary and procedural innovations to very "special" cases).
114. 1985 Mo. Legis. Serv. ch. 573.050, § 8 (Vernon).
115. See Note, supra note 1, at 1017.
116. See Bulkley, supra note 18, at 649.
117. 1985 Mo. Legis. Serv. ch. 573.050, § 9.2 (Vernon).
118. See Bulkley, supra note 18, at 647.
119. Id. at 650.
Age alone does not guarantee a victim protection from the psychological trauma which can result from testifying in court. However, the constitutional rights of the defendant require the use of videotaping to be restricted to special cases in which the balancing clearly favors the needs of the victim/witness over the rights of the defendant. No one seriously contends the legislation can provide protection for all citizens; instead the legislation is designed to protect a special class which is largely without adequate protection.121

V. Conclusion

'As in other sciences, so in politics, it is impossible that all things should be precisely set down in writing; for enactments must be universal, but actions are considered with particulars.'

Aristotle

The desire to protect children from the ordeal of testifying in court in the presence of individuals who may be responsible for horrifying acts of abuse motivates this legislation governing videotaping. Missouri's law is not a legal panacea to the problem of child abuse prosecutions, but it is a prudent attempt to provide protection for innocent children while maintaining procedural safeguards which guarantee the defendant's constitutional right to a fair trial. Under the provisions of this statute the rights of the accused are not seriously undermined. The statute is flexible enough to allow for a case by case assessment of the rights and interests of both parties. The statute should be applied only when it is clearly shown that the child will suffer significant harm if forced to testify in court or in the presence of the defendant and when the defendant's ability to present his case is not jeopardized by the videotaping procedure. In light of the conflicting interests at stake, the statute's approach is the only realistic method of protecting the interests of the child, the accused, and the state. Nevertheless, the court must heed caution when applying this procedure and must temper its zeal for protecting children and its abhorrence of child sexual abuse with the fear of committing another outrage—impermissibly infringing on the constitutional rights of the accused.

Colly J. Frissell-Durley

120. Id. at 647 (It is unclear what aspects of the legal process cause the greatest trauma.).
121. See McDonald, Towards a Bicentennial Revolution in Criminal Justice: The Return of the Victim, 13 AM. CRIM. L. REV. 649, 662 (1976) ("Victims and witnesses do not receive even a fraction of the protection and defenses that are afforded an accused.").