1998

Witness Protection in Criminal Cases: Anonymity, Disguise or Other Options

Nora V. Demleitner
Washington and Lee University School of Law, demleitnern@wlu.edu

NORA V. DEMLEITNER

Witness Protection in Criminal Cases: Anonymity, Disguise or Other Options?

I. INTRODUCTION

Confronting the witnesses against herself is among the defendant's central rights in an adversary system. The boundaries of that right, which in the United States is constitutionally enshrined, will constrain the methods of witness protection available to the criminal justice system. Generally, U.S. law does not permit the use of anonymous or disguised witnesses even in situations where the defendant or her associates threaten the physical safety of the witnesses. Instead the criminal justice system has attempted to protect witnesses, including victims, through other means. Among such protective measures are the pre-trial incarceration of the defendant and, in extreme situations, witness protection programs.

When a threat to a witness emanates from unrelated third parties, as might be the case for undercover agents, the courts permit the exclusion of such spectators or a total closure of the proceedings to the public, including the press. Such exclusions will be narrowly construed so as to violate neither the defendant's constitutional right to a public trial nor the freedom of speech or of the press.

Within the last two decades the rather limited rights of victims and of witnesses in criminal proceedings generally have been challenged as too restrictive, particularly when being contrasted with the often broadly construed rights of defendants. The most dramatic protection of the victim's *privacy* interests grew out of the women's movement. The so-called rape shield legislation which restricts the defendant's right to cross-examine the victim in a rape case about her sexual history inherently limits the defendant's right to confront the witnesses against him. Passed by state legislatures beginning in the

NORA V. DEMLEITNER is Associate Professor, St. Mary's University School of Law, San Antonio, TX. Bates College, B.A., 1989; Yale Law School, J.D., 1992; Georgetown University Law Center, LL.M. (International & Comparative Law), 1994. For their constructive criticism and helpful guidance, I am indebted to David Dittfurth, Marc Miller, Michael Smith, and Maryellen Tria. Special thanks go to Susanne Walther whose now slightly dated country report on witness protection in the United States served as a useful starting point.

late 1970's, these laws continue to constitute the most substantial and broadest limitation on the defendant's confrontation rights.

The women's rights movement with its focus on the (female) rape victim provided the starting point for the victim's rights movement which aims to improve the position of the victim (and of witnesses) within the criminal justice system. Some state constitutions and state laws assure the crime victim and other witnesses of safety and protection. Such a guarantee will inevitably cause a conflict between the victim's and the defendant's rights. Might such a clash eventually lead to the use of anonymous or disguised witnesses in U.S. courts?

This article will first address the issue of witness protection in light of the existing constitutional and legislative framework in the United States. Next it will outline the means constitutionally permissible to conceal the identity of a witness from the defendant prior to trial and at trial. The article will then analyze constitutional barriers to the closure of trial and the concealment of identifying information to protect the witness from threats by unrelated third parties. Finally, it will evaluate the effectiveness of current methods, and discuss potential future developments in light of the evolving victim's rights movement.

II. The Constitutional and Legislative Framework

The perceived abuses of the English crown prior to American independence caused the drafters of the Constitution to draw up guarantees for a fair criminal trial. One of the most important safeguards included in the Bill of Rights is the Sixth Amendment which mandates that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and *public trial* . . . ; . . . [and] to be *confronted with the witnesses against him*; . . . ."[1] The courts have interpreted the First Amendment which insures freedom of speech and freedom of the press to grant the public and the press access to any trial and to information about witnesses.[2] While both provisions, as written, apply only to the federal government, because they contain "fundamental rights," the U.S. Supreme Court, the ultimate arbiter of constitutional questions, has made them applicable to the states through the due process clause of the Fourteenth Amendment.[3] While the Framers explicitly protected the rights of criminal defendants, so far no parallel constitutional protections exist for victims or witnesses.

1. U.S. Const. amend. VI (emphasis added).
2. Id. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or the press; . . . .").
3. Gitlow v. New York, 268 U.S. 652 (1925) (incorporation of First Amendment); Pointer v. Texas, 380 U.S. 400 (1965) (incorporation of Confrontation Clause).

Constitutional guarantees serve a symbolic function since they protect the individual against governmental abuse, such as a trial by affidavit. In addition, the rights to a public trial and to confront witnesses against oneself are of important practical value. Even though a large number of defendants in the United States choose not to stand trial but rather plead guilty often in exchange for a lesser charge or a lesser sentence, every year approximately 100,000 felony cases are tried.

In addition to the constitutional provisions, congressional legislation governs witness testimony in the federal system. The federal rules of criminal procedure and the federal rules of evidence are among the most noteworthy and relevant statutes since they outline the parameters of witness testimony. Aside from regulating the testimony itself, the U.S. Code also provides for limited witness protection by criminalizing witness tampering, contempt of court and obstruction of justice, with the latter applying to instances of witness intimidation.

Because of the expansive concept of federalism built into the U.S. Constitution, states have the power to regulate witness testimony through state constitutions, codes of criminal procedure, evidentiary rules, and special legislation. Most state constitutions include an analog to the federal confrontation, public trial and free speech clauses. Those state clauses provide an independent basis for state court analyses as long as the decisions do not conflict with the Supreme Court's interpretation of the federal constitution. Since many states have modeled their evidence and criminal procedure codes on the federal rules, the deviations tend to be often only marginal.

Since constitutional protections of the accused are considered higher law and no concomitant provisions exist for witnesses or victims, measures employed to protect the safety of the witnesses may not violate the defendant's rights to confront her accusers and to a public trial. Therefore, protective measures have focused on pre- and post-trial procedures, including the detention of the defendant prior to trial to prevent him from endangering any witnesses' life or health and the placement of witnesses in the witness protection program. These protections are designed to guarantee the integrity and effectiveness of the criminal justice process. Were the public's belief in the criminal justice system undermined and witnesses afraid of being retaliated against by the defendant or his associates, the state would be severely hampered in investigations involving those types of criminal activity in which witnesses would expect to be threatened and intimidated. Witnesses might not only refuse to testify in open court but be reluctant to cooperate with law enforcement generally.

In contrast to the federal system, states have been more willing to pass victim's rights legislation and even to amend their constitu-

tions to protect such rights.[4] Even though many of these legislative measures have proven rather ineffective in practice, they send a strong symbolic message to victims and witnesses. Moreover, they may provide the nucleus for a conflict between victims' and defendants' rights which could include a clash between guaranteeing a witness physical safety and a defendant the right to confront her accusers.

III. Witness Identity and the Confrontation Clause

Because of the constitutional nature of the defendant's rights, the limitations upon such protections have traditionally been very limited, even in light of other important state interests, such as the protection of witnesses. It was not until the passage of rape shield laws that the first major restriction on the confrontation right was upheld.

A. An Important Interest: Witness Safety

Criminal proceedings involve only the rights of two parties, the defendant's and the State's, or as it is labeled in many states, the People. Currently the victim and other witnesses are accorded only very limited, generally unenforceable rights. This means that only representatives of the state, the prosecution, can initiate procedures designed to protect a witness.

The safety of a witness and/or her family might be endangered at different stages in a criminal investigation, often depending on the type of case and threat involved. During the 1960's and 1970's many of the prosecutions of organized crime figures had to be put on indefinite hold because crucial witnesses were murdered prior to testifying in court. Most of the endangered witnesses in those cases were informants who had turned against the syndicates and were willing to testify against them.

Over time witness intimidation has become a more publicized issue in cases of domestic abuse. In those instances the threat against the victim/witness emanates from the battering spouse or his family. Since the late 1980's witness protection has become particularly salient in gang-related offenses. Either the defendant himself or other gang members often attempt to prevent the witness, usually an innocent victim or bystander, from testifying. They may accomplish this either through direct, illegal pressure which includes only slightly veiled threats or through the creation of an atmosphere of fear in a gang-dominated neighborhood. In the latter case, the potential wit-

4. See, e.g., Cal. Const. art. 28, § 28; Colo. Const. art. II, § 16a; Fla. Const. art. I, § 16; Ill. Const. art. 1, § 8.1; Kan. Const. art. 15, § 15; N.J. Const. art. 1 § 22; Tex. Const. art. I, § 30; Utah Const. art. 1, § 28.

ness may refuse to testify because she perceives herself or her family to be threatened even though no directs threats were ever uttered.[5]

In such situations, a witness might be more willing to testify if he were guaranteed anonymity or some form of physical disguise.[6] The primary constitutional obstacle to shielding a witness's identity from the defendant at trial is the Sixth Amendment's Confrontation Clause. It protects the defendant by limiting the admission of hearsay evidence at trial and by allowing for extensive cross-examination. The latter rationale applies to the potential testimony of anonymous witnesses since non-disclosure of a witness's identity inevitably limits the breadth of cross-examination, and therefore the defendant's ability to test the witness's veracity adequately.

Even though the state has only a limited array of options to protect witnesses against physical harm, victims have been accorded more rights to safeguard their private sphere. Rape shield laws shield rape victims against intrusive questioning by defense counsel about their prior sexual history.[7] They constitute the largest existing restriction on the confrontation right which has been consistently upheld as constitutional.[8]

B. Discovery for Defendant's Counsel—Discovery for the Defendant?

The role of defense counsel, who is considered an officer of the court, in the criminal trial is crucial to the administration of justice. As the standards of the American Bar Association indicate, "[a] court properly constituted to hear a criminal case must be viewed as a tripartite entity consisting of the judge (and jury, where appropriate), counsel for the prosecution, and counsel for the accused."[9] Any limitation on the rights of defense counsel create a systemic imbalance.

On the other hand, because of the adversarial nature of the system, defense counsel is supposed to operate as the zealous advocate of her client. In that role she is assumed to discuss any information available to her, including witness statements and the witness list,

---

5. Michael H. Graham, *Witness Intimidation: The Law's Response* 6 (1985).

6. Disguised and anonymous witnesses often testify before special commissions or even congressional committees investigating corruption or governmental abuse of power.

7. For a general discussion of rape shield laws, see Galvin, "Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade," 70 *Minn. L. Rev.* 763 (1986).

8. For a discussion of some of the cases finding rape shield laws constitutional, see Wallach, "Rape Shield Law: Protecting the Victim at the Expense of the Defendant's Constitutional Rights," 13 *N.Y. L. Sch. J. Hum. Rts.* 485 (1997).

9. ABA Criminal Justice Standards Committee, ABA Standards for Criminal Justice Prosecution Function and Defense Function, standard 4-1.2(a), at 120 (3d ed. 1993).

with the defendant. Any restriction on the defendant's rights to pre-trial discovery generally implies a concomitant bar on counsel.

In rare cases counsel's dual role might permit her to gain access to incriminating material but prevent her from revealing it to her client. Prosecutors in Maryland provided the name of a witness to defense counsel but then obtained a protection order barring the attorney from revealing the witness's identity to the defendant, his relatives, and their acquaintances.[10]

Should counsel acquire knowledge that her client plans on harming a witness, she is under an ethical obligation to report him to authorities. Defense attorneys who personally or through third parties harm or intimidate a witness are subject to criminal sanctions as well as to disbarment because they violated their ethical and professional duties.

C. Limited Restrictions upon the Defendant's Rights Prior to Trial

The scope of permissible non-disclosure of identifying witness information varies between the pre-trial and the trial stages. Because of the emphasis on orality and immediacy, which includes the cross-examination of witnesses, ordinarily witnesses must be available at trial. Hearsay testimony is usually inadmissible at trial unless it falls into one of the exceptions to the so-called hearsay rule. The general exclusion of hearsay testimony and the opportunity for cross-examination allow the parties to test the veracity of witness statements and to establish their trustworthiness and reliability. But they also mandate the actual appearance of live witnesses - and therefore their protection prior to trial.

Prior to trial the defendant normally has limited discovery rights which provide her with the opportunity to gain access to some of the inculpating materials the prosecution has collected against her. The two primary avenues for pre-trial disclosure are discovery and the preliminary hearing which has supplemented or supplanted the traditional Grand Jury inquest in a number of states.

1. Pre-trial Discovery

Pre-trial discovery in criminal cases is historically a rather recent development. Originally, criminal proceedings in the adversarial system required neither the prosecution nor the defense to reveal any information about their case to the other side. Increasingly, the federal and state systems have allowed the defense access to incriminating and exculpatory materials. The precise scope of ac-

10. Veronica T. Jennings, "Identity of Witness Is Shielded: Fear of Retaliation Cited in Murder Trial," *Wash. Post*, Mar. 14, 1994, at B1.

cess remains disputed, however, since the prosecution's discovery rights are substantially more limited than those of the defendant.

While more liberal discovery rules allow for more efficient trials and prevent trial "by surprise," the opponents of such rules have focused to a large extent on the danger pre-trial discovery may pose to potential witnesses. They have argued that the defendant "may take steps to bribe or frighten [witnesses] into giving perjured testimony or into absenting themselves so that they are unavailable to testify."[11]

Such concerns are not unjustified since in some states the prosecution has a duty to list all the persons "'known by the government to have knowledge of relevant facts'" independent of whether they will testify in court.[12] These statutory requirements, however, often do not apply to those anonymous informers who triggered an investigation. Their identity, even if it becomes known to the police or the prosecutors in the course of the investigation, does not have to be revealed to the defendant assuming enough evidence can be assembled otherwise to convict the accused.

In many other states a defendant's right to discovery encompasses only the statutorily guaranteed access to the names and addresses of witnesses who will be testifying at trial and who testified in preliminary hearings, including the Grand Jury proceeding. In other states and the federal system the disclosure of the witness list is generally within the discretion of the trial court. Not even in federal capital cases is disclosure of the list any longer mandatory. "[S]uch list of . . . witnesses need not be furnished if the court finds by a preponderance of the evidence that providing the list may jeopardize the life or safety of any person."[13] A number of states, however, require not only the disclosure of a witness list but also mandate that the prosecution turn over written or recorded witness statements to the defense prior to trial.

In states with expansive pre-trial disclosure statutes, many legislatures have chosen to bestow upon the trial court the power to restrict the defendant's right to pretrial discovery to protect the safety of witnesses. In an application for a protective order, the state bears the burden of establishing the need for it. As a rule, that requirement can be met through an *in camera* showing of a threat to the witness's safety. Once the prosecution has made a satisfactory showing, the court will be able to restrict the defendant's access to identifying information and possibly even witness statements. The record of the *in camera* proceeding has to be sealed but will be available on

11. State v. Tune, 98 A.2d 881 (N.J. 1953).

12. Wayne R. LaFave & Jerold H. Israel, *Criminal Procedure* § 19.3(f) (1984 & Supp. 1991).

13. 18 U.S.C.A. § 3432 (West 1997 Supp.).

appeal. The likelihood of reversal of the ruling is small because an appellate court would consider the decision either discretionary or constituting harmless error without impact on the ultimate finding of guilt.[14]

While restrictions on pre-trial discovery protect the integrity of the judicial process, they do not infringe too substantially upon the defendant's rights since she retains the opportunity to confront the witness in court. This, however, applies only to those defendants who choose to test the evidence against them at trial. Denial of pre-trial discovery might cause some defendants to accept a guilty plea rather than exercise their constitutional right to a trial.

2. Preliminary Hearing

In more serious criminal cases the defense is often afforded the opportunity to test the evidence against the accused in preliminary proceedings. In contrast to a Grand Jury inquiry,[15] the defense attorney has the right to be present and to cross-examine prosecution witnesses. Therefore, these hearings can be used to preserve witness testimony since hearsay testimony is permissible at trial as long as the defense had an opportunity to subject the witness earlier to cross-examination.[16] However, usually these hearings merely serve to establish sufficient evidence for a formal indictment.

Some states have statutorily eased the ban on otherwise inadmissible hearsay evidence in preliminary hearings. California, for example, permits police officers to testify as to incriminating evidence included in police reports signed by witnesses and victims who are unavailable to testify. In federal cases, it has become customary for police officers to recount information provided by witnesses, including the victim.[17] Such hearsay testimony protects those witnesses who want to shield their identity until trial while allowing the prosecution to establish probable cause. However, this procedure will only be successful if the witness is available at trial and will not change her testimony.[18] Washington, DC has pursued a different course. There witnesses in preliminary hearings are identified by number only.

14. LaFave & Israel, supra n. 12, § 19.3(i).

15. Grand Jury hearings are closed to the public; neither the defendant nor defense counsel are permitted to attend; presentation of the evidence is solely the province of the prosecution. Nevertheless, a number of states require disclosure of the witnesses' grand jury testimony under their pre-trial discovery rules.

16. In contrast to civil cases, or criminal cases, depositions of witnesses are very rare and occur only in exceptional situations. Because of the hearsay rule, deposition testimony cannot be introduced at trial for its veracity unless the defense had the opportunity to cross-examine the witness during the deposition akin to an in-court cross-examination.

17. Cassell, "Balancing the Scales of Justice: The Case for and the Effects of Utah's Victims' Rights Amendment," 1994 *Utah L. Rev.* 1373, 1424 (1994).

18. National Institute of Justice, Preventing Gang- and Drug-Related Witness Intimidation 77 (Nov. 1996) (memorandum of Los Angeles district attorney's office out-

However, such concealment of a witness's identity is often insufficient protection since the testimony has to be turned over to the defendant who might be able to deduce her identity.[19]

D. Limited Restrictions Upon the Defendant's Rights at Trial

In contrast to the preliminary hearing, at trial the defendant has a constitutional right to confront his accusers directly.[20] Implicitly, the Confrontation Clause guarantees him the right to be present at every stage of the trial.[21] That right is not unlimited, however. It can be curtailed when the defendant's behavior disrupts the trial[22] or when he chooses to absent himself during the trial.[23] It appears though that a defendant may not be excluded from trial or the testimony of a particular witness even upon a showing that he threatened or attempted to intimidate the witness.

The frequent use of juries in the criminal justice system necessitates the personal appearance of witnesses at trial and requires that the defendant have an opportunity to test their veracity so as to guarantee a fair trial. Because of the adversarial nature of the system, the Court has equalized the confrontation clause with the right to cross-examine witnesses against oneself since cross-examination provides defense counsel with an opportunity to test the credibility of the witnesses' statements thoroughly and directly.[24] This process is necessary to guarantee the reliability of the evidence and to prevent the jury from reaching an unjustified conviction based on unexamined evidence. Implicitly, the right to test the evidence must allow the jury to see the witness's reactions and demeanor since they are an integral part of the determination of truthfulness.

Restrictions on cross-examination are permissible constitutionally only as long as they still allow the defendant to conduct an effective cross-examination. Rape shield laws currently present the broadest authorized restriction upon cross-examination since they prevent a defendant from exploring the victim's prior sexual history to the fullest extent.

Since the use of anonymous or disguised witnesses vitiates effective cross-examination in almost all circumstances, U.S. courts have been very reluctant to permit even relatively minor exercises of ano-

---

lining categories of witnesses where such hearsay testimony should not be used which includes most intimidated witnesses).

19. Id. at 79.

20. Cassell, supra n. 17, at 1428-30 (recounting historical understanding of confrontation rights as trial rights).

21. Lewis v. United States, 146 U.S. 370 (1892).

22. Illinois v. Allen, 397 U.S. 337 (1970).

23. Taylor v. United States, 414 U.S. 17 (1973).

24. Pointer v. Texas, 380 U.S. 400, 404 (1965) ("It cannot seriously be doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him.")

nymity. They have also implicitly rejected the use of disguised witnesses since a disguise would make a direct confrontation impossible. However, in some cases involving charges of sexual abuse of minors, the courts have interpreted direct confrontation rather loosely by permitting the child to testify in a room separate from the courtroom in which the defendant is located.

1. Anonymity? — Disclosure of Name and Address

As early as 1931, the Supreme Court outlined its position on partial anonymity in *Alford v. United States* where defense counsel had not been permitted to interrogate the witness as to his current place of residence.[25] It held that to ascertain the veracity of a witness it was crucial to be able to place him in his environment. Since counsel for the defendant often does not know in advance what issues may be uncovered during cross-examination, "[p]rejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise him."[26] The right to effective cross-examination, therefore, encompasses access to material that could serve as a basis for such questioning, including a witness's address.

Nevertheless, the Supreme Court recognized some limitations on the right to cross-examination. "There is a duty to protect [the witness] from questions which go beyond the bounds of proper cross-examination merely to harass, annoy or humiliate him."[27] Even though the Court did not comment on restricting cross-examination based on a witness's safety, it had provided a potential opening for such a limitation.

The Supreme Court had opportunity to revisit its *Alford* decision in *Smith v. Illinois* where the defendant had been prevented from discovering the real name and address of a prosecution witness at trial.[28] The Court reiterated its earlier position by stating that "when the credibility of a witness is in issue, the very starting point in 'exposing falsehood and bringing out the truth' through cross-examination must necessarily be to ask the witness who he is and where he lives. The witness's name and address open countless avenues of in-court examination and out-of-court investigation."[29] As a lower federal court put it later, the purpose of the *Smith* standard is "to prevent a criminal conviction based on the testimony of a witness who remains 'a mere shadow' in the defendant's mind."[30]

25. 282 U.S. 687 (1931).
26. Id. at 692.
27. Id. at 694.
28. 390 U.S. 129 (1968).
29. Id. at 131.
30. Siegfriedt v. Fair, 982 F.2d 14, 17 (1st Cir. 1992).

In *Davis v. Alaska*, the Supreme Court held that restrictions on cross-examination were a constitutional error of the first magnitude even if they did not cause prejudice.[31] Thus, it can be concluded that "the defendant's right of cross-examination . . . can be overcome, if at all, only for compelling reasons."[32] This high standard does not seem to apply when the restriction on cross-examination is harmless beyond a reasonable doubt in light of the insignificance of the witness's testimony as viewed against the totality of the evidence against the defendant.[33]

In none of these Supreme Court cases was there any indication that the identity and/or address of the witness had been concealed from the defendant because the prosecution feared for the witness's safety. Nevertheless, concurring in *Smith*, Justice White noted explicitly that the *Alford* exceptions to full disclosure should also apply when "those inquiries [ ] tend to endanger the personal safety of the witness."[34] Lower federal and state courts appear to have accepted the dictum in Justice White's concurrence as guiding principle.[35]

While the Supreme Court in *Alford* and *Smith* seemed primarily concerned with the defendant's rights, federal appellate courts have appeared more inclined to weigh the value of disclosure against other factors.[36] In *United States v. Palermo*, which has been followed by at least two other federal courts of appeal, the court, relying on Justice White's concurrence in *Smith,* held that the defendant had no absolute right to discover the names and addresses of witnesses if a threat to their personal safety existed.[37] Other courts affirmed non-disclosure orders independent of whether the threat to the witness's safety emanated from the defendant or from unknown third parties.[38]

Since most courts consider questions about a witness's name and address so routine that they do not require any justification, the prosecution must support any restrictions upon this information by showing that the witness is endangered by the revelation.[39] In federal

31. 415 U.S. 308, 318 (1974) ("The State's policy interest in protecting the confidentiality of a juvenile offender's record cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness." Id. at 320.).

32. Westen, "Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases," 91 *Harv. L. Rev.* 567, 580-81 (1978).

33. Delaware v. Van Arsdall, 475 U.S. 673 (1986).

34. Smith, 390 U.S. at 133-34 (White, concurring).

35. See United States v. Saletko, 452 F.2d 193, 196 (7th Cir. 1971), cert. denied, 405 U.S. 1040 (1972); State v. Hassberger, 350 So.2d 1, 3-4 (Fla. 1977).

36. See United States v. Cosby, 500 F.2d 405, 407 (9th Cir. 1974).

37. 410 F.2d 468 (7th Cir. 1969).

38. See, e.g., Clark v. Ricketts, 958 F.2d 851, 855 (9th Cir. 1991), cert. denied sub nom. Clark v. Lewis, 506 U.S. 838 (1993) (witness "was a Drug Enforcement Agency informant, [ ] threats against his life had been made in the city where he lived, and [ ] he still had cases pending in which he would give information.").

39. In some courts, however, the defense was asked to justify any inquiries about a witness's place of residence. In others, it had to show why the place of residence

cases the government must prove the existence of an *actual* threat and must disclose to the trial judge *in camera* relevant information, including the witness's location. The judge who evaluates the information, therefore, mediates the trade-off between communication and reliability of evidence.

The New York Court of Appeals elaborated on the balance the trial court is required to strike in determining whether a witness may testify without disclosing his name, address and/or occupation. Upon the prosecutor's showing, the defense must demonstrate the necessity for and materiality of the requested material to a determination of guilt or innocence. Then, the trial court is asked to balance the defendant's right to cross-examination with the witness's interest in some degree of anonymity.[40] Other courts apply a higher standard to non-disclosure if the witness's testimony is significant or crucial to the determination of guilt and innocence. Some California courts go so far as to prohibit concealment of a witness's place of residence even when a threat exists if the witness's testimony is important to the outcome of the case.[41]

These cases confirm the narrow scope of a trial court's discretion in restricting the range of cross-examination. Some courts have held that "[u]nder almost all circumstances, the true name of the witness must be disclosed. . . . A witness' prior address must also be disclosed if the witness does not intend to return to this location."[42] Such narrowly circumscribed non-disclosure orders are important to prevent cross-examination from becoming ineffective. After all, restrictions on the right to cross-examine a witness as to his real name and address might also limit the defense's investigation into other background factors, such as his criminal record. Most importantly, such limitations might impede inquiries into the witness's true motivation for testifying against the defendant. In *Davis v. Alaska* the Supreme Court held the right to confrontation to trump the State's policy of protecting a juvenile offender from disclosure of his record since a denial of such right would prevent the defendant from "prob[ing] into the influence of possible bias in the testimony of a crucial identification witness."[43]

2. Special Witnesses

Three groups of witnesses pose particular problems with respect to defense demands for disclosure of their true name and current ad-

---

should not be concealed, at least upon some presentation of evidence indicating the need for such concealment. Friedman, Annotation, "Right to Cross-Examine Witness As To His Place of Residence," 85 *A.L.R.* 3d 541, 550-51 (1978 & Supp. 1997).

40. People v. Stanard, 365 N.E.2d 857, 863 (N.Y. 1977).

41. Friedman, supra n. 39, at 569-70.

42. Palermo, 410 F.2d at 472.

43. 415 U.S. 308, 319 (1974).

dress. Those are undercover agents, informants and witnesses in the witness protection program.

A witness's home address serves to allow the defense to identify her with her environment so as to allow for meaningful cross-examination. Some courts have held that with respect to undercover agents, this goal can be accomplished differently. It might be sufficient to disclose their occupational background and circumstances.[44] Police agents, even if working undercover, are subject to supervision and constant monitoring by their superiors who can testify as to the agents' general truthfulness. This exception, however, does not necessarily extend to informants since they tend to be subject to less supervision.[45]

If informants triggered a criminal investigation but did not further it, they have a right to anonymity under the so-called "informer's privilege" which encourages witnesses to come forward in exchange for anonymity. A police officer may testify as to the course of the investigation which was sparked by the informant without revealing the informant's identity.[46] However, should the testimony as to the informant's identity be "essential" or even "relevant and helpful," it must be provided.[47] Any disclosure requires the "balancing [of] the public interest in protecting the flow of information against the individual's right to prepare his defense."[48] Since the courts will be able to consider the issue as to which the informer provided material, those informants who provide information on a peripheral issue will be less likely to have their identity disclosed than those who have information as to the ultimate issue of guilt or innocence.[49]

Only a few courts have addressed the question as to whether a witness's identity, i.e., her real or current name, can be concealed from the defense when the person has assumed a new name while in the witness protection program or when an undercover agent adopts a "work" name. Disclosure of a witness's current name would either vitiate the purpose of the witness protection program or unnecessarily endanger undercover agents who testify under their actual but not their "work" name. Therefore, numerous courts permitted nondisclosure as long as sufficient other evidence was available to allow for effective cross-examination.

In *United States v. Ellis*, the Ninth Circuit Court of Appeals affirmed a trial judge's decision not to force an informant to reveal his

44. See, e.g., United States v. Alston, 460 F.2d 48 (5th Cir.), cert. denied, 409 U.S. 871 (1972).

45. See id. at 53.

46. Wright, *Federal Practice and Procedure: Criminal Law 2d* § 406, at 440-41 (1982).

47. Roviaro v. United States, 353 U.S. 53, 60-61 (1957).

48. Id. at 62.

49. Wright, supra n. 46, § 406, at 442.

name and address based on his safety claims and the marginal importance of his testimony.[50] Later cases interpret the Ninth Circuit's holding such that even outside the undercover agent and protected witness realm, the defendant has no absolute right of access to the witness's name and address. On the other hand, the Florida Supreme Court, which recognizes a limited "personal safety" exception to the state's duty to reveal witnesses against the defendant, has rejected the use of "John Doe" witnesses and requires explicitly that the real name of a witness be disclosed at trial.[51]

These disparate case outcomes indicate that, as a rule, the relationship of a witness to the case does not determine whether she may testify without revealing her residence or name. However, courts are more likely to protect victims of the underlying offense and law enforcement officers from such discovery than other prosecution witnesses.[52]

3. Disguise? - Physical Confrontation

The Supreme Court has interpreted the Confrontation Clause to guarantee the accused the right to be tried by live testimony and to confront witnesses against him physically. This implies that the defendant has the right to be located during trial so as to see and be seen by the witnesses. However, in recent years this right has been undermined, especially in sexual abuse cases involving minor victims.

In *Coy v. Iowa*, the Supreme Court found the defendant's Sixth Amendment right violated because the trial court had permitted two underage witnesses to testify from behind a screen which blocked the defendant from their sight but allowed him to perceive them dimly and to hear them.[53] Justice Scalia, who authored the majority opinion, found the justification for the decision in the historical roots and "irreducible literal meaning of the [Confrontation] Clause: a right to meet face-to-face all those who appear and give evidence at trial."[54]

In *Maryland v. Craig,* the Court reached the question it had left unresolved in *Coy* whether the right to confront one's accusers could be restricted because of other important interests, presumably including the safety of a witness.[55] It held that "the Confrontation Clause [does not] guarantee[ ] criminal defendants the *absolute* right to a face-to-face meeting with witnesses against them at trial."[56] Rather, if a child allegedly sexually abused by the defendant were to

50. 468 F.2d 638 (9th Cir. 1972).
51. State v. Hassberger, 350 So.2d 1, 5 (Fla. 1977).
52. Friedman, supra n. 39, at 553-55.
53. 487 U.S. 1012 (1988).
54. Id. at 1021 (quotations and citations omitted).
55. 497 U.S. 836 (1990).
56. Id. at 844.

suffer serious emotional trauma because of the presence of the alleged victimizer and therefore communicate less effectively, the use of one-way closed circuit television was constitutionally permissible as long as the judge and the jury could observe the child's demeanor and defense counsel could conduct cross-examination in the room in which the child testified under oath. The Court found that such testimony would achieve the purposes behind the Confrontation Clause and was therefore justifiable in light of "public policy" and the apparent need for such protection of the victim/witness.

Relying in part on the confrontation clauses imbedded in state constitutions, some state courts reached conclusions similar to *Craig* before and after the Supreme Court's decision. While some state supreme courts now permit the two-way closed televising of testimony, others continue to require that the defendant and the alleged victim both be physically present in the same courtroom.

The Supreme Court's decision in *Craig* seems to indicate a substantial shift away from the view that the Confrontation Clause encompasses an almost absolute due process right for the defendant. The Sixth Amendment guarantee appears to have been turned into a fairness doctrine, primarily designed to assure the integrity of the proceedings and the adversarial process. Such a shift in position parallels the present emphasis on crime control over due process, which Herbert L. Parker had postulated to be the two primary models of American criminal procedure.

Despite the limitation on the confrontation clause, the restriction permitted in *Craig* still appears substantially different from the use of fully disguised witnesses. A full facial disguise, after all, would prevent the defendant and the jury from viewing the witness's face during testimony, which was not the case in *Craig* where both could observe the witness's testimony directly even though the witness was spatially removed from them.

Since the right to physical confrontation preserves the defendant's dignity, any limitation upon such right infringes upon the system's and society's respect for the accused who is presumed innocent. By preventing a direct physical confrontation between the witness and the defendant, the judicial system signals to the jury that the defendant is so dangerous that the witness's face must be hidden from him. In a lay system, such a perception, even if tempered with cautionary instructions, could undermine the presumption of innocence by creating unwarranted bias against the defendant.

IV. Concealing a Witness's Identity from the Public

Not all witnesses who fear for their safety view the defendant as the source of the threat. Often relatives and acquaintances, especially in prosecutions of the members of criminal gangs and organized

crime groups, pose a more direct danger to the witness. For undercover agents and informants, parties entirely unrelated to the defendant on trial might constitute a risk to their lives. However, any attempts to prevent information identifying the witness from getting to the public will be subject to constitutional challenge under the First and/or the Sixth Amendments.

A. *The First Amendment: Freedom of Speech and of the Press*[57]

The Supreme Court has interpreted the First Amendment freedoms of speech and of the press to imply "the right to attend criminal trials. . . ."[58] Subsequently it extended this holding also to preliminary hearings that are like trials.[59] However, the access right is not absolute. To be upheld, restrictions on the press's qualified right of access to a criminal trial require the prosecution to "advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceedings, and it must make findings adequate to support the closure."[60]

Occasionally, in cases involving the sexual abuse of minors, the real names of the victims/witnesses have been withheld. Because of concern about the privacy rights of victims of sexual offenses, the "great majority of news organizations in the country do not publish the names of alleged rape victims. . . ."[61] The Supreme Court has also held that under certain, narrowly drawn circumstances states may even pass legislation sanctioning the press for disclosing the identity of witnesses or victims to the public prior to trial. However, if the press publishes truthful information which it obtained lawfully, the state must show an interest of the highest order before a penalty can be imposed.[62]

In very rare situations witnesses seem to have been permitted to change their appearance with wigs and make-up so as to protect their identity from the public. However, such appearance alterations were not motivated by fear but rather by privacy concerns.[63]

---

57. The press has not been accorded access rights to a trial under the Sixth Amendment's guarantee of a public trial. The Supreme Court has held this constitutional protection to be personal to the defendant. Gannett Co., Inc. v. DePasquale, 443 U.S. 368 (1979).

58. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 (1980).

59. Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986).

60. Waller v. Georgia, 467 U.S. 39, 48 (1984) (total closures governed by test set out in Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984)).

61. Denno, "Perspectives on Disclosing Rape Victims' Names," 61 *Fordham L. Rev.* 1113, 1113 (1993).

62. Florida Star v. B.J.F., 491 U.S. 524 (1989).

63. See Jennings, supra n. 10 (in fraud trial of fertility specialist, parents of children conceived were permitted to testify in partial disguise "to protect the identities of their children.").

B. The Sixth Amendment Right to a Public Trial

The Supreme Court has held that the defendant's right to a public trial guaranteed in the Sixth Amendment and applicable to federal and state criminal proceedings is not absolute but rather must be balanced against other interests essential to the fair administration of justice. Those interests are the same as the ones outlined in the First Amendment four-part test.[64] Generally, the trial court must balance the four considerations after an evidentiary hearing even though under appropriate circumstances the judge may take judicial notice of certain facts.[65]

Closure of a trial can either be total, excluding all spectators, or partial, banning only certain individuals, such as members of the defendant's gang or family. To close a trial totally to the public and the press, the trial court must find an "overriding interest." This might be the case where pre-trial threats indicate a serious danger to the lives of the witness and his family or where the identity of an active undercover agent must be kept confidential for him to continue his work.[66] In New York state, the latter seems to be "well established that trials may be closed during the testimony of undercover agents whose public appearance would endanger their lives or seriously damage other investigations."[67] California permits closure of preliminary hearings "where no alternative security measures, including, but not limited to, efforts to conceal his or her features or physical description, searches of members of the public attending the examination, or the temporary exclusion of other actual or potential witnesses, would be adequate to minimize the perceived threat."[68]

If the court plans on closing a trial partially, it has to identify merely a "substantial reason" for such selective closure.[69] While partial closures are often designed to give victims of sexual offenses privacy and some protection during their testimony, they have also been upheld if a witness feared retribution from perpetrators still at large upon disclosure of his identity.[70] A California statute also permits the court to remove a spectator who is threatening the witness as long as it finds, after a hearing, by clear and convincing evidence that

64. Waller, 467 U.S. at 48 (total closures governed by test set out in Press-Enterprise Co. v. Superior Court, 464 US. 501 (1984)).

65. United States ex rel. Lloyd v. Vincent, 520 F.2d 1272, 1275, cert. denied, 423 U.S. 937 (1975). But see Fleming, "Exclusion of Public from State Criminal Trial In Order to Prevent Disturbance by Spectators or Defendant," 54 *A.L.R.*4th 1170, 1175 (1987 & 1993).

66. Lloyd, 520 F.2d 1272; United States v. Hernandez, 608 F.2d 741 (9th Cir. 1979).

67. People v. Stanton, 485 N.Y.S.2d 998 (N.Y. App. Div. 1985).

68. Cal. Penal Code § 868.7(2) (West 1997).

69. Douglas v. Wainwright, 739 F.2d 531 (5th Cir. 1984), cert. denied, 469 U.S. 1208 (1985).

70. Nieto v. Sullivan, 879 F.2d 743 (10th Cir.), cert. denied, 493 U.S. 957 (1989).

the spectator actually intimidated the witness, the witness will not be able to give full, free and complete testimony unless the spectator is removed and removal of the spectator is the only reasonable means of ensuring that the witness will give complete testimony.[71]

At present, twenty-six states allow explicitly for the closure of trials to protect witnesses.[72] Appellate courts have exhorted trial judges to exercise their discretion to order exclusions rarely and only "where such action is deemed necessary to further the administration of justice."[73] The likelihood of appellate reversal of closure orders is relatively high because closures usually are not subject to the harmless error rule. Consequently, trial courts tend to be reluctant to order closure of their courtrooms. But the more temporary and limited a trial closure is, the more likely will it be upheld on appeal especially if it is based on the finding of a legitimate threat or fear of reprisal established for the record.[74]

V. Limited Protection For Threatened Witnesses

Federal and state laws criminalize attempts to intimidate or retaliate against a witness. The Victim and Witness Protection Act of 1982 makes it a criminal offense to "tamper[ ] with a witness, victim or an informant."[75] It imposes imprisonment and/or a fine upon anyone who intimidates, harasses or assaults a witness with the purpose of preventing that person from providing evidence in an official proceeding. The federal act applies not only to trial testimony but also at earlier stages, such as when a witness is prevented from reporting an offense. While such legislation allows the justice system to proceed against individuals who threaten or physically endanger witnesses, it does not directly protect intimidated witnesses.

The American criminal justice system is based on the notion, which is reinforced by existing legislation, that every citizen has a duty to aid in the enforcement of the law and to testify. Duress, in the form of fear, does not constitute a legal excuse that would absolve a potential witness from her duty.[76] Should the prosecution suspect that a witness may abscond out of fear of testifying, it has the power to detain her to guarantee her appearance, at least until she can be deposed.[77] A witness who refuses to cooperate with the authorities

71. Cal. Penal Code § 686.2 (West 1997).

72. See, e.g., N.C. Gen. Stat., § 15A-1034 (1996) (Official Commentary: "This section originated with the Commission based upon several acts of violence occurring in courtrooms in the early 1970s.").

73. Lloyd, 520 F.2d at 1274.

74. See, e.g., id. (closure of courtroom during undercover agent's testimony upheld even though judge did not conduct evidentiary hearing).

75. Victim and Witness Protection Act of 1982, 18 U.S.C.A. § 1512 (West 1984 & 1997 Supp.).

76. Piemonte v. United States, 367 U.S. 556 (1961).

77. 18 U.S.C.A. § 3149 (West 1985 & 1997 Supp.).

out of fear for her life can be prosecuted for obstruction of justice. Alternatively, refusal to testify in open court can lead to a contempt citation. The court may either assess a fine or detain an obstinate witness until she testifies. If a witness gives false testimony under oath, even if motivated by fear, untruthfulness may trigger a perjury prosecution. Whether the state will bring criminal charges against a witness who fails to cooperate or testifies falsely out of fear for her or her family's safety is solely within the prosecution's discretion.

Even though the witness is under compulsion to testify, she has no enforceable rights against the state to assure her physical protection either through police protection or (partial) anonymity at or before trial. The decision whether to offer any protection to a witness rests solely with the police and the prosecution unless the police detains the witness. Physical custody creates a duty upon the state to protect the witness since it limits her ability to move freely.[78]

As indicated above, the police will generally be permitted to conceal an informant's personal data if other evidence is sufficient for a conviction. Should this not be the case, the prosecution will have to make a showing to the court as to the threat under which the informant operates to be granted some modicum of anonymity. Often the effort invested by the prosecution will be directly related to the quality and amount of testimony offered by the witness. This holds true especially for more comprehensive and effective but also more costly programs, such as the federal witness protection program which leads to permanent relocation of the witness who is given an entirely new identity.

Congress created the federal witness protection program in the early 1970's primarily to protect informants who testified against organized crime. This permanent identity change is also available to witnesses in state prosecutions as long as they meet certain strict standards and the local U.S. attorney recommends their acceptance into the program. Because of the high cost of the program, it has been available only to a small number of individuals, primarily major witnesses in large-scale federal prosecutions.

The program also exacts large sacrifices from the witnesses who will be separated from old friends and (extended) family for the rest of their lives. While the state may be able to impose such a burden upon former participants in organized crime, it is less justifiable when the future of innocent victims or bystanders is at issue.

In addition to permanent relocation and the grant of a new identity, emergency and temporary witness protection programs have become more prevalent. Such projects are less costly since they entail only the guarding and relocating of a witness prior to and during trial

78. See Piechowicz v. United States, 885 F.2d 1207, 1215 (4th Cir. 1989).

or for some, relatively short time after the trial. So far, however, these programs are still limited in number and often require a substantial personal investment and time commitment on the part of local police and prosecutors.

VI. An Outlook - Assessing the Present and Future of Witness Protection

Threats against witnesses have triggered a conflict between the constitutionally embedded rights of the defendant to confrontation and the public to information on the one hand with the witness's legitimate demand for bodily safety. In the long run the resolution of the conflict between these competing values will affect the public's perception of the criminal justice system. Lack of protection for witnesses, especially innocent bystanders and victims, will undermine the public's confidence in the legal process and the criminal justice system as a whole. At the same time, the fairness of procedures for the defendant must be assured.

A. How Effective Are the Current Procedures?

The witness protection program has long been the sole focus of witness protection efforts, to the exclusion of other methods. All the evidence available on the success of the federal witness protection program indicates that as long as witnesses comply with the demands of the program, their lives are safe. However, the development of smaller and often very violent gangs in major cities would necessitate an exponential growth in the scope of witness protection programs to accommodate all possibly endangered witnesses. So far, most states and local communities lack the funding as well as the strategic vision for effective victim or witness assistance programs. Therefore, witnesses against gang-related violence are not convincingly sheltered despite assurances to the contrary in some state victim's bills of rights.[79] To address this precarious situation, proposals have been put forth to assure the physical safety of witnesses shortly before and after trial through "emergency and short-term relocation programs, security measures in courthouses and at correctional facilities, and secure transportation."[80] These suggestions assume that the defendant's sole objective is to prevent the witness from testifying rather than to engage in retaliatory actions at a later point.

Despite the shortcomings of the current witness protection programs, alternatives to guarantee the protection of witnesses are very limited. This is so even though the request for and grant of partial

79. U.S. Dep't of Justice, Office for Victims of Crime, *Special Report: Victims of Gang Violence: A New Frontier in Victim Services* 2, 13-14 (Oct. 25, 1996).
80. Id. at 36.

anonymity creates a lesser monetary and functional burden upon the attorneys and the judge involved and is substantially more cost-effective for the state. Nevertheless, courts accept partial anonymity - usually in the form of non-disclosure of a witness's home address or a new name - primarily in two paradigmatic situations. They generally permit the non-disclosure of the new identity of a witness who is in the witness protection program. Undercover officers, and sometimes also police informants, are frequently granted partial anonymity since their usefulness would be destroyed were their real identity revealed. Courts are more likely to allow partial anonymity if the restrictions on the defendant's constitutional rights are limited and enough avenues for cross-examination remain open to the defense.

Despite these safeguards, any restriction on the defendant's confrontation rights potentially injects bias into the trial. Closing the courtroom, keeping certain personal data about a witness from the jury and allowing a witness to testify in a separate room might prejudice the jurors unfairly against the defendant. Their perception of the defendant's dangerousness will undermine the presumption of innocence. In addition, the jury might give a disproportionate amount of weight to the protected witness's testimony, especially if she is an undercover officer. So far, no studies exist that assess the effect of such protective measures on juries. Ultimately, studies might merely be concerned with the impact of the grant of partial anonymity on the shielded witness's life rather than factoring in any other systemic considerations, such as the impact on the jury and on the public's perception of the fairness of trials and the effectiveness of the criminal justice system.

To alleviate any potential anti-defendant bias, the trial courts must instruct the jurors that the use of protective measures should not affect their decision on guilt or innocence. In addition, they usually give general instructions as to the weighing of witness testimony to prevent the jury from overestimating the value of the evidence given by the protected witness. To disclose any pro-prosecution bias on part of the witness, the defense must have the opportunity during cross-examination to bring out evidence of any benefits a witness might have received from the government, including her placement in a witness protection program. The court should admonish the jury to consider the extent to which the receipt of such benefits might have influenced the witness's testimony.[81] Despite such cautionary instructions, a grant of anonymity and closure of the courtroom might impose an additional, unjustified burden upon the defendant to prove his innocence, or at least his lack of dangerousness.

81. Wright, supra n. 46, § 490, at 755-56.

B. The Potential Impact of the Victim's Rights Movement

In a reactionary political climate of crime control, it is not inconceivable that the defendant's rights will be increasingly less protected since her guilt rather than innocence becomes the operating assumption. This has already occurred at the pre-trial stage where constitutional rights do not shield the defendant. For example, defendants are frequently detained prior to trial when their release appears to constitute a threat to the victim.[82]

The protection of victims of sexual crimes, generally women and children, has also already caused some restrictions on constitutional rights. In such trials the public's access to identifying information and to the courtroom has been restricted more frequently. Many state constitutions support such closure by guaranteeing the victim that the criminal justice process will operate "with respect for the victim's dignity and privacy . . . ."[83] Such a general assurance, however, seems to allow for the extension of trial closures from sexual offenses and volatile victims to all victims and all types of crimes.

The relatively recent development of a politically powerful movement to protect victim's rights has upset the previously existing balance between the defendant's and the state's rights. It has shifted the focus from their rights to the victim's (and witnesses'). While one of the movement's goals is to secure participatory rights for victims, another is to guarantee their physical safety. The proposed victim's rights amendment to the federal constitution, for example, notes explicitly that "each victim of a crime of violence, and other crimes that Congress may define by law, shall have the rights to notice of, and not to be excluded from, all public proceedings relating to the crime: . . . To consideration for the safety of the victim in determining any release from custody. . . ."[84] President Clinton remarked that the proposed amendment should guarantee the victim "reasonable protection from the defendant . . . ."[85] Some state constitutions already incorporate such provisions which grant crime victims the right to receive protection from intimidation.[86] Such constitutional provisions provide specific support, for example, for the pre-trial detention of those defendants who are perceived as dangerous.

---

82. Mosteller, "Victims' Rights and the United States Constitution: An Effort to Recast the Battle in Criminal Litigation," 85 *Geo. L.J.* 1691, 1707-08 (1997).

83. Tex. Const. art. I, § 30(a)(1). See also Ill. Const. art. I, § 8.1(a)(1).

84. S. Joint Res. 6, 105th Cong., 1st Sess. (Jan. 21, 1997), reprinted in Mosteller, supra n. 82, at 1714.

85. President William Clinton, "Remarks by the President at Announcement of Victims' Rights Constitutional Amendment," 32 *Weekly Comp. Pres. Doc* 1134, 1134 (June 25, 1996).

86. See, e.g., Ala. Const. art. I, § 24 ("Crime victims, as defined by law, shall have the following rights as provided by law: the right to be reasonably protected from the accused through the imposition of appropriate bail or conditions of release by the court . . . ."); Tex. Const. art. I, § 30(a)(2).

When the constitutional protection of the victim/witness does not clash with any constitutional guarantees provided to the defendant, the victim will benefit. This is particularly likely at the pre-trial stage. However, at trial the defendant's rights are also constitutionally anchored. Nevertheless, some state constitutions and legislation explicitly permit some encroachment upon such protections. The Utah Crime Victims Act, which implements the state's victim's rights amendment, states that "[t]he victim of a crime has the right, at any court proceeding, not to testify regarding the victim's address, telephone number, place of employment, or other locating information unless the victim specifically consents or the court orders disclosure on finding that a compelling need exists to disclose the information."[87] This legislation reverses the prior presumption that a defendant have access to any identifying information. However, commentators have argued that the "compelling need" exception sufficiently protects the defendant's constitutional confrontation rights even though the new law restricts such rights.

While the inroads on the defendant's constitutional rights have been limited so far, the victim's rights movement might undermine many of the previously existing presumptions. The constitutional protections for the accused are rooted in the belief that he must be shielded against the power of the state. However, the focus on victims' rights centers around another group worthy - and possibly even worthier - of protection, especially if one assumes that the defendant is guilty. At least one commentator has noted that the symbolism inherent in the victim's rights amendment "may permanently alter both our conceptualization of criminal litigation and our perspective on the appropriateness of special procedural protections and mercy toward criminal defendants."[88]

The danger, however, persists that the use of anonymous witnesses and other measures to protect victims moves the ultimate decision on guilt and innocence from the jury verdict to the charging or even the arrest stage. It is worthwhile to keep in mind that "[n]ot all who claim to be victims are indeed victims, and more significantly, not all those charged are the actual perpetrators of the injuries that victims have suffered."[89]

VII. Conclusion

The new state of flux created by the victim's rights movement might ultimately lead to the acceptance of anonymous or disguised witnesses in U.S. courts. After all, permitting the testimony of anon-

87. Utah Code ann. § 77-38-6(1) (1995). For further discussion, see Cassell, supra n. 17, at 1410-11 (1994).

88. Mosteller, supra n. 82, at 1694.

89. Id. at 1708.

ymous witnesses at the War Crimes Tribunal in Yugoslavia might be merely the logical extension of rape shield legislation.[90] Might it not be solely the level of hatred and violence rather than any systemic difference that distinguishes the level of victim/witness protection considered legitimate in the two systems?

90. Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, Prosecutor v. Dusko Tadic a/k/a "Dule", Case No. IT-94-1-T (Aug. 10, 1995), reprinted in 7 *Crim. L. Forum* 139 (1996).