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LB 90 and the Confrontation Clause: The Use of Videotaped and In Camera Testimony in Criminal Trials to Accommodate Child Witnesses

Emily Campbell
University of Nebraska College of Law, ecampbell@campbellfirm.com

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Comment

LB 90 and the Confrontation Clause: The Use of Videotaped and In Camera Testimony in Criminal Trials to Accommodate Child Witnesses

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I. INTRODUCTION

With the increasing reports of sexual abuse in the United States, much attention has been given to the conflict between the interests of victims and those of defendants in criminal sex offense cases. Growing public awareness of the problems associated with the prosecution of sex abuse cases has led many states to alter their rules of evidence and criminal procedure. Many states now allow a child's testimony to be videotaped and shown at trial or allow the child to testify via closed-circuit television. Nebraska recently passed LB 90, which
permits the use of videotaped testimony or in camera testimony of not only child victims of sexual abuse, but also of child victims or witnesses of other felonies.\(^5\)

Videotaping and in camera procedures allow a child who has been a victim of sexual abuse to be spared the ordeal of testifying in open court in front of a jury and spectators. In addition, videotaping the testimony may facilitate the child’s recovery by limiting the number of times the child must recount the traumatic details of the abuse.\(^7\)

Although the use of videotaped and in camera testimony may reduce the stress of testifying, serious questions arise concerning the constitutionality of such procedures.\(^8\) For example, the use of in camera testimony may violate the defendant’s sixth amendment right to confront adverse witnesses at trial.\(^9\) The sixth amendment guarantees

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\(^5\) LB 90, 1988 Neb. Laws 70-73, was passed on April 7, 1988, signed by Governor Kay Orr on April 7, 1988, and effective on July 9, 1988, (codified at NEB. REV. STAT. §§ 29-1917, -1925 & -1926 (Cum. Supp. 1988)). LB 90 is not exclusively designed for child sexual abuse cases; it also covers cases involving child witnesses to a felony. However, for purposes of this Comment, the bill will be discussed in reference to child sexual abuse prosecutions.

\(^6\) This Comment will discuss LB 90 in the context of sexual abuse prosecutions.


Prosecutors argue that the admission of videotaped testimony is consistent with the defendant’s constitutional rights, but defendants argue that the admissibility of such testimony is unconstitutional. See Ginkowski, The Abused Child: The Prosecutor’s Terrifying Nightmare, 1 CRIM. JUST. 30 (1986). However, many defendants argue for use of videotaped testimony instead of the live witness because videotaped testimony has less impact on the jury.

\(^9\) In camera testimony typically is taken using a two-way closed-circuit television procedure. Both the courtroom and the room in which the child testifies are equipped with television cameras for transmission and television monitors for viewing. The monitor in the child’s room televisuals the defendant and the other parties in the courtroom. The monitor in the courtroom simultaneously shows the minor and the examining attorney. See, e.g., Hochheiser v. Superior Court, 161 Cal. App. 3d 777, 788, 208 Cal. Rptr. 273, 279-80 (1984).

The procedure is consistent with LB 90, which provides that “all persons in
the defendant the right to be present at the trial, to confront adverse witnesses, and to cross-examine those witnesses. In general, the United States Supreme Court has stated that confrontation:

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

The Supreme Court also has stated that the confrontation clause reflects a preference for "face-to-face" confrontation. However, instead of having the witness appear in person, in the same room as the defendant, LB 90 provides for the use of in camera testimony. According to LB 90, the child witness must be in a position to see the defendant on camera at all times, but the constitutionality of this special accommodation must be examined and contrasted with the defendant's right to confrontation. Specifically, whether viewing the defendant on a closed-circuit monitor satisfies the principles of face-to-face confrontation, whether being removed from the jury's physical presence during the testimony is permissible, and whether a compelling need is established for the use of such an accommodation will be examined.

In addition, constitutional problems may arise with videotaped testimony. Videotaped testimony is a form of hearsay—evidence presented in court of an out-of-court statement, which is offered to show the truth of matter asserted. Arguably, the type of videotaped testimony taken under LB 90 is permissible under either the pre-existing exception for former testimony or as a special legislatively created exception. However, the Nebraska Legislature's special accommodation for child witnesses should not be exempt from constitutional scrutiny. Potentially, child witness accommodations may violate a defendant's sixth amendment right to confrontation. The Supreme Court has stated that the rules of evidence permitting cer-

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10. See infra note 54.
12. Id.
13. See infra text accompanying notes 40-53.
tain types of hearsay are not equivalent to the values protected by the sixth amendment.\textsuperscript{18}

We have more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception.\textsuperscript{19}

The modification of a State's hearsay rules to create new exceptions for the admission of evidence against a defendant, will often raise questions of compatibility with the defendant's constitutional right to confrontation. Such questions require attention to the reasons for, and the basic scope of, the protections offered by the Confrontation Clause.\textsuperscript{19}

LB 90 provides for the defendant's presence at the videotaping and for the defendant's counsel to cross-examine witnesses.\textsuperscript{20} However, the videotaping procedure is done outside the presence of the jury and later is shown to the jury at the time of trial. This Comment addresses the issue of whether a defendant's constitutional right to confrontation is consistent with Nebraska's decision to provide for a child's testimony to be taken via videotape and used in lieu of live testimony. Specifically, this Comment focuses on whether the provisions of cross-examination at the time of the testimony are adequate under the confrontation clause, whether the absence of the jury at the videotaping is constitutionally permissible, and whether adequate justification exists for using the tape at the time of the trial because of the witness's unavailability and reliability of the testimony.

Part II of this Comment examines the content and history of LB 90 and compares it with similar statutes in other jurisdictions. Part III examines the Supreme Court's analysis of the principles underlying the confrontation clause and focuses on how various states have dealt with in camera testimony in criminal trials, including a recent Nebraska decision. Part IV analyzes LB 90 to determine whether the in camera procedures meet the constitutional standards set forth by the Supreme Court concerning the confrontation clause.\textsuperscript{21}

\textsuperscript{18} See, e.g., Dutton v. Evans, 400 U.S. 74, 86 (1970).


\textsuperscript{20} See infra text accompanying notes 50-52.

\textsuperscript{21} This Comment does not examine the due process questions presented by videotaping and in camera procedures. Potential problems include the right to a jury trial or the infringement of the presumption of innocence recognized as an essential element of a fair trial in Estelle v. Williams, 425 U.S. 501 (1975). Few courts have addressed the possible infringements on due process. In Hochheiser v. Superior Court, 161 Cal. App. 3d 777, 208 Cal. Rptr. 273 (1984), the defendant's right to confrontation was violated by the use of in camera testimony authorized by state statute. The court addressed the problems associated with the use of the videotaped depositions or closed-circuit television to admit children's testimony in criminal trials:

[T]here are serious questions about the effects on the jury of using closed-circuit television [or videotaped testimony] to present the testimony of an absent witness since the camera becomes the juror's eyes, selecting and commenting upon what is seen. . . . [T]here may be significant differences between testimony by closed-circuit television and testi-
Part V examines the principles of the confrontation clause as set forth by the Supreme Court in cases where prior testimony was used at trial and focuses on methods various states have used to deal with challenges to the videotaping procedures. Finally, Part VI analyzes LB 90 to determine whether the bill meets the constitutional standards for admitting prior testimony in accordance with the defendant's sixth amendment right to confrontation.

Id. at 786-87, 208 Cal. Rptr. at 278-79 (citations omitted)(quoting Note, The Criminal Videotape Trial, Serious Constitutional Questions, 55 Ore. L. Rev. 567, 575-77 (1976)). For a discussion of the confrontation issue in Hochheiser v. Superior Court see infra text accompanying note 73.


Some courts suggest the jury might think that because the child had to be removed from the courtroom the defendant must be guilty, violating the presumption of innocence. See, e.g., arguments made by the defense attorneys in Coy v. Iowa, 108 S. Ct. 2788 (1988); Long v. State, 742 S.W.2d 302 (Tex. Crim. App. 1988); and State v. Warford, 223 Neb. 368, 389 N.W.2d 575 (1986). A related concern with the use of in camera testimony involves due process questions implicated by the unknown effect of viewing the defendant "on television." The child may think that the defendant is not real or that the entire proceeding is a game, i.e., the "program" will go away once the monitor is turned off. If the child could not distinguish between reality and make-believe, the child might be more likely to lie. For a discussion of children's competency to testify, see Melton, Children's Competency to Testify, 5 Law & Hum. Behav. 73 (1981); Melton, Sexually Abused Children & the Legal System: Some Policy Recommendations, 13 Am. J. Fam. Therapy 61 (1985).
II. STATES PERMITTING THE USE OF VIDEOTAPED AND IN CAMERA TESTIMONY

A. Other Jurisdictions

Many of the states allowing the testimony of child victims to be videotaped and used at trial, or providing for the use of in camera testimony, have similar statutes. However, the states vary on the issue of what findings must be made before the special accommodations will be implemented.

Most states allow a child’s testimony to be taped, or taken in camera, at the request of the prosecutor. At least six states require the court to make a specific finding that the child is likely to suffer psychological harm if required to appear in court, and thus, is unavailable to testify at trial. For example, in Colorado, testimony of child witnesses may be videotaped upon “recommendations from the child’s therapist or any other person having direct contact with the child, whose recommendations are based on specific behavioral indicators exhibited by the child.”

The procedures for videotaping testimony and the findings necessary to admit the tape into evidence at trial also vary from state to state. States requiring a finding of likely psychological harm to the child before a deposition can be videotaped also require an additional finding of psychological harm at trial before the tape can be admitted into evidence. States that do not require a court to make specific findings regarding the child’s ability to testify at trial before ordering the taping do not specify the circumstances for admitting the tape at trial.

Most states that allow videotaping or in camera accommodations require the defendant, the defendant’s counsel, the prosecutor, and the judge to be present during the child’s testimony. Further, most states require that the defendant have a full opportunity to cross-examine the child witness.

22. See supra note 4.
B. Nebraska: LB 90

1. Legislative History

LB 90 first was introduced in the Judiciary Committee of the Ne-

31. LB 90 reads:

AN ACT relating to criminal procedure; to amend section 29-1917, Reissue Revised Statutes of Nebraska, 1943; to state intent; to authorize the taking of videotape depositions and in camera testimony of certain children as prescribed; to define a term; to authorize rules of procedure; to harmonize provisions; and to repeal the original section.

Be it enacted by the people of the State of Nebraska,

Section 1. The Legislature recognizes that obtaining testimony in a criminal prosecution from a child victim . . . may be a delicate matter and may require some special considerations. It is the intent of the Legislature to promote, facilitate, and preserve the testimony of such child victim or child witness in a criminal prosecution to the fullest extent possible consistent with the constitutional right to confrontation guaranteed by the Sixth Amendment of the Constitution of the United States and Article I, section 11, of the Nebraska Constitution.

Sec. 2. That section 29-1917, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

29-1917. (1) Except as provided in section 3 of this act, at any time after the filing of an indictment or information in a felony prosecution, the prosecuting attorney or the defendant may request the court to allow the taking of a deposition of any person other than the defendant who may be a witness in the trial of the offense. The court may order the taking of the deposition when it finds the testimony of the witness:

(a) May be material or relevant to the issue to be determined at the trial of the offense; or

(b) May be of assistance to the parties in the preparation of their respective cases.

(2) An order granting the taking of a deposition shall include the time and place for taking such deposition and such other conditions as the court determines to be just.

(3) The proceedings in taking the deposition of a witness pursuant to this section and returning it to the court shall be governed in all respects as the taking of depositions in civil cases.

(4) A deposition taken pursuant to this section may be used at trial by any party solely for the purpose of contradicting or impeaching the testimony of the deponent as a witness.

Sec. 3. (1) Upon request of the prosecuting or defense attorney and upon a showing of compelling need, the court shall order the taking of a videotape deposition of a child victim of or child witness to any offense punishable as a felony. The deposition ordinarily shall be in lieu of courtroom or in camera testimony by the child. If the court orders a videotape deposition, the court shall:

(a) Designate the time and place for taking the deposition. The deposition may be conducted in the courtroom, the judge's chambers, or any other location suitable for videotaping;

(b) Assure adequate time for the defense attorney to complete discovery before taking the deposition; and

(c) Preside over the taking of the videotape deposition in the same manner as if the child were called as a witness for the prosecution during the course of the trial.

(2) Unless otherwise required by the court, the deposition shall be conducted in the presence of the prosecuting attorney, the defense
The Nebraska Legislature in 1985. The bill authorized videotaping the testi-
attorney, the defendant, and any other person deemed necessary by the
court, including the parent or guardian of the child with whom the child
is familiar. Such parent, guardian, counselor, or other person shall be
allowed to sit with or near the child unless the court determines that
such person would be disruptive to the child's testimony.

(3) At any time subsequent to the taking of the original videotape
deposition and upon sufficient cause shown, the court shall order the
taking of additional videotape depositions to be admitted at the time of
the trial.

(4) If the child testifies at trial in person rather than by videotape
deposition, the taking of the child's testimony may, upon request of the
prosecuting attorney and upon a showing of compelling need, be
conducted in camera.

(5) Unless otherwise required by the court, the child shall testify in
the presence of the prosecuting attorney, the defense attorney, the
defendant, and any other person deemed necessary by the court,
including the parent or guardian of the child victim or child witness or a
counselor or other person with whom the child is familiar. Such parent,
guardian, counselor, or other person shall be allowed to sit with or near
the child unless the court determines that such person would be
disruptive to the child's testimony. Unless waived by the defendant, all
persons in the room shall be visible on camera except the camera
operator.

(6) If deemed necessary to preserve the constitutionality of the child's
testimony, the court may direct that during the testimony the child shall
at all times be in a position to see the defendant live or on camera.

(7) For purposes of this section, child shall mean a person eleven
years of age or younger at the time the motion to take the deposition is
made or at the time of the taking of in camera testimony at trial.

(8) Nothing in this section shall restrict the court from conducting
the pretrial deposition or in camera proceedings in any manner deemed
likely to facilitate and preserve a child's testimony to the fullest extent
possible, consistent with the right to confrontation guaranteed in the
Sixth Amendment of the Constitution of the United States and Article I,
section 11, of the Nebraska Constitution. In deciding whether there is a
compelling need that child testimony accommodation is required by
pretrial videotape deposition, in camera live testimony, in camera
videotape testimony, or any other accommodation, the court shall make
particularized finding on the record of:

(a) The nature of the offense;
(b) The significance of the child's testimony to the case;
(c) The likelihood of obtaining the child's testimony without
modification of trial procedure or with a different modification involving
less substantial digression from trial procedure than the modification
under consideration;
(d) The child's age;
(e) The child's psychological maturity and understanding; and
(f) The nature, degree, and duration of potential injury to the child
from testifying.

(9) The court may order an independent examination by a
psychologist or psychiatrist if the defense attorney requests the
opportunity to rebut the showing of compelling need produced by the
prosecuting attorney. Such examination shall be conducted in the child's
county of residence.

(10) After a finding of compelling need by the court, neither party
may call the child witness to testify as a live witness at the trial before
mony of child witnesses and the use of in camera testimony of child witnesses. Although LB 90 passed unanimously in the unicameral, Governor Robert Kerrey, who had concerns about the constitutionality of the legislation, vetoed the bill.

However, support for LB 90 did not end with Governor Kerrey's veto. In 1986, LB 90 was reintroduced with some minor changes. At the public hearing on the merits of LB 90, many senators, experts, and interested citizens spoke in favor of the bill. The focus of testimony

the jury unless that party demonstrates that the compelling need no longer exists.

(11) Nothing in this section shall limit the right of access of the media or the public to open court.
(12) Nothing in this section shall preclude discovery by the defendant as set forth in section 29-1912.
(13) The Supreme Court may adopt and promulgate rules of procedure to administer this section, which rules shall not be in conflict with laws governing such matters.

Sec. 4. That original section 29-1917, Reissue Revised Statutes of Nebraska, 1943, is repealed.


32. LB 90 was introduced to amend Neb. Rev. Stat. § 29-1917, which permitted the taking of depositions in criminal trials, but did not specifically authorize the taking and use of videotaped depositions. The bill originally was introduced as LB 90, 89th Leg., 1st Sess. (1985) and again as LB 90, 90th Leg., 1st Sess. (1987). LB 90 was re-introduced by Senator Sandra Scofield, who stated:

The bill is intended to allow child victims or witnesses in a felony case to testify by means of a videotaped deposition in lieu of testifying in person in court. The procedure outlined in the bill for using this option is the same as if the child were called as a witness for the prosecution during the trial. The bill states that if the deposition is received into evidence, the child will not be allowed to testify in court.

LB 90 is intended to reduce some of the emotional trauma associated with the court proceeding for the child but does, however, still require the child to face the accused during the deposition or in camera proceeding. This provision insures the accused's right to confront his or her accusers, thereby protecting the accuser's sixth amendment right to confront witnesses against him or her.

INTRODUCER'S STATEMENT OF INTENT, LB 90, 90th Leg., 1st Sess., (Feb. 11, 1987).

33. Josephine Potuto, a professor of criminal and constitutional law at the University of Nebraska College of Law, helped revise LB 90 after it was introduced for the first time and again after Governor Kerrey vetoed the bill. Professor Potuto indicated that LB 90 needed to be revised because it originally was drafted using the Texas videotaping statute as a model. Interview with Josephine Potuto, Professor of Law, University of Nebraska College of Law, Lincoln, Neb. (June 1988).

34. At the Feb. 12, 1987, public hearing, proponents of LB 90 were: Senator Sandra Scofield, Dean Skokan and Richard Boucher of the Nebraska County Attorney Association, Chris Hanus of the Department of Social Services, Jenny Jorgensen of the Nebraska County Attorney Association, Deborah Suttle of the Nebraska Parent Teachers Association, and Joan and Bobbie Jo Hunter. Opponents of LB
was the accommodation of child witnesses.\textsuperscript{35} The speakers said they thought videotaping and in camera proceedings would reduce the trauma that sexually abused children undergo during the prosecution of sexual abuse cases.\textsuperscript{36} For example, the speakers suggested that a nonpublic videotaping, or in camera proceedings, would be less intimidating to a child than public testimony and that the videotaping procedure would reduce the number of times a child victim would be required to testify concerning the traumatic events.\textsuperscript{37}

During the hearing, Josephine Potuto, a professor of criminal and constitutional law at the University of Nebraska College of Law, ad-

\textsuperscript{35} Other testimony involved the effect the procedures would have on children prone to lie. See, e.g., Videotaping of Depositions of Minors for Use in Criminal Prosecutions: Public Hearing on LB 90 Before the Judiciary Committee, 90th Leg., 1st Sess. (1987) [hereinafter Public Hearing] (statement of William F. McIver II). However, under LB 90 attorneys (not counselors or therapists as in State v. Warford, 223 Neb. 368, 389 N.W.2d 575 (1986)) will question the child and must avoid leading questions. Because the child will be subject to the same questioning that he or she would encounter in the courtroom with the defendant in full view, the concern for lying should not be any greater than with the witness testifying in open court.

\textsuperscript{36} Professor Josephine Potuto said videotaped testimony enables the child to spend only a brief time recounting the events, rather than six months or a year rehashing the testimony in preparation for testimony at trial. Public Hearing, supra note 35 (statement of Josephine Potuto).

\textsuperscript{37} Chris Hanus, Administrator of the Human Services Division for the Department of Social Services, testified in favor of LB 90. He discussed the trauma many children face when brought in to testify about sexual abuse. He stated that the Department of Social Services recognized two important recent committee reports recommending similar laws. First, Governor Kerrey’s 1984 Task Force on Violence Against Women and Children found that repeated interrogations of the child during the investigation and in the courtroom may be more traumatic to the child than the abuse itself, and thus, many states provide for videotaped depositions of child sexual abuse victims if the court finds that further testimony by the child would damage the child. Second, the National Council of Juvenile Family Court Judges endorsed 73 recommendations published by a committee of presiding judges. The judges represented the 40 largest urban courts in which 60 percent of child abuse and neglect cases are heard. The report stated that a child’s physical or mental health can be threatened through abuse or neglect by parents or through the insensitivity of a rigid legal or administrative system with no regard for delay. The justice system tends to be overly formalized at the expense of the child victim. The legal system must treat children with special courtesy, respect, and fairness. Judges must work with attorneys, law enforcement, child protection agencies, and state and local funding sources to improve facilities, services, and procedures affecting children who appear in court. Frequent recesses, confidentiality for the name and address of the child, removal of courtroom observers during sensitive testimony, separation of the victim and the accused, testimony in chambers through closed-circuit television, expeditious return of evidence, and other victim services should be assured to all children in court. Public Hearing, supra note 35 (statement of Chris Hanus).
dressed the constitutional issues surrounding the bill. Professor Potuto stated that the bill did meet the requirements of the U.S. Constitution's confrontation clause and that it was an appropriate policy choice to make special accommodations for child witnesses. She posed the following question to those present at the hearing:

[D]oes the State of Nebraska through its representative officials want to take the position that the child witness's testimony should be encouraged and ... accommodate [the witness] ... [setting] some standardized guidelines for judges throughout this state to use? Or does the state want to stand silent on the subject and leave vulnerable, the most vulnerable in our society, the least protected?

The Legislature answered the question by passing LB 90, and this time, the new Governor, Kay Orr, signed the bill.

2. *The Videotaping and In Camera Procedures*

One of the reasons legislators supported LB 90 was the bill's specific procedures for three types of accommodation for child witnesses: videotaped depositions, in camera videotaped testimony, and in camera live testimony. Upon a request by the prosecuting or defense attorney and upon a showing of compelling need, the court may order any of the specific accommodations.

To determine whether a compelling need exists to videotape the child's testimony or to implement in camera proceedings, the court must make particularized findings on the record. The court must

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38. Professor Potuto stated:

On the constitutional question, the confrontation clause of the United States Constitution has never in all circumstances required eye-to-eye contact between the defendant ... and the witness .... [T]o my knowledge [there has never been a] court that has said in all circumstances the accommodation is unconstitutional. The Nebraska Supreme Court [in State v. Warford], for example, found that the particular procedures in a case in Nebraska were not demonstrably needed in order to obtain the testimony of the child. The court did not say, however, that if the showing were made the accommodation would be unconstitutional. *Public Hearing, supra* note 35 (statement of Josephine Potuto).

39. The American Psychological Association (APA) states that no present evidence indicates that all children will be injured by confrontation with a defendant in a particular case. However, the APA has stated that evidence shows some children may be harmed. Nebraska's statute addresses the group of children that would be harmed. If a compelling need is shown, the child may testify through videotape or in camera procedures. *See infra* note 112.

40. LB 90 § 3(8); Neb. Rev. Stat. § 29-1926(8)(Cum. Supp. 1988). For purposes of implementing any of the three special accommodations, a child is any person eleven years old or younger at the time the motion to take the deposition is made. LB 90 § 3(7); Neb. Rev. Stat. § 29-1926(7) (Cum. Supp. 1988).

41. In effect, the court's determination insures that the videotaped testimony will not be used unless the child is unable to testify at trial, as required by Ohio v. Roberts, 448 U.S. 56 (1980), when admitting previous out-of-court statements. *See infra* text accompanying notes 121-24.
consider six factors:

a) the nature of the offense; b) the significance of the child's testimony to the case; c) the likelihood of obtaining the child's testimony without modification of trial procedure or with a different modification involving less substantial digression from trial procedure than the modification under consideration; d) the child's age; e) the child's psychological maturity and understanding; and f) the nature, degree, and duration of the potential injury to the child from testifying.42

The court may order an independent examination by a psychologist or a psychiatrist43 if the defense attorney disputes the showing of compelling need by the prosecuting attorney.44 After a finding of compelling need by the court, neither party can call the child as a live witness at trial unless the compelling need no longer exists.45

The purpose of the videotaped testimony ordinarily is to prepare testimony that will be used in lieu of any courtroom appearance.46 However, if the child does testify in person, the child's testimony may be conducted in camera upon a showing of cause.47 Where in camera testimony is used, the defendant and child will be in a position to see one another on closed-circuit television monitors.48

When the court orders testimony to be preserved by videotape, the court must designate the time and place for taking the testimony.49 Ordinarily, the testimony will be taken in the presence of the prosecutor, the defense attorney, the defendant, and any other individuals deemed necessary by the court, such as the parent or guardian of the child.50 The court must ensure that the defense attorney has adequate time to complete discovery before the videotape is taken51 and must preside over the testimony as if the child were called as a witness dur-

42. LB 90 § 3(8); NEB. REV. STAT. § 29-1926(8) (Cum. Supp. 1988).
43. Gary Melton, Ph.D., has found this provision questionable. He indicates that psychologists have no specialized knowledge or expertise beyond the court's ability to determine whether a child should testify in open court. In addition, Melton suggests that subjecting children to psychological evaluation may invade their privacy. However, the benefits conferred by the videotaping procedure may outweigh any privacy invasions. Interview with Gary Melton, Chairman of the Law-Psychology Program at the University of Nebraska-Lincoln, Lincoln, Neb. (Sept. 1988).
44. LB 90 § 3(9); NEB. REV. STAT. § 29-1926(9) (Cum. Supp. 1988).
45. Id. at § 3(10); NEB. REV. STAT. § 29-1926(10) (Cum. Supp. 1988).
46. Id. at § 3(1); NEB. REV. STAT. § 29-1926(1) (Cum. Supp. 1988).
47. Id. at § 3(4); NEB. REV. STAT. § 29-1926(4) (Cum. Supp. 1988).
48. Id. at § 3(6); NEB. REV. STAT. § 29-1926(6) (Cum. Supp. 1988).
49. The deposition may be conducted in the courtroom, judge's chambers, or any other suitable location. Id. at § 3(1)(a); NEB. REV. STAT. § 29-1926(1)(a) (Cum. Supp. 1988).
50. If the child's parent or guardian is allowed to be present, he or she may sit with or near the child unless the court determines that the presence of the parent or guardian would disrupt the child's testimony. Id. at § 3(2); NEB. REV. STAT. § 29-1926(2) (Cum. Supp. 1988).
51. Id. at § 3(1)(b); NEB. REV. STAT. § 29-1926(1)(b) (Cum. Supp. 1988).
III. THE PRINCIPLES BEHIND THE CONFRONTATION
CLAUSE

The sixth amendment states:

In all criminal prosecutions, the accused shall enjoy the right to a speedy
and public trial, by an impartial jury of the State and district wherein the
crime shall have been committed, which district shall have been previously
ascertained by law, and to be informed of the nature and cause of the accusa-
tion; to be confronted with the witnesses against him; to have compulsory pro-
cess for obtaining witnesses in his favor, and to have the Assistance of Counsel
for his defence.54

There have been many Supreme Court decisions regarding the right to
confrontation under the sixth amendment. This Comment is not
designed to exhaust all of the case law on this topic, but rather to give
an overview of the principles the Supreme Court has stated are the
foundation of the right to confrontation.

The Court has consistently stressed that confrontation is essential
to fairness.55 In general, the Supreme Court has stated that confron-
tation ensures that the witness will give his or her statements under
oath, thereby emphasizing the seriousness of the matter and guarding
against the chances of perjury. In addition, confrontation forces the
witness to submit to cross-examination and permits the jury to ob-
serve the demeanor of the witness making the statement and to assess
the witness's credibility.56

According to the Supreme Court, the confrontation clause guaran-
tees the defendant a face-to-face meeting with the witnesses appearing
before the trier of fact.57 Recent cases have described a "literal right
to 'confront' the witnesses at the time of trial" as forming "the core of
values furthered by the Confrontation Clause."58

The Supreme Court has found physical confrontation and cross-
examination important in preserving a defendant's sixth amendment
right to confrontation. However, the right to confrontation is not ab-

52. Id. at § 3(1)(c); NEB. REV. STAT. § 29-1926(1)(c) (Cum. Supp. 1988).
53. Id. at § 1; NEB. REV. STAT. § 29-1925 (Cum. Supp. 1988).
54. U.S. CONST. amend. VI. The sixth amendment's protections apply to the states
under the fourteenth amendment. The Nebraska Constitution also provides for
the defendant's right to confront adverse witnesses. NEB. CONST. art. I § 11. This
Nebraska constitutional provision has been interpreted and applied consistently
with the sixth amendment's guarantee to confrontation. See State v. Thaden, 210
solute. In some cases, a defendant may waive his right to confrontation by stipulating to the admission of certain evidence,\textsuperscript{59} by threatening or intimidating the witnesses,\textsuperscript{60} or by engaging in disruptive behavior in the courtroom.\textsuperscript{61} Furthermore, a defendant who pleads guilty waives his right to confrontation.\textsuperscript{62} The Supreme Court has recognized that occasionally the right to confrontation must give way to considerations of public policy and the necessities of a particular case.\textsuperscript{63}

The question of whether it was constitutionally permissible to accommodate child witnesses through the use of a special procedure designed to keep the defendant out of the child witness's view recently was discussed in \textit{Coy v. Iowa}.\textsuperscript{64} In \textit{Coy}, a statute authorizing the use of either in camera testimony or a screen to block the witness's view of the defendant was challenged.\textsuperscript{65} The defendant was charged with two counts of committing lascivious acts with a child. During the defendant's trial, a screen was placed between him and the two complaining witnesses, thereby blocking him from their sight. The trial court made lighting adjustments in the courtroom so that the defendant could see the witnesses, but the witnesses were unable to see the defendant.

The defendant argued that the procedure violated his right to confrontation.\textsuperscript{66} The trial court rejected the claim and convicted the defendant on both counts. The Supreme Court of Iowa affirmed. The United States Supreme Court focused on the literal right to "confront" the witness at the time of trial.

The perception that confrontation is essential to fairness has persisted over the centuries because there is much truth to it. A witness "may feel quite differently when he has to repeat his story looking at the man whom he will harm greatly by distorting or mistaking the facts." . . . It is always more difficult to tell a lie about a person "to his face" than "behind his back."\textsuperscript{67}

The Court noted that the confrontation clause does not compel the witness to fix his eyes on the defendant, as the witness may look elsewhere. Nevertheless, there is a profound effect on the witness who has to stand in the presence of the person he or she accuses. Although that face-to-face presence may upset a truthful child victim, it also

\textsuperscript{59} Williams v. Oklahoma, 358 U.S. 576 (1965).
\textsuperscript{60} See United States v. Carlson, 547 F.2d 1346 (8th Cir. 1976).
\textsuperscript{63} Mattox v. United States, 156 U.S. 237 (1985).
\textsuperscript{64} 108 S. Ct. 2798 (1988).
\textsuperscript{65} IOWA CODE § 910A.14 (1987).
\textsuperscript{66} The appellant also argued that his due process rights were violated because the procedure would make him appear guilty and thus erode the presumption of innocence. However, the trial court rejected this argument. Coy v. Iowa, 108 S. Ct. 2798, 2799 (1988).
\textsuperscript{67} \textit{Id.} at 2802 (footnotes and citations omitted).
may "confound and undo the false accuser or reveal the child coached by a malevolent adult." 

The Court determined that in the present case the defendant's right to confrontation was violated because the trial court failed to make individualized findings that the witnesses needed special protection. Thus, the judgment of the trial court was reversed. The Court concluded:

To hold that our determination of what implications are reasonable must take into account other important interests is not the same thing as holding that we can identify exceptions, in light of other important interests, to the irreducible literal meaning of the clause: "a right to meet face to face all those who appear and give evidence at trial." ... We leave for another day, however, the question whether any exceptions exist. Whatever they may be, they would surely be allowed only when necessary to further an important public policy. 

In a concurring opinion, Justice O'Connor noted that in certain cases it might be appropriate to weigh the interests of a state in protecting child witnesses more heavily than the defendant's right to confrontation and to permit the use of certain procedural devices designed to shield a child witness from the trauma of courtroom testimony. Although Justice O'Connor agreed that the defendant's right to confrontation had been violated by the use of the screen, she pointed out:

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

Moreover, even if a particular state procedure runs afoul of the Confrontation Clause's general requirements, it may come within an exception that permits its use. There is nothing novel about the proposition that the Clause embodies a general requirement that a witness face the defendant. ... But it is also not novel to recognize that a defendant's "right physically to face those who testify against him," even if located at the "core" of the Confrontation Clause, is not absolute, and I reject any suggestion to the contrary in the Court's opinion. Rather, the Court has time and again stated that the Clause "reflects a preference for face-to-face confrontation at trial," and expressly recognized that this preference may be overcome in a particular case if close examination of "competing interests" so warrants. ... 

Thus I would permit use of a particular trial procedure that called for something other than face-to-face confrontation if that procedure was necessary to further an important public policy. The protection of child witnesses is, in my view and in the view of a substantial majority of the States, just such a policy. 

Although Coy prohibited the use of a screen blocking the witnesses' view of the defendant, Coy did not deal with the in camera procedures also authorized by the Iowa statute. To date, the Supreme

68. Id.
69. Id. at 2803 (citations omitted).
70. Id. at 2804-05 (O'Connor, J., concurring) (citations omitted).
Court has not considered the question of whether the use of in camera testimony in a criminal prosecution violates the defendant's right to confrontation. However, the confrontation question has been addressed in state courts.71

A. State Court Decisions

Several state court decisions have addressed the question of whether the use of in camera testimony violates the defendant's right to confrontation.72 For example, in Hochheiser v. Superior Court,73 the court considered the use of in camera testimony in the prosecution of a defendant for lewd conduct with a minor. The procedure proposed by the prosecutor would have enabled the witness to see the defendant and the cross-examiner, and would have enabled the defendant to see the witness. Although the defendant raised constitutional objections to this procedure, the appellate court did not reach the constitutional issues because it held that the trial court did not have the power to permit the accommodation without statutory authority. Although the court did not rule on the confrontation issue, it did indicate that before such an accommodation was employed to prevent additional injury to a child victim, the prosecution must present a factual basis supporting the nature of the potential injury to the witness.

In contrast, the court in State v. Sheppard74 was more amenable to the use of in camera testimony. In Sheppard, the state allowed a child victim of sexual abuse to testify via closed-circuit television. A hearing was held to consider the need for the procedure during which a forensic psychiatrist testified about the potential trauma the child might experience if the child was forced to testify in the courtroom. In addition, two attorneys who had prosecuted sex abuse cases testi-

71. For cases dealing with in camera testimony see In re Appeal in Pinal County Juvenile Action, 147 Ariz. 302, 709 P.2d 1361 (Ct. App. 1985)(two juvenile defendants were excluded from the courtroom and allowed to watch testimony of child victim's six-year-old brother via closed-circuit television; such procedure was constitutionally permissible because defendants had threatened the child before trial); People v. Algarin, 129 Misc. 2d 1016, 498 N.Y.S.2d 977 (Sup. Ct. 1986)(compelling interest of the State and the presence of the defendant's attorney to ensure proper cross-examination allowed the use of two-way closed-circuit television); Commonwealth v. Ludwig, 366 Pa. Super. 361, 531 A.2d 459 (1987)(use of closed-circuit television to obtain testimony of child abused by a family member did not violate defendant's right to confront the witness because face-to-face confrontation was found to pose a danger to the child's psychological well-being); In re James A., 505 A.2d 1386 (R.I. 1986) (in camera interview of abused child conducted by the judge did not violate rights of confrontation or due process because attorneys were allowed to submit questions for the judge to ask).

72. See supra note 71.


fied that potential difficulties with children’s testimony might be eliminated by the use of in camera proceedings.

Although there was no statutory authority to permit the use of such an accommodation, the court noted the use of such procedures in other states, and delineated a specific procedure that would be followed in implementing the closed-circuit presentation. According to

75. The use of in camera testimony would be permitted when the following conditions were met:

1. The testimony of the child victim shall be taken in a room near the courtroom from which video images and audio information can be projected to courtroom monitors with clarity.
2. The persons present in the room from which the child victim will testify (testimonial room) shall consist, in addition to the child, only of the prosecuting and defense attorneys, together with the cameraman.
3. The only video equipment to be placed in the testimonial room shall be the video camera and such tape recording equipment as may be appropriate to carry out the conditions herein set forth.
4. The courtroom shall be equipped with monitors having the capacity to present images and sound with clarity, so that the jury, the defendant, the judge, and the public shall be able to see and hear the witness clearly while she testifies. . . .
5. It shall not be necessary to conceal the video camera. A videotape shall be made containing all images and all sounds projected to the courtroom which tape shall be introduced in evidence as a state exhibit.
6. No bright lights shall be employed in the testimonial room.
7. Color images shall be projected to the courtroom by the video camera.
8. The video camera shall be equipped with a zoom lens to be used only on notice to counsel who shall have an opportunity to object.
9. The video camera, the witness and counsel shall be so arranged that all three persons in the testimonial room can be seen on the courtroom monitors simultaneously. The face of the witness shall be visible on the monitor at all times, absent an agreement by counsel or direction by the court for some other arrangement. The placement of counsel in the testimonial room shall be at the discretion of each counselor.
10. The defendant and his attorney shall be provided by the State with a video system which will permit constant private communication between them during the testimony of the child witness.
11. An audio system shall be provided connecting the judge with the testimonial room to the end that he can rule on objections and otherwise control the proceedings from the bench.
12. In the event testimony is being recorded by use of a mechanical system, the video monitors or one of them shall be so connected so that equipment as to record all of the child witness’s testimony.
13. In the event the proceedings are being recorded by a court stenographer, that stenographer shall remain in the courtroom and shall rely upon the video monitors for the purpose of recording the testimony of the child victim.
14. All video equipment, the videotape and the cameraman, shall be provided by and at the expense of the State.
15. The oath of the child witness may be administered by the judge using the audio equipment, or by the court clerk who may enter the testimonial room for that purpose only, or otherwise as the judge may direct.
16. The testimony of the child victim shall be interrupted at reasonable intervals to provide the defendant with an opportunity for person-to-person consultation.
the procedure, the child, prosecutor, defense attorney, and cameraman would be in the room in which the child would testify, and the defendant would be in the courtroom with the judge and jury. The defendant and those in the courtroom would at all times be in a position to see the child, and the defendant would have the means to communicate with his attorney. The court found the procedure satisfied the requirements of the sixth amendment. It stated:

The Confrontation Clause is not implacable in its demands. Nearly every authority agrees that it is subject to exceptions. In reaching the conclusion, as this court has, that the use of ... [closed-circuit] testimony in this case of child abuse is permissible, it is accepted as a fact that only a modest erosion of the clause, if any, will take place. The child, through the use of video, will not be . . . exposed to the usual courtroom atmosphere. Nevertheless, the defendant as well as the judge, the jury, and the spectators, will see and hear her clearly. Adequate opportunity for cross-examination will be provided. This is enough to satisfy the demands of the confrontation clause. If it is not, it represents a deserved exception . . . . Everything but "eyeball-to-eyeball" confrontation will be provided. No case has held eye contact to be a requirement. It is not demanded when a witness "confronts" a defendant in the courtroom. The 

Sheppard court then described the risk in which the child would be placed if she were required to testify in open court. The court stated that competing interests, if " 'closely examined,' may warrant dispensing with confrontation at trial . . . . Child abuse cases present such interests."

The Nebraska Decision: State v. Warford

After the original LB 90 was introduced, but before it was adopted, the Nebraska Supreme Court was asked to determine to what extent a trial court might constitutionally limit confrontation to accommodate the needs and emotional fragility of a child sexual assault victim. In State v. Warford, the defendant claimed that his constitutional rights were violated by the use of in camera testimony absent statutory authority. The defendant was charged with first-

17. The trial court, before the child victim testifies, shall provide the jury with appropriate instructions concerning the videotape presentation. 
18. These conditions have been adopted by the court after counsel has been provided with the opportunity to make objections to them. 
Id. at 442-43, 484 A.2d 1349-50. 
76. The case was decided before Coy v. Iowa, and thus, did not find it unconstitutional for the child to be unable to see the defendant. However, under Coy, this procedure probably would be modified to have a two-way closed-circuit procedure to comply with the requirement that the child be in a position to see the defendant. See supra text accompanying notes 64-70 for a discussion of Coy v. Iowa. 
78. Id. at 433, 484 A.2d at 1343. 
79. LB 90 was first introduced in 1985 and then was reintroduced in 1987 with minor changes. See supra text accompanying notes 32-33. 
80. 223 Neb. 368, 389 N.W.2d 575 (1986). 
81. The Eighth Circuit Court of Appeals has considered the admissibility of video-
degree sexual assault of a child under four years of age. The victim indicated that she had been abused one evening when her mother was playing bingo. Before trial, the defendant filed a motion objecting to the competency of the victim to testify because of her age. During the competency hearing, the only persons present were the judge, child, social worker, and court reporter. The record did not indicate whether the defendant's attorney had been notified of the interview.

Upon a determination that the victim was competent to testify as a witness, the child was called to testify at trial. However, shortly after taking the stand, she became uncooperative. The prosecuting attorney asked the child if she could show him what happened to her if all the people in the courtroom were not present; she agreed. The prosecuting attorney then moved to examine the witness in a separate room outside the presence of the jury, and to allow the defendant and the jury to watch the examination in the courtroom on a closed-circuit television monitor.

Over defense counsel's objections that the procedure would violate the defendant's constitutional rights by denying him the right to confront the witness, the trial court stated that the procedure was approved.

taped depositions absent any specific statutory authorization. In United States v. Benfield, 593 F.2d 815 (8th Cir. 1979), the court addressed the issues of whether a live, face-to-face meeting is part of the sixth amendment right to confrontation, and whether a videotaped deposition is admissible absent a statute permitting such admission. In Benfield, the defendant was excluded from the deposition room. Basing its decision on Snyder v. Massachusetts, 291 U.S. 97 (1934); Dowdell v. United States, 221 U.S. 325 (1911); Kirby v. United States, 174 U.S. 47 (1899); and Mattox v. United States, 156 U.S. 237 (1895), the court concluded that the defendant's right to confrontation was violated:

Normally the right of confrontation includes a face-to-face meeting at trial at which time cross-examination takes place. . . . While some recent cases use other language, none denies that confrontation required a face-to-face meeting . . . and none lessens the force of the sixth amendment. Of course, confrontation requires cross-examination in addition to a face-to-face meeting. The right of cross-examination reinforces the importance of physical confrontation. Most believe that in some undefined but real way recollection, veracity, and communication are influenced by face-to-face challenge. This feature is a part of the sixth amendment right additional to the right of cold, logical cross-examination by one's counsel. While a deposition necessarily eliminates a face-to-face meeting between witness and jury, we find no justification for further abridgment of the defendant's rights. A videotaped deposition supplies an environment substantially comparable to a trial, but where the defendant was not permitted to be an active participant in the video deposition, this procedural substitute is constitutionally infirm.

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

82. The trial court determined that the child understood the nature of the proceedings and that she would be truthful in her statements and answers. State v. Wardford, 223 Neb. 368, 370, 389 N.W. 2d 575, 578 (1986).

83. While using the equipment, the defense attorney and the defendant had no means of communication, and the judge could not monitor the activity in the courtroom. Id.
priate because of the child's age. Further, the court indicated that the defendant's rights would be protected by permitting the defendant's attorney to confer with his client before cross-examination.\textsuperscript{84}

However, even in private chambers the child remained uncooperative. The prosecuting attorney asked permission for the child's therapist to question the child. Again, over defense counsel's objections,\textsuperscript{85} the court allowed the therapist to question the child. The therapist asked a series of leading questions and, following a recess, the therapist was allowed to question the child alone. Only after the therapist completed her examination was the defense attorney allowed to enter the room and cross-examine the child. The prosecuting attorney conducted the redirect. At no time did the judge have any means to exercise control over the examination of the witness or interrupt the questioning to rule on objections made by defense counsel.

On appeal, the defendant argued that his constitutional rights under the confrontation clause were violated by the use of the in camera procedure. The defendant argued: 1) the state failed to show any need for the innovative means used in questioning the child; 2) the jury and the defendant were not physically present in the room in which the witness was testifying; 3) no means were provided by which the defendant's objections could be made; and 4) no means were provided to prevent the therapist's use of leading questions.

Although the Nebraska Supreme Court was sympathetic to the growing problems associated with prosecuting sexual abuse cases,\textsuperscript{86} the court refused to strip the defendant of his constitutional rights. The court indicated that new procedures should be implemented in the courts, but the procedures must be more carefully planned to protect the competing interests of the child witness and the defendant.

\textsuperscript{84} Id.

\textsuperscript{85} The defense attorney objected to the examination being conducted by someone who was not an attorney and who was an officer of the State. \textit{Id.} at 372, 389 N.W.2d at 579.

\textsuperscript{86} The court stated that "it would be remiss to close its eyes to the ever increasing problems associated with child victimization and the child's role in prosecuting the perpetrators of such crimes." \textit{Id.} The court looked to reports suggesting that eight percent of cases of child sexual abuse involve a stranger, while the majority of such cases involve a member of the child's family or the child's acquaintances.

The court was concerned that a low percentage of assaults that are brought to the attention of authorities lead to criminal prosecutions. Many cases involve a decision by the prosecutor not to prosecute because little physical evidence exists and the only witness is the child who may be perceived as an unreliable or incredible witness by the jury. In addition, many children are not allowed to testify because of the psychological harm they would experience from participating in the trial. \textit{See} D. Whitcomb, E. Shapiro & L. Stellwagen, \textit{When the Victim is a Child: Issues for Judges and Prosecutors} 4, 6, & 13-20 (1985); \textit{Note, The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations}, 98 \textit{Harv. L. Rev.} 806 (1985).
Looking to the available case law, the Nebraska Supreme Court held that the right to confrontation could be infringed only by a showing of compelling need. In addition, when infringement "must [occur] must be as minimally obtrusive as possible." The court found that the trial court had not required the state to stay within minimal constitutional guidelines and, thus, denied the defendant his right to confrontation.

The court stated that a compelling need to protect the child witness from testifying must be shown. Once an adequate showing of need is on the record, the use of tools such as closed-circuit television must be minimally intrusive, and the camera should be situated so that all persons present in the room where the examination is being conducted (other than the cameraman) should be on camera at all times.

The court agreed that it was proper to allow a parent, therapist, or other person who might offer the child support to be present during the examination. However, the court held that questioning of the witness must be done by persons "authorized to participate in the proceeding as members of the bar." "At the very least, the defendant must at all times have a means of communicating with his attorney, and the court must be able to control the examination by interrupting the questioning to rule on objections."

Although no established procedure existed for conducting testimony in camera at the time of Warford, LB 90 now provides such a procedure. The question of whether LB 90 can withstand constitutional scrutiny is examined below.

88. Warford relied on two cases to require a specific showing of special circumstances, i.e., a compelling need as defined under the new statute: United States v. Benfield, 593 F.2d 815 (8th Cir. 1979), and Hochheiser v. Superior Court, 161 Cal. App. 3d 777, 208 Cal. Rptr. 273 (1984). Warford concluded that whether curtailment or diminishment of confrontation rights might be constitutionally permissible depends on the factual context of each case. Exceptions should be narrow in scope and based on necessity or waiver. Extreme care must be taken to strike the correct balance between the policies protecting the mental health of the child victim and the right of the accused to a fair trial. State v. Warford, 223 Neb. 368, 376, 389 N.W.2d 575, 581 (1986).
89. The court found that the record did not show that the attempt to examine the child in open court was frustrated by the child's failure to cooperate. State v. Warford, 223 Neb. 368, 376-77, 389 N.W.2d 575, 581 (1986).
92. Id. at 377-78, 389 N.W.2d at 582.
93. Id. at 377, 389 N.W.2d at 581.
IV. ANALYSIS OF LB 90’S PROVISIONS FOR THE USE OF IN
CAMERA TESTIMONY

Several issues from the confrontation clause cases discussed above are pertinent to a discussion of the constitutionality of LB 90’s in camera testimony provisions. Although a defendant’s attorney would be able to conduct a thorough cross-examination of the child witness, other issues arise besides cross-examination. Other possible concerns about LB 90 are the jury’s ability to evaluate the witness’s credibility and a defendant’s opportunity to physically confront the witness. Furthermore, a compelling need should be demonstrated to justify the use of such procedures. However, even if the LB 90 safeguards slightly infringe a defendant’s constitutional rights, the infringements may be justified by an appropriate policy determination, in this case the accommodation of child witnesses.

A. Face-to-Face Confrontation

One of the reasons the defendant’s conviction in Warford was reversed was because the defendant had been denied the opportunity to see the witness and have the witness see him during the witness’s testimony. Although the sixth amendment reflects a preference for face-to-face confrontation at trial, lower courts such as Sheppard have found that in camera testimony satisfies the physical confrontation requirement. Essentially the only difference between the in camera procedure and an in-person, courtroom appearance by the child would be that the child would probably be in a separate room and be viewed by the defendant, the jury, and any spectators through a television monitor in the courtroom.

Unlike the Iowa statute in Coy, which required the defendant to be kept out of the child’s line of vision, LB 90 provides that “the child shall at all times be in a position to see the defendant … on camera,” if necessary to preserve the constitutionality of the testimony. Under Coy, the child would likely be required to be in such a position to meet the requirements of physical confrontation.

Testimony of a witness who testifies against the accused is more reliable when the accused has had the opportunity to confront the witness face-to-face. As pointed out in Coy, it is more difficult to lie in front of the witness than it is if the witness does not have to see the person whom he or she accuses. LB 90 permits the defendant to be

95. See supra notes 64-66 and accompanying text.
96. See supra note 48.
97. Coy v. Iowa, 108 S. Ct. 2798, 2802 (1988). See also Herbert v. Superior Court, 117 Cal. App. 3d 661, 172 Cal. Rptr. 850 (1981), in which the defendant was charged with oral copulation of a five-year-old. The seating in the courtroom had been rearranged so that neither the child nor the defendant could see one another.
within the child's sight at all times via a television monitor, thus les-
sening the threat of fabrication.98

B. The Opportunity for Cross-Examination

Another reason the defendant's conviction in Warford was re-
versed was because the defendant had been denied the opportunity to
cross-examine the child witness. According to LB 90, the child would
testify like any other witness at a trial except that the defendant and
others in the courtroom would view the child via a television moni-
tor.99 The child would be under oath just as at trial and subject to
cross-examination by defense counsel.100 LB 90 explicitly provides for
the right of cross-examination, as the in camera testimony shall be
taken "in the same manner . . . as [for any other] . . . witness for the
prosecution during the course of the trial."

C. The Jury's Opportunity to Judge the Witness's Credibility

One element to confrontation is the opportunity for the jury to de-
termine the credibility of the witness by observing him or her on the
stand. However, no court has ever read the confrontation clause so
literally as to require jury observation of every witness in person.102

Where in camera testimony is used, the jury will be able to view
the witness on a television monitor. Thus, the jury should be able to
have verbal and nonverbal cues available to determine the witness's
credibility.

D. Demonstration of a Compelling Need

Coy, Hochheiser, and Warford emphasized the fact that findings
should be made on the record to justify the use of special accommoda-

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98. See supra note 48.
99. See supra note 47.
100. See supra note 52.
101. Id.
102. To require jury observation of every single witness would negate the operation of
virtually every established hearsay exception. See infra text accompanying note 147.
tions for child witnesses. LB 90 provides that a compelling need be specifically indicated. The courts may consider factors such as a child's age, psychological maturity, and potential injury to the child from testifying. These determinations may be made through expert evaluation. Requiring the prosecution to prove that the child would be psychologically harmed protects the defendant's rights by requiring sufficient justification for the use of the procedure.

E. Accommodation as a Proper Public Policy

The Supreme Court in Coy and the court in Sheppard recognized that a defendant's right to confrontation may be subject to important public policy considerations. To determine whether accommodating child sexual abuse victims is a proper case for any possible infringement of the defendant's right to confrontation, the State of Nebraska would have to demonstrate a compelling interest in the welfare of the child witnesses. Such a demonstration should not be difficult.

Traditionally, the United States Supreme Court has held that safeguarding the physical and psychological well-being of minors and protecting minor victims of sex crimes from further trauma and embarrassment are compelling state interests. For example, in Globe Newspaper Co. v. Superior Court, the Supreme Court considered a mandatory closure statute that excluded the press and general public from the courtroom during testimony by minor sex offense victims. Although the Court declared mandatory closing of trials unconstitutional, the Court concluded that particularized determinations in individual cases could be made to exclude the press and the public consistent with the first amendment:

[The circumstances of the particular case may affect the significance of the [state's] interest. A trial court can determine on a case-by-case basis whether closure is necessary to protect the welfare of a minor victim. . . .]

[The State's] interest could be served just as well by requiring the trial

103. See supra text accompanying notes 41-42.
104. See also Mattox v. United States, 156 U.S. 237, 243 (1895).
105. For example, some might argue that the defendant's right of confrontation may be lessened by having the testimony taken through in camera live testimony, or in camera videotape testimony, as the child and defendant would not be in each other's physical presence. LB 90 § 3(8); Nebr. Rev. Stat. § 29-1926(8) (Cum. Supp. 1988).
106. When viewing legislatively authorized procedures that potentially deprive the defendant of his fundamental right to a fair trial, the legislation must be strictly scrutinized. The strict scrutiny standard requires that the classification be justified by a compelling state interest which is "necessary . . . to the accomplishment" of its legitimate purpose." Palmore v. Sidoti, 466 U.S. 429, 432-33 (1984)(quoting McLaughlin v. Florida, 379 U.S. 184, 196 (1964))(child custody determined on the basis of race violates the equal protection clause).
court to determine on a case-by-case basis whether the State's legitimate concern for the well-being of [a child] . . . necessitates closure. Such an approach insures that the constitutional right of the press and [the] public to gain access to criminal trials will not be restricted except where necessary to protect the State's interest. 108

Child sexual abuse is recognized as a pervasive wrong. 109 Although many cases of child sexual abuse are reported in the United States, 110 a significant percentage of child abuse cases are either dismissed before trial or result in acquittals as a result of problems in getting the child to testify. 111 For some children, the experience of testifying in open court may be traumatic, 112 but the state needs such testimony to prosecute a child abuser. LB 90 makes accommodations for child witnesses and provides for particularized findings of risk of trauma. By requiring particularized findings, a defendant's rights can be carefully balanced against a child's needs, thus safeguarding a defendant's sixth amendment rights.

V. PRIOR TESTIMONY AND THE CONFRONTATION CLAUSE

Part of the theory and principle behind the right to confrontation is indelibly linked to the practice of excluding hearsay statements from evidence. Historically, the exclusion of hearsay statements did not develop as a distinct idea until the early 1700s. 113 Early in the history of jury trials, the jury acquired knowledge of the case from designated witnesses who did not testify in open court. Statements made by such individuals were termed ex parte affidavits. The hearsay rule evolved because the validity of ex parte affidavits began to be

108. Id. at 608-09.
109. See supra note 1.
110. Ethical and practical problems exist in obtaining valid estimates of the prevalence of sexual abuse, but the research indicates that sexual abuse is under-reported. Melton, Children's Testimony, supra note 2, at 181-83.
111. Often children's parents decide it would be too stressful for the child to confront his or her abuser in court and therefore dismiss the case. In other cases, when the child does testify, the child breaks down emotionally and therefore his or her testimony is seen as inconsistent or unreliable by the jury.
112. In Kentucky v. Stincer, 482 U.S. 730 (1987), the American Psychological Association (APA) submitted an amicus brief discussing the need for the special accommodations for child witnesses. According to APA, little social science data exists to support the general proposition that face-to-face confrontation by child sexual abuse victims with their alleged abusers has any more negative psychological effects than such confrontation has for adult victims. APA suggested that some victims may experience benefits by vindicating their rights and regaining control over their lives. Nevertheless, APA stated in the amicus brief that in circumstances where the risk of trauma is documented, a special accommodation may be the proper mechanism to protect the child.
113. 5 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1384 (J. Chadbourne rev. ed. 1974).
Historically, the right of the defendant to confront adverse witnesses is said to have originated from the trial of Sir Walter Raleigh. Sir Walter Raleigh was convicted of treason after a trial by affidavit; he was never allowed to confront his accusers, or to summon witnesses in his own behalf. In response to this injustice, drafters of the United States Constitution incorporated the right to confront adverse witnesses in the sixth amendment.

Generally, the right to confrontation is to be exercised during the course of the trial. However, the Supreme Court has allowed the prosecution to use testimony taken prior to the trial when the defendant has had the opportunity to confront the witness at the time the prior testimony was taken, and when there was a demonstration that the witness was unavailable to appear at trial. A discussion of some of the principle cases in which the admission of prior testimony was at issue follows.

### A. Supreme Court Decisions

In 1895, the United States Supreme Court first examined the admissibility of prior testimony consistent with the confrontation clause in *Mattox v. United States*. In *Mattox*, the defendant was convicted of murder, but on appeal the conviction was reversed and remanded for a new trial. Before the new trial, the prosecution's key witnesses died. Over the defendant's objections, the transcribed testimony of the dead witnesses from the first trial was admitted into evidence in the second trial. The Court concluded that the rights of the public would not be served by declaring such evidence inadmissible. The Court stated:

> The primary object of the [right to confrontation] was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against [a] prisoner in lieu of a personal examination and cross-examination of the witness in which [an] accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

The Court determined that the defendant's rights had not been violated because he had been given the opportunity to cross-examine the
witnesses at the time the statements were made at the first trial. Furthermore, the witnesses were dead, and thus unavailable to be called at the second trial.

Continuing to follow the purposes stated in Mattox, the Court further addressed the admissibility of prior testimony in Kirby v. United States.\textsuperscript{119} In Kirby, the defendant was convicted of having received stolen federal property. The prosecution had introduced the record of conviction of the alleged thieves to prove that the property had been stolen. The Supreme Court reversed the conviction because the use of the record of another proceeding denied the defendant his sixth amendment right to confrontation. The defendant had not been given the opportunity to cross-examine the witnesses at the time the statements introduced into evidence had been made, and no evidence was introduced to show that the witnesses were unavailable to testify at Kirby's trial.

The Court later imposed the sixth amendment right to confrontation on the states under the fourteenth amendment in Pointer v. Texas.\textsuperscript{120} In Pointer, the defendant and co-defendant were charged with robbery. At the preliminary hearing, the complainant testified that the defendants had robbed him at gunpoint. Neither defendant was represented by counsel, and thus, no effective cross-examination occurred. After the defendants were indicted, the complaining witness moved to California. The witness did not return for trial, and the prosecutor introduced the testimony from the examining trial. The defendant was convicted, but the Supreme Court reversed the conviction. The Court concluded that the defendant was denied the opportunity for cross-examination guaranteed by the sixth amendment because he had not been represented by counsel at the hearing where the testimony was given.

More recently the Court addressed the admissibility of prior testimony in Ohio v. Roberts,\textsuperscript{121} in which the Supreme Court determined that under certain conditions out-of-court statements could be presented when a declarant was unavailable for trial. In Roberts, the defendant was convicted of forgery and the use of stolen credit cards. At the defendant's preliminary hearing, the victim's daughter testified that she had not given the defendant permission to use her parents' credit cards. However, at the defendant's trial the victim's daughter was unavailable because her whereabouts were unknown. The state introduced the testimony from the preliminary hearing, and the defendant objected on the grounds that admission of the testimony violated his right to confrontation. Both the Ohio Court of Appeals and the Ohio Supreme Court agreed with the defendant, and the defend-

\begin{itemize}
\item \textsuperscript{119} 174 U.S. 47 (1899).
\item \textsuperscript{120} 380 U.S. 400 (1965).
\item \textsuperscript{121} 448 U.S. 56 (1980).
\end{itemize}
ant’s conviction was reversed. However, the Supreme Court reinstated the conviction. The Court stated:

[When a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate “indicia of reliability.” Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.]

In Roberts, the Supreme Court rejected the defendant’s assertion that the Court must undertake a particularized search for indicia of reliability before admitting the preliminary hearing testimony of an unavailable witness under the “prior recorded testimony” exception to the hearsay rules. The Court held that the testimony provided sufficient guarantees of trustworthiness because the defendant was represented by counsel; the defendant had the opportunity to cross-examine the witness when the testimony was given; the witness was under oath; and the hearing took place before a judicial tribunal. Arguably, the type of videotaped testimony taken under LB 90 would fall under the former testimony exception, but to date the Supreme Court has not considered the question of whether the use of videotaped testimony in a criminal prosecution violates the defendant’s right to confrontation. However, the confrontation question has been addressed in state courts.

122. Id. at 66.
124. See supra note 16.
125. For cases dealing with the admission of videotaped evidence in criminal prosecutions for child sexual abuse, see Cogburn v. State, 292 Ark. 564, 732 S.W.2d 807 (1987) (videotaped deposition was improperly admitted because counsel did not comply with statutory procedures governing the admissibility of videotaped depositions); McGuire v. State, 288 Ark. 388, 706 S.W.2d 360 (1986) (statute authorizing videotaping of depositions satisfies the right to confrontation where testimony of child is before the judge in chambers and is in the presence of the defendant, his attorney, and the prosecutor, and where the opportunity exists for cross-examination); State v. Jarzbek, 204 Conn. 683, 529 A.2d 1245 (1987) (posibility that the alleged victim of sexual abuse might be psychologically harmed by direct confrontation with the accused is not enough to justify the exclusion of the defendant from the videotaping of the child’s deposition to avoid “eyeball-to-eyeball” confrontation); Gaines v. Commonwealth, 728 S.W.2d 525 (Ky. 1987) (although statute was replete with protections to ensure that the recording was accurately made in a non-threatening environment, no provisions were established to determine child’s competency to testify); In re R.C., 514 So. 2d 759 (La. Ct. App. 1987) (statute allowed the admission of pretrial videotaped testimony when 1) no attorneys were present during the taping, 2) the child was not asked leading questions, 3) the person conducting the interview was available at trial, 4) the defense was given the opportunity to review the video before trial, and 5) the child was available to testify at trial; admission of videotaped statements of a five-year-old sex abuse victim did not violate accused juvenile’s sixth amendment rights); State
B. State Court Decisions

Several state court decisions have addressed the question of whether videotaping a child witness's testimony and admitting the videotape into evidence at trial violates the defendant's right to confrontation. For example, in Long v. State, the Texas Court of Criminal Appeals considered the admissibility of videotaped testimony in child sexual abuse cases and ruled on the constitutionality of the Texas videotape statute. In Long, the defendant was convicted of sexually abusing a child.128 He was given the maximum sentence possible: twenty years in the Texas Department of Corrections and a $10,000 fine. A pretrial videotaped interview was taken pursuant to section 38.071 of the Texas Criminal Procedure Code and was used at the defendant's trial.129

An interview was conducted by the director of the Dallas Rape Crisis Center and was recorded on a videotape. During the interview, the twelve-year-old complainant explained the sexual incidents that

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126. See supra note 125.  
129. The Texas statute provided in part:

2(a) The recording of an oral statement of the child made before the proceeding begins is admissible into evidence if:

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

TEX. CRIM. PROC. CODE ANN. § 38.071 (Vernon 1979). This statute was amended in 1987 to better protect defendants' constitutional rights. See TEX. CRIM. PROC. CODE ANN. § 38.071 (Vernon Supp. 1989).

occurred between her and the defendant. Using anatomically correct dolls, the complainant "revealed a sordid and disgusting series of sexual activities between her and the appellant." The videotaped testimony was admitted and played for the jury. The defendant claimed that the admission of the videotaped testimony deprived him of his right to confrontation. The Texas statute in question did not enable the defense attorney to be present to cross-examine the child. Rather than simply being a means by which testimony could be taken outside the presence of the jury, it was a means by which the child could make a statement without pressure or questioning by adversarial counsel and without seeing the alleged perpetrator of the crime.

The court addressed the constitutional challenge to the statute permitting the admission of the videotape into evidence, focusing on the fact that the defense counsel was unable to cross-examine the child's statement presented via videotape. The court stated that the absence of cross-examination was indicative of testimony lacking indicia of reliability. The court stated:

[I]t was recognized long ago that cross-examination is a defendant's opportunity of "not only testing the recollection [of the witness] and sifting through the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor or upon the stand and the manner in which he gives testimony whether he is worthy of belief."

The court stated that the statute basically authorized a "significant departure from established trial procedure by dispensing with the requirement that the prosecution develop its case in chief in the courtroom, in the presence of the judge, jury, and the defendant." Because the prosecutor would use the videotaped testimony in lieu of live testimony, in effect, the witness would not be available for cross-examination unless the defendant called the witness to testify. The court found this to be violative of the right to confrontation:

It is an illogical as well as unconstitutional scheme to place a defendant, who, again, must be presumed innocent, in the untenable position of either requiring the child to testify and thereby run the very real risk of incurring the wrath of the jury or forgo the right to invoke "the greatest legal engine ever invented for the discovery of truth," [which is cross-examination].

131. According to the child, the appellant was her mother's boyfriend who had lived with them for several years. Her first sexual encounter occurred with the appellant when she was five and one-half years old. Id.
132. Id.
133. In rebuttal, the prosecutor called the child to testify in person. During the rebuttal testimony, the child related to the jury essentially the same series of sexual encounters, and consequently, the defendant claimed that the child's testimony was "improper bolstering." Id. at 305.
134. Id. at 315-16 (quoting Mattox v. United States, 156 U.S. 237, 242 (1895)).
135. Id. at 314.
136. Id. at 321 (quoting California v. Green, 399 U.S. 149, 158 (1970)).
On the other hand, in *Harp v. State*, the Indiana Court of Appeals found the use of videotaped testimony in criminal trials to be constitutionally permissible. In *Harp*, the defendant was convicted of sexual abuse after videotaped testimony of his three-year-old victim was admitted during his trial. The deposition was taken in substantial compliance with a statute authorizing the taking of a child's deposition, although the statute had not yet gone into effect. The child

138. *IND. CODE ANN.* § 35-37-4-8 (Burns Supp. 1988) provides in part:

(b) On the motion of the prosecuting attorney, the court may order that:
(1) The testimony of a child be taken in a room other than the courtroom and be transmitted to the courtroom by closed circuit television; and
(2) The questioning of the child by the prosecution and the defense be transmitted to the child by closed circuit television.

(c) On the motion of the prosecuting attorney, the court may order that the testimony of a child be videotaped for use at trial.

(d) The court may not make an order under subsection (b) or (c) unless:
(1) The testimony to be taken is the testimony of a child who:
(A) Is less than ten (10) years of age;
(B) Is the alleged victim of an offense listed in subsection (a) for which the defendant is being tried or is a witness in a trial for an offense listed in subsection (a);
(C) Is found by the court to be a child who should be permitted to testify outside the courtroom because:
   (i) A psychiatrist has certified that the child's testifying in the courtroom would be a traumatic experience for the child;
   (ii) A physician has certified that the child cannot be present in the courtroom for medical reasons; or
   (iii) Evidence has been introduced concerning the effect of the child's testifying in the courtroom, and the court finds that it is more likely than not that the child's testifying in the courtroom would be a traumatic experience for the child;
(2) The prosecuting attorney has informed the defendant and the defendant's attorney of the intention to have the child testify outside the courtroom; and
(3) The prosecuting attorney informed the defendant and the defendant's attorney under subdivision (2) within a time that will give the defendant a fair opportunity to prepare a response before the trial to the prosecuting attorney's motion to permit the child to testify outside the courtroom.

(e) If the court makes an order under subsection (b), only the following persons may be in the same room as the child during the child's testimony:
(1) Persons necessary to operate the closed circuit television equipment.
(2) Persons whose presence the court finds will contribute to the child's well-being.

(3) A court bailiff or court representative.

(f) If the court makes an order under subsection (c), only the following persons may be in the same room as the child during the child's videotaped testimony:
(1) The judge.
(2) The prosecuting attorney.
(3) The defendant's attorney (or the defendant, if the defendant is not represented by an attorney).
(4) Persons necessary to operate the electronic equipment.
The defendant was able to observe the proceeding through a closed-circuit television monitor. The court concluded that the defendant's rights were not violated because the defendant's counsel was present and was given the opportunity to cross-examine the witness at the time the videotaping was done.

VI. ANALYSIS OF LB 90'S PROVISIONS FOR THE USE OF VIDEOTAPED DEPOSITIONS

Reconciling both the admissibility of prior videotaped testimony and the defendant's right to confrontation raises several important issues. Prior recorded testimony should provide the jury with the opportunity to judge the witness's credibility and should have sufficient indications of reliability. However, other questions remain. Whether the defendant is able to cross-examine the witness at the time the deposition is taken is tantamount to the admissibility of the testimony, as is a determination that the witness is unavailable at the time of the trial.

A. Face-to-Face Confrontation and Cross-Examination

Although the Supreme Court has recognized that the confrontation clause reflects a preference for face-to-face confrontation at trial, the Supreme Court has allowed prosecutors to use testimony taken prior to the trial where a defendant had the opportunity to adequately cross-examine a witness at the time prior testimony was taken.

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

139. The court used only a one-way closed-circuit system so that the child was not able to see the defendant. Under Coy, this procedure probably would have to be modified to have a two-way closed-circuit procedure to comply with the requirement that the child be in a position to see the defendant. See supra text accompanying notes 64-70 for a discussion of Coy v. Iowa.
141. See supra text accompanying note 116.
LB 90 provides for the use of prior testimony through the use of videotaped testimony in criminal trials.\textsuperscript{142} Arguably, the only significant difference between the videotaped testimony and the child's court appearance is that the jury and the public are excluded. At the videotaping session, the child would likely be sworn in and would be under oath, as at trial. The defendant would be present during the child's testimony unless otherwise required by the court.\textsuperscript{143} In this context, present could mean either physically present in the same room, or present by way of a television monitor during the videotaping.\textsuperscript{144} In either case, the child "shall at all times be in a position to see the defendant."\textsuperscript{145}

Unlike the Texas statute in \textit{Long}, which was declared unconstitutional because the defendant was not given the opportunity for cross-examination, LB 90 explicitly provides for the right of cross-examination. LB 90 states that the videotaped testimony shall be taken "in the same manner as if the child were called as a witness for the prosecution during the course of the trial."\textsuperscript{146} Therefore, when the prosecutor moves to admit the prior videotaped testimony of a child witness, there should be no grounds for a constitutional objection on the basis that the defendant did not have adequate opportunity to physically confront and cross-examine the witness at the time the prior testimony was taken.

B. The Jury's Opportunity to Judge the Witness's Credibility

Although one element to confrontation is the opportunity of the jury to determine the credibility of the witness by observing him or her on the stand, no court has ever read the confrontation clause so literally as to require jury observation of every witness. Such an approach would negate the operation of virtually every established hearsay exception.\textsuperscript{147} If the jury had to view every witness in open court,
out-of-court statements previously held to be constitutionally admissible suddenly would be inadmissible.

Although observation of the witness by the jury is important, Wigmore points out that the focus of the confrontation clause actually is on cross-examination:

The essential requirement of the hearsay rule, as just examined, is that statements offered testimonially must be subjected to the test of cross-examination. But a process commonly spoken of as confrontation is also often referred to as an additional and accompanying test or as the sole test.

Now confrontation is, in its main aspect, merely another term for the test of cross-examination. It is the preliminary step to securing the opportunity of cross-examination; and, so far as it is essential, this is only because cross-examination is essential. The right of confrontation is the right to the opportunity of cross-examination. Confrontation also involves a subordinate and incidental advantage, namely, the observation by the tribunal of the witness' demeanor on the stand, as a minor means of judging the value of his testimony. But this minor advantage is not regarded as essential, i.e., it may be dispensed with when it is not feasible. Cross-examination, however, the essential object of confrontation, remains indispensable.\(^\text{148}\)

Unlike admitting a written transcript of preliminary hearing testimony, which has been held to be constitutionally permissible,\(^\text{149}\) a videotape would afford the jury some evidence of demeanor. LB 90 requires that all persons are to be visible on camera except the camera operator when testimony is taken so that the jury can have all verbal and nonverbal cues available when determining the credibility of a witness.\(^\text{150}\)

C. Unavailability

The Supreme Court has stated that some out-of-court statements are admissible when the prosecution establishes that the declarant is unavailable to testify at trial,\(^\text{151}\) because such statements are "preferred over complete loss of the evidence."\(^\text{152}\) However, the problem of determining whether the admission of such evidence would violate a defendant's right to confrontation has troubled the court system.\(^\text{153}\)

To determine whether a witness is unavailable to testify at trial

\(^{148}\) J. Wigmore, supra note 113, § 1365 (emphasis in original).
\(^{149}\) See supra text accompanying notes 117-18 for a discussion of Mattox v. United States.
\(^{150}\) Although one might argue that having all those people on camera at one time would make the testimony seem unnatural, the approach is better than having the camera select what the jury will see at any given time. This way the jury can observe the reactions of others, just as they could in the courtroom.
\(^{151}\) See supra text accompanying notes 121-24 for a discussion of Ohio v. Roberts.
\(^{152}\) See Fed. R. Evid. 804 advisory committee's note.
\(^{153}\) See, e.g., Dutton v. Evans, 400 U.S. 74, 86 (1970). The Supreme Court has recog-
because of mental illness or infirmity, courts generally require expert testimony to establish the existence of such a condition.\textsuperscript{154} Case law indicates that the evidence must establish that the witness would suffer severe, perhaps permanent injury if he or she were forced to testify in open court.\textsuperscript{155}

While any court proceeding is traumatic for a victim,\textsuperscript{156} special need must be demonstrated to implement the videotaping proceedings. If nothing more than a request to use the procedure is required, the use of such electronic means is arguably unconstitutional.\textsuperscript{157} However, LB 90 does not allow blanket videotaping. Rather, it requires a particularized finding of need.

LB 90 provides an approach consistent with other videotape statutes upheld by state courts as constitutional. The statute requires that a compelling need be specifically determined based on such factors as the child's age, psychological maturity, and potential injury from testifying.\textsuperscript{158} Such a determination may be made based on findings of a psychological or psychiatric examination.\textsuperscript{159}

Requiring the prosecution to prove that the child would be psychologically harmed and thus qualify as unavailable facilitates the court's efforts to reconcile society's desire to accommodate the special needs of child victims with the defendant's constitutionally guaranteed right to confrontation.\textsuperscript{160} The prosecution must demonstrate a legitimate need for protection. The need generally will be demonstrated through

\begin{itemize}
\item the probability of psychological injury as a result of testifying,
\item the degree of anticipated injury,
\item the expected duration of the injury,
\item whether the expected psychological injury is substantially greater than the reaction of the average victim of rape, kidnapping or terrorist act.
\end{itemize}

\textit{Id.} at 830 n.18. Such factors should be considered in light of the nature of the crime and the past psychological history of the witness.


\textsuperscript{157} See supra text accompanying notes 127-36 for discussion of \textit{Long v. State}, in which a Texas videotaping statute requiring no particularized finding of need was declared unconstitutional.

\textsuperscript{158} See supra note 42.

\textsuperscript{159} See supra note 44.

\textsuperscript{160} Some commentators suggest that the need to use the videotaping or in camera procedures may be proved by a preponderance of the evidence rather than beyond a reasonable doubt. See Note, supra note 8, at 287-88.
expert testimony rather than relying solely on the testimony of family members and friends.

Once the child is determined to be unavailable and the child's testimony may be videotaped, the child's unavailability is presumed to continue at the time of trial.161 After a finding of compelling need by the court, neither party may call the witness to testify in open court before the jury unless that party demonstrates that the compelling need no longer exists.162 As long as the child is not called and the videotape is the only testimony of the child presented, the defendant is not subjected to "improper bolstering,"163 a concern raised in Long when the trial court impermissibly allowed the child to testify in court to the same sexual acts after her initial testimony by videotape.

D. Reliability

An unavailable witness's prior statements may be admissible if they bear certain "indicia of reliability."164 Where the evidence falls into a traditional hearsay exception, reliability may be inferred.165

Arguably, the type of videotaped testimony taken under LB 90 is permissible under the pre-existing exception for former testimony.166 Nevertheless, the admissibility of videotaped testimony should satisfy the test of reliability under Roberts. So long as the witness is under oath, the defendant is present, defense counsel is given the opportunity to cross-examine the witness, and the testimony takes place before the judge, the videotaping should possess the necessary indications of reliability required under Roberts.

VII. CONCLUSION

The Supreme Court has recognized the need to protect child witnesses. In Coy, Justice O'Connor suggested that the protection of sexual abuse victims was a proper public policy that perhaps would allow a state to implement procedures that might infringe upon a defendant's right to confrontation. Nebraska's interests in the protection of the emotional well-being of child sex offense victims and the need of their testimony to ensure successful prosecutions are compelling.

LB 90 has outlined a proper procedure for the use of videotaped and in camera testimony of child witnesses at trial. The legislature has taken every precaution to preserve the rights of a defendant. Procedures similar to those declared constitutional in other states can be

161. See supra note 45.
162. Id.
163. See supra note 133.
164. For a discussion of Ohio v. Roberts, see supra text accompanying notes 121-24.
165. See supra text accompanying note 122.
166. See supra note 16.
found in LB 90. When the procedures outlined by LB 90 are followed, a defendant's right to confront adverse witnesses is preserved.

LB 90 should be a great asset to prosecutors who must call children as witnesses, but who are reluctant to do so for fear of traumatizing the children. LB 90 accommodates child witnesses while protecting defendants' sixth amendment rights. Thus, LB 90 should withstand constitutional scrutiny.167

Emily Campbell '91

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167. Most cases dealing with new technology have not addressed the issue of whether videotaped or in camera testimony violates the defendant's right of due process under the fourteenth amendment. See supra note 21 for a discussion of the defendant's right of due process. More investigation of this constitutional right is needed to determine whether LB 90 can withstand all constitutional attacks.