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CONSIDERING THE CONSTITUTIONALITY OF A CONFRONTATION CLAUSE EXCEPTION FOR DOMESTIC VIOLENCE VICTIMS

BY THEKLA HANSEN-YOUNG

INTRODUCTION

The Confrontation Clause exists to ensure the reliability of testimony, and thus, a fair trial for defendants. By requiring a victim's or witness's physical presence, testimony under oath, cross-examination and allowing the fact finder to observe the demeanor of the witness, the Confrontation Clause attempts to ensure that evidence admitted against a defendant is reliable and subject to rigorous adversarial testing.

In spite of its benefits, the face-to-face confrontation of a witness is sometimes impossible or highly undesirable. In these situations, the protections of the Confrontation Clause give way to compelling state interests, and courts will admit evidence without the witness's physical presence. The hearsay exception for unavailable witnesses is a classic example of when the reliability of a particular out-of-court statement is ensured to such a degree that a court will forgo the requirement that the witness testify in court to the fact asserted in the hearsay statement. In the last several decades, efforts have been made to expand exceptions to the face-to-face requirement of the Confrontation Clause to vulnerable witnesses, particularly child witnesses. The physical presence of vulnerable victims in front of defendants can sometimes cause great psychological trauma to the victims, making prosecution of certain crimes difficult. This "trauma"

exception to the face-to-face requirement of the Confrontation Clause has not been extended to other classes of victims.

This paper explores the possible application of the trauma exception to domestic violence victims. Section I reviews the requirements for admissible evidence set forth by the Confrontation Clause. It evaluates the exception to the face-to-face requirement of the Confrontation Clause as it has developed to shield child witnesses from testifying. Section II describes the current state of domestic violence prosecutions in the United States. The paper ultimately argues that an expansion of the trauma exception to shield domestic violence victims from testifying in the physical presence of their abusers on a case-by-case basis will enable states to protect the psychological well-being of victims and to better prosecute domestic violence crimes, while still ensuring a fair trial to defendants.

THE CONFRONTATION CLAUSE APPLIED TO CHILD WITNESSES

The Sixth Amendment gives any criminal defendant "the right . . . to be confronted with the witnesses against him." The fundamental concern of the Sixth Amendment Confrontation Clause is to make certain that evidence admitted against a criminal defendant is reliable. Reliability is guaranteed by subjecting

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3 The author recognizes that the question of how domestic violence should be resolved and treated by the state is in dispute and that there are many complex issues surrounding domestic violence. In discussing the prosecution of domestic violence crimes and a possible exception to face-to-face testimony, this paper does not wish to simplify or ignore other issues surrounding domestic violence, but will only address issues as they are directly relevant to the question of whether the expansion of such an exception is constitutional. For a discussion of domestic violence crimes, see EVE S BUZAWA & CARL G. BUZAWA, DOMESTIC VIOLENCE; THE CRIMINAL JUSTICE RESPONSE (Sage 1996) and Lori Heise & Jane Roberts Chapman, Reflections on a Movement: the U.S. Battle Against Women Abuse, in FREEDOM FROM VIOLENCE: WOMEN'S STRATEGIES FROM AROUND THE WORLD 257, 265 (Margaret Schuler ed., UNIFEM 1992).

4 U.S. CONST. amend. VI.

5 Crawford v. Washington, 541 U.S. 36, 74-75 (2004); Dutton v. Evans, 400 U.S. 74 (1970) (plurality opinion) ("The mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that ‘the trier of fact [has] a satisfactory basis for
witness testimony to "rigorous testing in the context of an adversary proceeding before the trier of fact."  

Evidence is rigorously tested in several ways. Courts have interpreted the Confrontation Clause to require that the prosecution prove facts "by witnesses who confront [the defendant] at the trial, upon whom [the defendant] can look while being tried, whom [the defendant] is entitled to cross-examine, and whose testimony [the defendant] may impeach in every mode authorized by the established rules governing the trial or conduct of criminal cases."  

Cross-examination has been described as "the greatest legal engine ever invented for the discovery of truth."  

The Confrontation Clause was also interpreted to require testimony under oath. Testimony under oath impresses a witness with "the seriousness of the matter and guard[s] against the lie by the possibility of a penalty for perjury."

The physical presence of a witness serves two purposes. It serves a strong symbolic purpose, sending a message that the American system is one in which criminal defendants are afforded certain guarantees and protections.  

Physical presence of witnesses also allows the fact finder to "observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility."  

In requiring face-to-face confrontation with child witnesses, the Supreme Court has held that face-to-face confrontation is valuable because it "may confound and undo the false accuser, or reveal the child coached by a malevolent adult,"


 Maryland v. Craig, 497 U.S. 836, 846 (1990); Kentucky v. Stincer, 482 U.S. 730, 737 (1987) ("The right to cross-examination, protected by the Confrontation Clause, thus is essentially a "functional" right designed to promote reliability in the truth-finding functions of a criminal trial.").

 Craig, 497 U.S. at 846.

 See Coy v. Iowa, 487 U.S. 1012, 1017 (1988) ("There is something deep in human nature that regards face-to-face confrontation between accused and accuser as 'essential to a fair trial in a criminal prosecution.").

 Craig, 497 U.S. at 846.
reducing the risk that a witness will wrongfully accuse an innocent person.\textsuperscript{12}

Courts also recognized that “face-to-face presence may, unfortunately, upset the truthful rape victim or abused child,” but as late as 1988 dismissed the effects of psychological harm as “costs” of “constitutional protections.”\textsuperscript{13} However, two years later, the Supreme Court held that in the face of trauma caused to vulnerable witnesses, the defendant’s right to face-to-face confrontation, as with other Sixth Amendment rights,\textsuperscript{14} is not absolute.\textsuperscript{15} The Court based its reasoning on the idea that face-to-face confrontation is not the “sine qua non of the confrontation right.”\textsuperscript{16} Face-to-face confrontation is not “an indispensable element of the Sixth Amendment’s guarantee of the right to confront one’s accusers.”\textsuperscript{17}

Referencing the admissibility of hearsay, the Court pointed out that it “never insisted on an actual face-to-face encounter at trial in every instance in which testimony is admitted against a defendant,” and instead has taken a pragmatic approach to the Confrontation Clause.\textsuperscript{18} Although face-to-face physical presence is

\textsuperscript{12}Coy, 487 U.S. at 1020 (“It is always more difficult to tell a lie about a person ‘to his face’ than ‘behind his back.’”).
\textsuperscript{13}Id. at 1020.
\textsuperscript{15}Craig, 497 U.S. 836 (1990).
\textsuperscript{16}Craig, 497 U.S. at 847; Delaware v. Fensterer, 474 U.S. 15, 22 (1985) (per curiam) (“The Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose [testimonial] infirmities through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness' testimony”).
\textsuperscript{17}Craig, 497 U.S. at 849-50.
\textsuperscript{18}Id. at 847-48.
CONSIDERING THE CONSTITUTIONALITY

preferred, the preference “must occasionally give way to considerations of public policy and the necessities of the case.”

In striking a balance between limiting “evidence that may be received against a defendant” and society’s interest in “accurate fact-finding,” the Court held that a “defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured.” The critical inquiry in all cases, therefore, becomes (1) whether the testimony, absent physical face-to-face confrontation, is “necessary to further an important state interest,” and (2) whether the procedure used to admit the evidence ensures its reliability.

In evaluating whether the state had an important interest, the Supreme Court looked at the goals of the regulation, statutes, judicial opinions and trends that supported those goals. Numerous courts have found that states have compelling interests in protecting “minor victims of sex crimes from further trauma and embarrassment.” A state’s interest in the “physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant’s right to face his or her accusers in court.” Given the state’s interest in protecting children and the increasing amount of “academic literature documenting the psychological trauma suffered by child abuse victims who must testify in court,” it is constitutional, in some instances, to allow minor victims to testify outside of the defendant’s presence.

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19 Id. at 849.
20 Id.
21 Craig, 497 U.S. at 850.
22 Id. at 852.
23 Id. The court also pointed out that it had previously upheld laws protecting the physical and psychological well-being of minors as constitutional, even though the laws would exclude the public from their right to attend trials, and laws preventing exploitation of children. Id. at 852-53.
24 Id. at 853.
25 Id. at 855.
It is constitutional for a minor victim to testify outside of a defendant's presence when the trial court finds (1) a particular need for protection; (2) that trauma is caused by the defendant rather than the court; and (3) the stress suffered by the witness is more than de minimus. Judges must make a finding of necessity on a case-by-case basis to determine whether some form of protection, such as the use of a one-way closed circuit television procedure, is necessary to protect the welfare of a particular child. It is also crucial that a trial court find that testifying in the presence of the defendant, not just testifying in a courtroom, would traumatize the witness. If the courtroom is the cause of trauma, the state can take other measures to protect witnesses, such as allowing testimony in a different venue, with the defendant present. Last, a trial court must find that the trauma suffered by the witness is more than "mere nervousness or excitement or some reluctance to testify." When evaluating these three factors, a district court can rely exclusively on expert testimony, and need not test the minor victim in court in the defendant's presence.

Simply because a compelling state interest exists in shielding the witness from testifying in the presence of the defendant, does not mean that the witness may testify outside the defendant's presence. The procedure by which the testimony is admitted must ensure the reliability of the testimony and uphold the rigorous testing of the adversarial process. Closed-circuit testimony under oath, with cross-examination, and the ability of the fact finder to view the witness, has been held to satisfy the requirements of the Confrontation Clause. Sometimes, excluding the witness from the physical presence of the defendant may increase the Confrontation Clause's "truth-seeking goal," as face-to-face confrontation may sometimes "so overwhelm the child as

26 Id.
27 Id.
28 Id.
29 Id.
30 Id. at 856.
31 Id. at 860.
32 Id.
33 Id. at 856-57.
to prevent the possibility of effective testimony, thereby undermining the truth-finding function of the trial itself.”

THE TRAUMA EXCEPTION APPLIED TO DOMESTIC VIOLENCE VICTIMS

Although the Court has recognized a trauma exception for minor victims, the exception has not been expanded to other equally vulnerable classes, such as victims of domestic violence. This failure is not due to judicial rulings against expansion, but a lack of critical inquiry that such a possibility might exist. A parallel comparison of the state’s interests between crimes against a minor child and crimes of domestic violence could ultimately help safeguard the psychological well being of domestic violence victims, as well as increase the number of successful prosecutions against domestic violence crimes.

Domestic violence has traditionally been an inconspicuous crime that has been treated as a separate class of crimes in the United States. Prior to the 1970’s, the criminal justice system treated domestic violence as a private family matter. In spite of studies that revealed that severe repeated violence occurred in about 6.8% of all marriages, police, prosecutors and judges more often than not declined to interfere in what they perceived to be a domestic matter. This hands-off attitude had, and continues to have, a disparate impact on women, who comprise the majority of domestic violence victims.

In spite of reforms, many cases of domestic violence still fail to be prosecuted. Current reporting, arrest, prosecution and conviction rates for domestic violence crimes are low. The “single greatest impediment to a more effective criminal justice response to wife assault is the victim’s failure to report the event to the police.” Estimates of calls to the police as a percentage of actual

34 Coy, 487 U.S. at 1032 (Blackmun, J., dissenting).
35 Craig, 497 U.S. at 850.
37 See Heise & Chapman, supra note 3, at 265.
38 Dutton, supra note 36, at 125.
domestic violence range from 2% to approximately 50%. Other estimates show that at least 93% of the cases are not reported because there was no injury or threat of injury enough to justify calling the police. In one of the largest studies conducted, it was determined that only 6.7% of all spousal assaults were reported.

Compounding the effects of the low reporting rates are similarly low arrest rates once a crime has been reported, as well as low prosecution and conviction rates. One study found a 7.3% arrest rate for all reported cases, and found that police arrested in only 24% percent of the cases where prima facie evidence for arrest exists. Although there are many reasons why prosecutors decline to prosecute domestic violence cases, the willingness of victims to assist officers and prosecutors to follow through on a case may be an important determinant of an arrest and prosecution. Of those jurisdictions for which reports were available (jurisdictions that tended to have the most progressive programs in place to prosecute domestic violence), approximately 50% of all prosecutions resulted in conviction. In less progressive jurisdictions, convictions were close to zero percent.

For a variety of reasons, victims of domestic violence fail to report crimes or support arrest and prosecution of their abusers, thus contributing to the low reporting, arrest, prosecution and conviction rates. Many women do not want their abusers to be jailed. Victims may also believe that the dispute is private or that

39 Buzawa, supra note 3 at 44.
40 Id.
41 Dutton, supra note 36, at 138. An arrest typically resulted in a decrease in postcharge violence.
42 For a documentation of those reasons, see Buzawa, supra note 3, at 82-87.
43 Buzawa, supra note 3, at 55.
44 Dutton, supra note 36, at 141.
45 Id.
46 For a discussion of why women remain with their batterers and do not want to see them jailed, see Dee L.R. Graham, Edna Rawling, and Nelly Rimini, Survivors of Terror, Battered Women, Hostages, and the Stockholm Syndrome, in Feminist Perspectives on Wife Abuse, 217 (Kersti Yllo & Michele Bograd eds., Sage 1988).
the abuse is not a crime. Many fear economic or physical reprisal if they report the incident.

Studies have also concluded that a "more sympathetic and informed judiciary is key" to preventing further domestic violence. Many victims wish to avoid the ordeal of an adversarial proceeding. When "left to face the justice system alone, a high percentage of women end up withdrawing their support for prosecution either by requesting that the charges be dropped or refusing to testify against their abusers." Many victims also suffer from post-traumatic stress disorder (PTSD), which renders them unable to make a rational decision to report the crime and makes it difficult for them to talk about the abuse or to testify. Moreover, if a victim has had poor interactions with the criminal justice system in the past, she is unlikely to turn to it in the future.

The state has both an interest in successfully prosecuting these cases and, at the same time, protecting the well being of women. While many reforms can be made to increase the successful prosecution of domestic violence cases and to better protect the welfare of women, expanding the trauma exception to the face-to-face requirement of the Confrontation Clause may be a good starting point to increase reporting, arrests, and prosecutions of crimes of domestic violence.

The expansion of the trauma exception to cover domestic violence victims is necessary to protect the state's interest in successfully prosecuting domestic violence crimes. Because domestic violence crimes have been historically under-prosecuted, with attention only recently being given to domestic violence, constitutional methods that may increase reporting, arrest, and prosecution rates should be employed. Prosecution can help

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47 Id.
48 Id.
49 Id. at 269.
50 See Heise & Chapman, supra note 3, at 269.
51 Id. at 272.
52 Id.
53 Id.
54 For example, more support of victims throughout the criminal justice process.
women regain their dignity and their lives. Prosecuting offenders sends an important message that violence towards women, after decades of acceptance, is now untenable. Prosecution also reduces the likelihood that the offender will abuse his victim after the prosecution.

The state also has an interest in protecting the welfare of women, who comprise the majority of the victims of domestic violence. State laws providing shelters and services to domestic violence victims demonstrate the strength of states’ interests in protecting domestic violence victims. Many prosecutor’s offices have instituted special divisions devoted to the prosecution of domestic violence cases. Further, the state has an interest in promoting the equality and dignity of women.

Expanding the trauma exception will help further these state interests by easing the trauma suffered by victims when they must testify in the presence of their abuser. A particular victim’s reactions depend on a “variety of factors, such as the nature of the experience and the circumstances surrounding it, the characteristics of the victims themselves and the degree of violence experienced.” Although it is difficult to generalize victims’ responses to their abuse, many victims suffer from post-traumatic stress disorder, making it difficult for them to talk about the abuse, particularly in front of their abusers, whom they fear. Their experiences may be exacerbated when testifying in front of their abusers, and feelings of extreme helplessness and fear may return.

55 Heise & Chapman, supra note 3, at 284.
56 It should be noted that there are alternative methods of addressing the issue of domestic violence, some of which may be seen as more effective than prosecution. For a discussion of these alternatives, see Heise & Chapman, supra note 3, at 269.
57 For a discussion of laws and programs relating to the protection of domestic violence victims and women, see Buzawa, supra note 3 and Heise & Chapman, supra note 3.
58 Buzawa, supra note 3, at 93.
59 Id.
60 A large majority of women who stayed in abusive relationships before leaving reported feeling helpless. Lee Ann Hoff, BATTERED WOMEN AS SURVIVORS 64 (Routledge 1990).
I interviewed a woman who, when thinking about facing her abuser, began to cry uncontrollably and became fearful for her life. She will testify in the hopes that her abuser will finally leave her alone. Although she has finally learned to affirm that her abuse was wrong, testifying in front of her abuser will be extraordinarily difficult and painful, and she will relive the abuse vividly. If a trauma exception was currently in place, both the woman, and the fact finders, would benefit from her testimony projected via closed-circuit camera. Her trauma and stress level would be lessened by the fact that she would not have to see her abuser. Her testimonial accuracy would also increase, with her increased ability to communicate.

When combined with the fact that the court process often leaves victims feeling vulnerable, and that many victims feel that the criminal justice system supports their abusers, the thought of testifying in front of their abusers can easily cause victims to decide not to report the crime or support an arrest or prosecution. Indeed, the woman I interviewed had not reported the abuse for a long time out of fear. Victims “sustain high perceived and real costs to continue prosecution.” By requesting individualized court rulings that a domestic violence victim be permitted to testify via closed-circuit camera, states can ease the trauma suffered by victims, thereby protecting their psychological welfare. By easing the trauma suffered by victims, states can also increase the chances that they will support arrests and prosecutions of domestic violence crimes, because victims may be more willing to testify if they need not do so in front of their abusers. Further, because the trauma exception is applied on a case-by-case basis, states do not run the risk of imposing a broad, paternalistic testimonial requirement on

61 Personal interview with victim of abuse (March 2005).
62 Studies done in the child witness context indicate that child witnesses are also more reliable when testifying outside of the presence of their abusers. See Katherine W. Grearson, Proposed Uniform Child Witness Testimony Act: An Impermissible Abridgement of Criminal Defendants’ Rights, 45 B.C. L. REV. 467, 483-89 (2004).
63 Id. at 126-27.
64 Id.
domestic violence victims, which may stifle the desires of some victims who wish to confront their abusers.

By safeguarding important state interests, expanding the trauma exception to protect domestic violence victims from testifying in the presence of their abusers does not run afoul of the Confrontation Clause. Apart from protecting an important state interest, the state must ensure that the testimony is reliable. Special evidentiary problems may arise in the context of domestic violence cases. Some reports indicate that a portion of women may use domestic violence laws to "get back" at their ex-boyfriends or husbands. In instances where it may sometimes be difficult to determine who is telling the truth, it may be especially important to require face-to-face confrontation. This concern may, however, be unjustified to some degree. Many of the cases in which jilted partners might use domestic violence laws as a form of revenge can be weeded out through the normal screening processes conducted by a prosecutor's office. Moreover, there is some evidence that testimony projected into a courtroom by television has less of an emotional impact on the fact finder than live testimony. A partner who was attempting to obtain revenge would probably prefer live testimony, which is subject to all the protections of the Confrontation Clause.

A domestic violence victim's live testimony projected into the courtroom by one way closed-circuit camera, with cross examination, testimony under oath, and the ability of the fact finder to view the witness, thus satisfies the requirements of the Confrontation Clause by "adequately ensur[ing] the accuracy of the testimony and preserv[ing] the adversary nature of the trial." Perhaps surprisingly, there is no indication that testimony by closed-circuit decreases the presumption of innocence afforded to the defendant. Rather, because closed-circuit testimony may decrease the effect of the testimony on the fact-finder, it typically

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65 For a discussion of the improper use of domestic violence laws and the dangers that arise from admitting hearsay into domestic violence cases, see Peter R. Dworkin, Confronting Your Abuser in Oregon: A New Domestic Violence Hearsay Exception, 37 WILLAMETTE L. REV. 299 (2001).
66 See Grearson, supra note 62, at 467.
67 Craig, 497 U.S. at 856-57.
harms the prosecution's case. Prosecutors thus face a trade-off when victims testify via closed circuit. The option of testimony by closed-circuit camera may increase the odds that a victim will testify, but may decrease the effectiveness of the testimony, in spite of increasing the accuracy of the same testimony.

**CONCLUSION**

Domestic violence often happens under the legal radar. States have an interest in preventing domestic violence crimes, which have low reporting, arrest, prosecution, and conviction rates. States also have an interest in protecting women, who are disproportionately impacted by domestic violence.

Broad reforms of the criminal justice system as they relate to domestic violence have been proposed elsewhere. Rather than outlining sweeping, macro changes to address the issue of crimes of domestic violence, this paper argues that the States can make a simple and immediate reform by expanding the narrow exception to the face-to-face requirement of the Confrontation Clause and allowing women to testify outside of the presence of their abusers.

In making a particularized finding that the victim will suffer more than de minimus trauma as a result of testifying in the presence of the defender, trial courts can satisfy the protections guaranteed by the Confrontation Clause, protect the interests of the state, safeguard the psychological welfare of the victim, ensure the reliability of the testimony and effectively prosecute domestic violence, thus sending a clear message to offenders that violence against women will not be tolerated.

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68 See Grearson, supra note 62, at 483-89.