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# A Child's Well Being v. A Defendant's Right to Confrontation

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### I. INTRODUCTION

One in three females<sup>1</sup> and one in seven males are sexually victimized as children.<sup>2</sup> Reports of child sex abuse have increased throughout the 1980's, exceeding 113,000 cases in 1985.<sup>3</sup> More shocking, two out of three cases of child sex abuse go unreported.<sup>4</sup>

Statistics reflect that successful prosecution is rare in cases involving a sexual assault.<sup>5</sup> This adds to an already disheartening problem. Heavy reliance by prosecutors on the testimony of the child reflects one reason for this low number of successfully prosecuted

1. American Bar Association, *Guidelines for the Fair Treatment of Child Witnesses in Cases Where Child Abuse is Alleged* 7 (1985).

2. Wolfe, Sas & Wilson, *Some Issues in Preparing Sexually Abused Children for Courtroom Testimony*, 10 *The Behavior Therapist* 107 (1987).

3. Christiansen, *The Testimony of Child Witnesses: Fact, Fantasy, and the Influence of Pretrial Interviews*, 62 *WASH. L. REV.* 705, n.1 (1987).

4. See D. Finkelhor, *Sexually Victimized Children* 53 (1979) (citing survey results).

5. See Note, *Sexually Abused Children: The Best Kept Legal Secret*, 3 *N.Y.L. SCH. HUM. RTS. ANN.* 441, 446 (1986) (it is estimated that only 24% of all cases nationwide result in criminal actions) (footnote omitted).

cases.<sup>6</sup> Often children are incompetent to testify or easily confused during cross-examination.<sup>7</sup> As a result, the child is often unable to recall crucial details<sup>8</sup> or unable to relate those details to the jury.<sup>9</sup>

Numerous commentators believe the courtroom experience is stressful for any witness, particularly for children unaccustomed to legal proceedings.<sup>10</sup> Some commentators have noted that the courtroom experience inflicts as much of a psychological crisis as the rape itself;<sup>11</sup> this further lessens the child's ability to testify. The child not only suffers the painful mental and physical consequences of the abuse itself, but must also face a possible devastating emotional court proceeding. Consequently, testifying becomes extremely stressful, as well as confusing for a child. As a result, the child's credibility is substantially weakened.

In recognition of the victimized child's situation, state legislatures have enacted legislation to strengthen the prosecutor's hand while easing the burden that the judicial system places on the testifying

6. See *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987).

7. At the trial of Robert and Lois Bentz, accused of participating with 22 other adults and one teenager in two child sex abuse rings in Jordan, Minnesota, "the defense team relied on traditional courtroom tactics to shake the children's stories and weaken their credibility with the jury. They badgered them in an effort to confuse them about dates and places. They accused them of lying and leaped onto the least inconsistency." The Bentz's were acquitted on all counts. N.Y. Times, Sept. 23, 1984, at A8, col. 1. All charges against other defendants were subsequently dropped. N.Y. Times, Oct. 16, 1984, at A18, col. 1.

8. See A. Yarmey, *The Psychology of Eyewitness Testimony* 203-05 (1979) (arguing that children possess inferior long-term and short-term memories). Memory is an important factor given the span of time separating the alleged abusive incident from the trial. See also Stevens & Berliner, *Special Techniques For Child Witnesses, In The Sexual Victimology Of Youth* 246, 248 (L. Schultz ed. 1980). But see Melton, *Children's Competency to Testify*, 5 LAW & HUM. BEHAV., 73, 76-77 (1981) (citing studies showing that children remember specific facts as well as adults do).

9. "A four-year-old doesn't know dates. You're lucky if you can get 'around christmas' or 'around my birthday.' Ten 'I don't knows' or 'I don't remembers' in a row make the child sound as though he or she doesn't know what he's talking about." N.Y. Times, Sept. 23, 1984, at A8, col. 1 (quoting Linda Fairstein, chief of the sex crimes prosecution unit of the New York County District Attorney's office).

10. See, e.g., Goodman & Helgeson, *Child Sexual Assault: Children's Memory and the Law*, 40 U. MIAMI L. REV. 181, 203 (1985).

11. Frumkin, *The First Amendment and Mandatory Courtroom Closure in Global Newspaper Co. v. Superior Court: The Press' Right, the Child Rape Victim's Plight*, 11 HAST. CONST. L. Q. 637 (1984); see also Note, *Protecting Child Rape Victims from the Public and Press After Global Newspaper and Cox Broadcasting*, 51 GEO. WASH. L. REV. 269 (1983) (testimony required and publicity generated expose victims to embarrassment and degradation).

child.<sup>12</sup> However, legislatures must keep in mind that political passion often clouds reality. As the offensiveness of the crime increases, so too does prosecutorial zeal and the need to guard against wrongful prosecutions.<sup>13</sup> While protecting a child's emotional well-being, the legislation must also preserve the accused's constitutional rights. Balancing the competing interests of a child witness against those of a defendant constitutes the challenge of this type of legislation.

This comment examines the defendant's constitutional right to confrontation versus a state's interest in protecting the well-being of sexually abused children. The discussion will first examine the case of *Maryland v. Craig*.<sup>14</sup> Second, *Coy v. Iowa*,<sup>15</sup> the seed of the *Craig*<sup>16</sup> decision, will be analyzed. Third, a detailed analysis will discuss the *Craig*<sup>17</sup> decision with an emphasis on its shortcomings and its future effects.

## II. STATEMENT OF THE CASE

### A. *Statement of Facts*

Sandra Ann Craig owned and operated Craig's County Pre-School located in Howard County, Maryland.<sup>18</sup> Brooke Etze attended the school from August, 1984 through June 7, 1986.<sup>19</sup> During that period, Brooke Etze was between four and six years of age.<sup>20</sup>

On June 21, 1986, Mr. and Mrs. Etze read a newspaper article describing complaints of child abuse at Ms. Craig's school.<sup>21</sup> Shortly

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12. Note, *The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations*, 98 HARV. L. REV. 806, 808 (1985).

13. *Id.*

14. *Maryland v. Craig*, 110 S. Ct. 3157 (1990).

15. *Coy v. Iowa*, 487 U.S. 1012 (1988).

16. *Craig*, 110 S. Ct. 3157.

17. *Id.*

18. *Craig v. State*, 76 Md. App. 250, 255, 544 A.2d 784, 786 (Md. Ct. Spec. App. 1988) (the trial in this case proceeded only upon the indictment involving Brooke Etze. Ultimately, 13 separate indictments were returned against Ms. Craig. Her son Jamal Craig was also charged in two other indictments).

19. *Id.*

20. *Id.*

thereafter, Mr. and Mrs. Etze contacted a sexual assault center and arranged to have Brooke examined by a therapist.<sup>22</sup>

In later conversations with her parents and the therapist, Brooke disclosed numerous incidents of physical, sexual, and psychological abuse.<sup>23</sup> The incidents of abuse which Brooke described were committed by Ms. Craig, her two children, and other children in the school.<sup>24</sup> According to Brooke, Ms. Craig had kicked her legs and her genitals, inserted objects in her vagina, and threatened her with the loss of her parents' love.<sup>25</sup> These allegations were confirmed by a medical exam conducted upon Brooke shortly after her parents learned of the incidents.<sup>26</sup>

Following the physicians report, a six-count indictment against Ms. Craig was returned in the circuit court of Howard County.<sup>27</sup> The indictment charged Ms. Craig with first degree sexual offense, second degree sexual offense, child abuse, unnatural and perverted sexual practice, common-law assault, and common-law battery.<sup>28</sup>

### B. Posture

The State, in recognition of the childrens' inability to communicate, moved to allow Brooke and other young children to testify through closed-circuit television in accordance with Maryland's closed-circuit-child-testimony statute.<sup>29</sup> The State's motion was granted.<sup>30</sup>

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22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* at 256, 544 A.2d at 786. Prior to trial a number of motions were filed. A motion in limine to preclude testimony by the therapist as to statements made to her by Brooke constituted one of the motions filed on Ms. Craig's behalf. Also, a motion for disclosure of impeaching information and a motion for discovery and production of documents were also filed on Ms. Craig's behalf. Ms. Craig's motion in limine was denied. In light of a formal response to a demand for particulars and discovery motions, the parties agreed to an open-file discovery.

29. Section 9-102 of the Courts and Judicial Proceedings Article of the Annotated Code of Maryland (1989) provides in full:

(a)(1) In a case of abuse of a child as defined in § 5-701 of the Family Law Article or Article 27, § 33A of the Code, a court may order that the testimony of a child victim be

Ms. Craig was convicted on all six counts.<sup>31</sup> Ms. Craig's motions for a new trial were denied on September 21, 1987.<sup>32</sup> An appeal then followed to the Court of Special Appeals of Maryland. There the court found no merit to any of the complaints and affirmed.<sup>33</sup> Again, Ms. Craig appealed and in July of 1989, the Court of Appeals of Maryland granted a Writ of Certiorari.<sup>34</sup> The Court of Appeals ordered the judgment of the Court of Special Appeals reversed and the case remanded in light of the Supreme Court's pronouncement in *Coy v. Iowa*, which will be discussed later herein.<sup>35</sup>

Finally, the State brought the case before the United States Supreme Court.<sup>36</sup> The Supreme Court reversed the Maryland Court of Appeals by a five-to-four majority. The Court upheld the consti-

taken outside the courtroom and shown in the courtroom by means of a closed circuit television if:

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

Md. Cts. & Jud. Proc. Code Ann. § 9-102 (1988).

30. *Craig*, 76 Md. App. at 256, 544 A.2d at 787.

31. *Id.* at 257, 544 A.2d at 787.

32. *Id.*

33. *Id.* at 258, 544 A.2d at 787.

34. *Craig v. State*, 316 Md. 551, 556, 560 A.2d 1120, 1122 (1989).

35. *Coy*, 487 U.S. 1012.

36. *Craig*, 110 S. Ct. 3157.

tutionality of Maryland's closed-circuit-child-testimony statute, which allowed sexually abused children to testify through closed-circuit television.<sup>37</sup> The majority opinion was written by Justice O'Connor and joined by Justices Rehnquist, White, Blackmun, and Kennedy.

### C. Prior Law

Although the Confrontation Clause of the Sixth Amendment has been the object of incessant litigation, the seed of *Maryland v. Craig*<sup>38</sup> was *Coy v. Iowa*.<sup>39</sup> In *Coy*,<sup>40</sup> the issue confronting the court was whether an Iowa statute,<sup>41</sup> which permitted the placement of a one-way screen between criminal defendants and child witnesses, violated the Confrontation Clause of the Sixth Amendment.<sup>42</sup> The Court, in

37. *Id.* at 3171.

38. *Craig*, 110 S. Ct. 3157.

39. *Coy*, 487 U.S. 1012.

40. *Id.*

41. The IOWA CODE states:

1. A court may, upon its own motion or upon motion of any party, order that the testimony of a child, as defined in section 702.5, be taken in a room other than the courtroom and be televised by closed circuit equipment in the courtroom to be viewed by the court. Only the judge, parties, counsel, persons necessary to operate the equipment, and any person whose presence, in the opinion of the court, would contribute to the welfare and well-being of the child may be present in the room with the child during the child's testimony.

2. The court may, upon its own motion or upon motion of a party, order that the testimony of a child, as defined in section 702.5, be taken by recorded deposition for use at trial, pursuant to rule of criminal procedure 12(2)(b). In addition to requiring that such testimony be recorded by stenographic means, the court may on motion and hearing, and upon a finding that the child is unavailable as provided in Iowa rules of evidence 804(a), order the videotaping of the child's testimony for viewing in the courtroom by the court. The videotaping shall comply with the provisions of rule of criminal procedure 12(2)(b), and shall be admissible as evidence in the trial of the cause.

3. The court may upon motion of a party admit into evidence the recorded statements of a child, as defined in section 702.5, describing sexual contact performed with or on the child, not otherwise admissible in evidence by statute or court rule if the court determines that the recorded statements substantially comport with the requirements for admission under Iowa rules of evidence 803(24) or 804(5).

A court may, upon its own motion or upon motion of a party, order the court testimony of a child to be limited in duration in accordance with the developmental maturity of the child. The court may consider or hear expert testimony in order to determine the appropriate limitation on the duration of a child's testimony. However, the court shall, upon motion, limit the duration of a child's uninterrupted testimony to one hour, at which time the court shall allow the child to rest before continuing to testify.

IOWA CODE ANN. § 910A.14 (West 1987).

42. U.S. CONST. amend. VI.

a six-to-two decision, held that although not absolute, the Confrontation Clause does provide a criminal defendant the right to face-to-face confrontation with witnesses testifying against him at trial.<sup>43</sup> Moreover, the Court held that the Iowa Screen Statute<sup>44</sup> violated the defendant's constitutional right to confrontation by allowing child witnesses to avoid viewing the defendant.<sup>45</sup>

In *Coy*,<sup>46</sup> Justice Scalia clearly demonstrated his devotion for face-to-face confrontation with arguments such as "[t]he perception that confrontation is essential to fairness has persisted over the centuries because there is much truth to it."<sup>47</sup> Although Justice Scalia declared that the "rights conferred by the Confrontation Clause are not absolute,"<sup>48</sup> it is apparent throughout his opinion that he believes a defendant's right of face-to-face confrontation should always outweigh any competing public interest. However, in determining that Iowa's screening procedure denied the defendant his constitutional right to face-to-face confrontation with complaining child witnesses, Justice Scalia, writing for a base majority of four, proclaimed that the Court would leave for another day the question of whether any exception exists to a defendant's constitutionally guaranteed right of face-to-face confrontation.<sup>49</sup>

In Justice O'Connor's concurring opinion in *Coy*,<sup>50</sup> she emphasized that nothing in this decision necessarily dooms similar efforts by state legislatures to protect child witnesses.<sup>51</sup> In other words, there may be an exception to the general requirement of face-to-face confrontation. Thus, *Coy v. Iowa*<sup>52</sup> set the stage for *Maryland v. Craig*,<sup>53</sup> the Supreme Court's most recent opinion considering the constitutionality of a state's closed circuit child testimony statute.<sup>54</sup>

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43. *Coy*, 487 U.S. at 1019.

44. See *supra* note 41.

45. *Coy*, 487 U.S. at 1021.

46. 487 U.S. 1012.

47. *Id.* at 1019.

48. *Id.* at 1020.

49. *Id.* at 1021.

50. 487 U.S. 1012.

51. *Id.* at 1023.

52. 487 U.S. 1012.

53. 110 S. Ct. 3157.

54. See *supra* note 29.



#### D. Majority Opinion

The majority in *Maryland v. Craig*<sup>55</sup> reaffirmed a preference for face-to-face confrontation with witnesses appearing at trial, but it refused to hold that such action constitutes an indispensable element of the Sixth Amendment's guarantee of the right to confront one's accusers. In interpreting the Confrontation Clause, the majority began by looking at its past treatment of the constitutionally guaranteed right of confrontation. The majority observed that in the past the court has recognized that the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact.<sup>56</sup> However, the majority observed that in past opinions the Court had suggested that an exception to the defendant's right to confront witnesses against him would only be allowed when consideration of public policy and the necessities of the case demanded it.<sup>57</sup> Justice O'Connor proclaimed that the Court's present interpretation of the Confrontation Clause constitutes a decision sensitive to its purpose and sensitive to the necessities of trial and the adversary process.<sup>58</sup>

The state's interest in the protection of child victims of sex crimes from further trauma and embarrassment was recognized by the majority as a "compelling" interest.<sup>59</sup> With little hesitation, the majority proclaimed that if the State makes an adequate showing of necessity, then a witness may testify through closed-circuit television without face-to-face confrontation with the defendant.<sup>60</sup>

In addition, the Court noted that a substantial state interest must be determined by a case-specific determination.<sup>61</sup> Accordingly, a statutory general finding of a substantial state interest will not withstand constitutional attacks. More specifically, the majority expressed the

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55. 110 S. Ct. 3157.

56. *Id.* at 3165.

57. *Id.* at 3162.

58. *Id.* at 3163.

59. *Id.* at 3169.

60. *Id.* at 3165.

61. *Id.* at 3167 (emphasis in original, *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982); see also *New York v. Ferber*, 458 U.S. 747, 756-57 (1982); *Federal Communication Comm'n v. Pacific Sound, Inc.*, 438 U.S. 726, 749-50 (1978)).

view that the trial court must hear evidence and determine whether use of the one-way-closed-circuit television procedure is necessary to protect the welfare of each particular child witness who seeks to testify.<sup>62</sup> Justice O'Connor further stated that the trial court must also find that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant.<sup>63</sup> The emotional distress suffered by the child witness in the presence of the defendant must be more than *de minimis* (more than mere nervousness or excitement or reluctance to testify).<sup>64</sup>

In applying this standard to the case before them, the majority concluded that because the Maryland statute requires a determination that the child witness will suffer "serious emotional distress such that the child cannot reasonably communicate,"<sup>65</sup> the statute clearly suffices to meet the case specific standards.<sup>66</sup>

Furthermore, the majority found error with the Court of Appeals assertions that Maryland's child-closed-circuit-testimony statute cannot be invoked unless the child witness initially is questioned in the defendant's presence.<sup>67</sup> Additionally, the majority found error with the Court of Appeals assertion that before using the one-way television procedure, a trial judge must determine whether a child would suffer "severe emotional distress" if he or she were to testify by two-way-closed-circuit television.<sup>68</sup> Following this finding of error, Justice O'Connor proclaimed "[a]lthough we think such evidentiary requirements would strengthen the grounds for use of protective measures, we decline to establish as a matter of federal constitutional law any such categorical evidentiary prerequisites for the use of the one-way television procedures."<sup>69</sup>

In sum, Justice O'Connor stated there was no dispute that the child witness in this case testified under oath, was subject to full

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62. See *Craig*, 110 S. Ct. at 3169.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* (citing MD. CTS. & JUD. PROC. CODE ANN. § 9-102(a)(1)(ii)).

67. See *id.* at 3170-71.

68. *Id.*

69. *Id.*

cross-examination, and was able to be observed by the judge, jury, and defendants as the child testified. Justice O'Connor concluded, to the extent that a proper finding of necessity has made, the admission of such testimony would be consistent with the Confrontation Clause.<sup>70</sup> The majority then vacated and remanded the judgment of the Court of Appeals of Maryland for further proceedings consistent with its opinion.<sup>71</sup>

### *E. Dissenting Opinion*

From a reading of the dissenting opinion, it is clear that Justice Scalia apparently believes that the purpose of enshrining the Confrontation Clause of the Constitution is to "assure that none of the many policy interests from time to time persuaded by statutory law could overcome a defendant's right to face his or her accusers in court."<sup>72</sup> It appears Justice Scalia believes the protection of sexually abused children is such a current widespread position or policy interest that should not be relied on by the majority to vary the literal, unavoidable text of the Constitution's Confrontation Clause.

It is unmistakably clear that the dissent's view constitutes a strict textual or tunnel-vision analysis. Through his opinion, Justice Scalia refers to the irreducible literal meaning of the Confrontation Clause.<sup>73</sup> In doing so, the dissent characterized the Sixth Amendment's Confrontation Clause as unavoidable text which unqualifiedly guarantees that the defendant should be confronted by witnesses who appear at trial.<sup>74</sup>

When addressing the majority opinion, Justice Scalia relies on analogies which he takes to great extremes in order to discredit the majority's opinion. For instance, the dissent analogizes the majority's statement that it "cannot say that face-to-face confrontation . . . is an indispensable element of the Sixth Amendment," to the legal absurdity of saying "we cannot say that being tried before a

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70. *Id.* at 3171.

71. *Id.*

72. *Id.*

73. *Id.* at 3174.

74. *Id.* at 3173.

jury is an indispensable element of the Sixth Amendment's guarantee of the right to a jury trial."<sup>75</sup> Similarly, the majority's conclusion that unopposed testimony may be admissible hearsay persuades Justice Scalia to the unconstitutional analogy that "presumably there are other categories of admissible hearsay consisting of unsworn testimony when the witness is unable to undergo hostile questioning."<sup>76</sup>

Justice Scalia tries to further undermine the majority opinion by using a means-ends analysis. By implying that the majority is only concerned with the ends and not the means, Justice Scalia proclaims that the majority's reasoning is wrong because the Confrontation Clause does not guarantee an "end" such as reliable evidence.<sup>77</sup> Rather, the dissent argues that the Confrontation Clause guarantees a "means." The means constitute specific trial procedures, such as face-to-face confrontation, which were thought to assure reliable evidence.<sup>78</sup> The dissent's literal interpretation concludes that "to be confronted with the witnesses against him means always and everywhere."<sup>79</sup>

Finally, the dissent ends its opinion where it began, questioning the majority's interest-balancing analysis and the majority's authority to judicially legislate where the text of the Constitution does not permit such judicial legislation.<sup>80</sup>

### III. ANALYSIS

The United States Constitution's Sixth Amendment states that "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."<sup>81</sup> This constitutional guarantee, known as the Confrontation Clause, appears to grant the accused the right to face-to-face confrontation of witnesses against him.

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75. *Id.* at 3172.

76. *Id.* at 3174.

77. *Id.* at 3172.

78. *Id.*

79. *Id.*

80. *Id.* at 3176.

81. U.S. CONST. amend. VI.

At common law there was never any recognized right to an indispensable thing called "confrontation" as distinguished from cross-examination.<sup>82</sup> As Dean Wigmore states, "it was the same thing under the different names."<sup>83</sup> Moreover, Dean Wigmore asserts that the primary purpose of the Confrontation Clause is to allow the defendant to cross-examine his accusers, rather than for the idle purpose of gazing upon the witness, or being gazed upon by the witness.<sup>84</sup>

The origins of the right to confront one's accusers are obscure. However, many legal historians cite the 1603 treason trial of Sir Walter Raleigh as the catalytic influence in the development of the right to confront one's accusers.<sup>85</sup> In his trial, Raleigh was convicted primarily on the basis of a written confession of an alleged co-conspirator who was not present at trial.<sup>86</sup>

Prior to 1964, the Sixth Amendment Confrontation Clause applied only to trials in federal courts. However, in *Pointer v. Texas*<sup>87</sup> the right of confrontation was applied to state action under a Fourteenth Amendment due-process claim. Since that time, states have independently begun to define this right through the passage of state statutes.<sup>88</sup> Although most state courts have upheld statutes which

82. 5 WIGMORE ON EVIDENCE §§ 1395-1401 (1974).

83. *Id.* at § 1397.

84. *Id.* at § 1395.

85. For a discussion of the Raleigh trial see F. Heller, *The Sixth Amendment to the Constitution of the United States* 104-05 (1951); Graham, *The Right to Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One*, 8 CRIM. L. BULL. 99 (1972).

86. See Graham, *supra* note 85, at 100.

87. 380 U.S. 400, 403-06 (1965).

88. See ALA. CODE § 15-25-2 (Supp. 1989); ARIZ. REV. STAT. ANN. §§ 13-4251 and 4253(B), (C) (1989); ARK. CODE ANN. § 16-44-203 (1987); CAL. PENAL CODE ANN. § 1346 (West Supp. 1990); COLO. REV. STAT. §§ 18-3-413 and 18-6-401.3 (1986); CONN. GEN. STAT. § 54-86g (1989); DEL. CODE ANN., Tit. 11, § 3511 (1987); FLA. STAT. § 92.53 (1989); HAW. REV. STAT., ch. 626, Rule Evid. 616 (1985); ILL. REV. STAT., ch. 38 106A-2 (1989); IND. CODE § 35-37-4-8(c), (d), (f), (g) (1988); IOWA CODE § 910A.14 (1987); KAN. STAT. ANN. § 38-1558 (1986); KY. REV. STAT. ANN. § 421.350(4) (Baldwin Supp. 1989); MASS. GEN. LAWS ANN., ch. 278, § 16D (Supp. 1990); Mich. Comp. Laws ANN. § 600.2163a(5) (Supp. 1990); MINN. STAT. § 595.02(4) (1988); MISS. CODE ANN. § 13-1-407 (Supp. 1989); MO. REV. STAT. §§ 491.-675-491.690 (1986); MONT. CODE ANN. §§ 46-15-401 to 46-15-403 (1989); NEB. REV. STAT. § 29-1926 (1989); NEV. REV. STAT. § 174.227 (1989); N.H. REV. STAT. ANN. § 517:13-a (Supp. 1989); N.M. STAT. ANN. § 30-9-17 (1984); OHIO REV. CODE ANN. § 2907.41(a), (B), (D), (E) (Baldwin 1986); OKLA. STAT., Tit. 22, § 753(C) (Supp. 1988); ORE. REV. STAT. § 40.460 (24) (1989); 42 PA. CONST. STAT. § 5982, 5984 (1988); R.I. GEN. LAWS § 11-37-13.2

allow for something less than face-to-face confrontation,<sup>89</sup> not all courts have decided to uphold this type of state statute.<sup>90</sup> For instance, in *Missouri v. Davidson*,<sup>91</sup> the state court held that the admission of video tape depositions of child victims taken while the defendant was excluded from the room violated the defendant's constitutional confrontational rights.<sup>92</sup> Therefore, due to the states lack of uniformity in defining a defendant's right to confrontation, the Supreme Court granted certiorari in *Maryland v. Craig*<sup>93</sup> to resolve the important Sixth Amendment Confrontation Clause issues raised by these types of cases.

After analyzing *Coy v. Iowa*,<sup>94</sup> it is apparent that Justice O'Connor's concurring opinion in that case was the seed of the majority opinion in *Craig*.<sup>95</sup> In her concurring opinion, Justice O'Connor stated, as she did in *Coy*,<sup>96</sup> that if a court makes a "case-specific finding of necessity . . . the structures of the Confrontation Clause may give way to the compelling State interest of protecting child witnesses."<sup>97</sup> Not surprisingly, Justice Scalia's majority opinion in *Coy*<sup>98</sup> was similarly restated in the *Craig* dissent.<sup>99</sup>

In the majority opinion in *Maryland v. Craig*,<sup>100</sup> Justice O'Connor addressed the real issue of the case which was the interpretation of the Sixth Amendment Confrontation Clause. She used a balancing

(Supp. 1989); S.C. CODE § 16-3-1530 (G) (1985); S.D. COD. LAWS § 23A-12-9 (1988); TENN. CODE ANN. § 24-7-116(d), (e), (f) (Supp. 1989); TEX. CRIM. PROC. CODE ANN., Art. 38.071, § 4 (Vernon Supp. 1990); Utah Rule Crim. Proc. 15.5 (1990); Vt. Rule Evid. 807(d) (Supp. 1989); WIS. STAT. ANN. § 967.04(7) to (10) (West Supp. 1989); Wyo. Stat § 7-11-408 (1987).

89. *State v. Melendez*, 135 Ariz. 390, 661 P.2d 654 (1982); *State v. Bonello*, 210 Conn. 51, 554 A.2d 277 (1989); *Commonwealth v. Ludwig*, 366 Pa. 361, 531 A.2d 459 (1987).

90. *See, e.g., Chambers v. State*, 504 So. 2d 476 (Fla. Dist. Ct. App. 1987); *State v. Cooper*, 291 S.C. 351, 353 S.E.2d 451 (1987); *State v. Warford*, 223 Neb. 368, 389 N.W.2d 575 (1986); *State v. Sheppard*, 484 A.2d 1330 (N.J. 1984).

91. 764 S.W.2d 731 (Ct. App. 1989).

92. *Id.* at 734.

93. 110 S. Ct. at 3162.

94. 487 U.S. 1012.

95. 110 S. Ct. 3157.

96. 487 U.S. 1012.

97. *Coy*, 487 U.S. 1025; *Craig*, S. Ct. at 3169.

98. 487 U.S. at 1014.

99. *See generally*, 110 S. Ct. at 3171.

100. 110 S. Ct. 3157.

approach which balanced the interest of the state in protecting a child witness' well-being against the criminal defendant's Sixth Amendment right to confrontation. In analyzing the Sixth Amendment Confrontation Clause, Justice O'Connor divided her discussion into three areas of concern. First, she avoided the literal meaning of the Confrontation Clause. Second, she found an important state interest. And third, she found the need for a case specific approach. These three areas of concern will now be addressed separately.

#### *A. Avoiding the Literal Meaning of the Sixth Amendment*

Justice O'Connor proclaimed that the Supreme Court had never held that the Confrontation Clause guarantees criminal defendants the absolute right to a face-to-face meeting with witnesses who were testifying against them at trial.<sup>101</sup> Furthermore, she argued that such a literal reading of the Confrontation Clause "would abrogate virtually every hearsay exception, a result long rejected as unintended and too extreme."<sup>102</sup> For example, if literal adherence to the Confrontation Clause was required, then, contrary to the established precedent, the admission of dying declarations would not be permitted.<sup>103</sup> Similarly, if literal adherence was required, then admissible testimony of a witness who had previously testified and been cross-examined but had died after the first trial, would become inadmissible at a second trial. This is also contrary to the established precedent.<sup>104</sup>

Rather, the nonliteral interpretation of the text of the Confrontation Clause which the majority adopted was consistent with other Supreme Court holdings restricting Sixth Amendment rights.<sup>105</sup> For example, precedent has established that the right to be present at trial was not violated where the trial judge removed the defendant

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101. *Id.* at 3163.

102. *Id.* at 3168.

103. *Mattox v. United States*, 156 U.S. 237, 243 (1895).

104. *Id.* at 240-44.

105. *Taylor v. United States*, 484 U.S. 400, 410-16 (1988) (the right to compulsory process not violated where trial judge precluded testimony of a surprise defense witness); *Pennsylvania v. Ritchie*, 480 U.S. 39, 51-54 (1987) (the right to cross-examination not violated where the State denied defendant

for disruptive behavior.<sup>106</sup> Additionally, the Supreme Court has held that the right to the effective assistance of counsel is not violated where the trial judge prevented the testifying defendant from conferring with counsel during a short break in testimony.<sup>107</sup> Consequently, a purpose-oriented interpretation of the Confrontation Clause reflects a reading consistent with prior interpretations of Sixth Amendment rights by the Supreme Court.

Justice O'Connor stated that "the central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant."<sup>108</sup> The Confrontation Clause has a functional purpose which preserves the reliability of testimony. Therefore, if there is another action which fulfills this reliability concern it will step in the place of the Confrontation Clause. The implied elements of the Confrontation Clause satisfy this functional purpose or central concern by ensuring the reliability of evidence. As expressed by Justice O'Connor, the implied elements of the Confrontation Clause constitute: "physical presence, oath, cross-examination, and observation of demeanor by the trier of fact."<sup>109</sup> These four reliability elements of confrontation "serve the purpose of the Confrontation Clause by ensuring that evidence admitted against an accused is reliable and subject to the rigorous adversarial testing that is the norm of Anglo-American criminal proceedings."<sup>110</sup> Moreover, observance by the trier of fact of the witness being cross-examined, which reflects the greatest legal engine ever invented for the discovery of the truth,<sup>111</sup> generally satisfies the objective of the Confrontation Clause. The four reliability elements must be satisfied before a court can refuse to allow criminal defendants to confront witnesses against them.

One commentator argues that the rights of a defendant must outweigh the welfare of a witness, even if the witness is a child, because the very essence of our criminal system is the presumption

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106. *Illinois v. Allen*, 397 U.S. 337, 342-43 (1970).

107. *Perry v. Leake*, 488 U.S. 272, 280-85 (1989).

108. *Craig*, 110 S. Ct. at 3163.

109. *Id.*

110. *Id.*

111. *Id.* (citing *California v. Green*, 399 U.S. 149, 158 (1970)).



of innocence.<sup>112</sup> According to supporters of the *Craig* dissent, the right of confrontation constitutes the primary safeguard for the presumption of innocence. Supporters of Justice Scalia's dissenting opinion declare that to abridge the right of one group in favor of the rights of another is not the answer.<sup>113</sup> Justice O'Connor correctly undermines such criticism by stating that "the law in its wisdom declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused."<sup>114</sup>

### B. Finding an Important State Interest

Due to the general agreement on the state's important interest in cases involving sexually abused children, Justice O'Connor virtually assumed, with little discussion, that an important state interest was involved. Considering the number of sexually abused children and the devastating effects of sexual abuse "it is evident beyond the need for elaboration that the state's interest in safeguarding the physical and psychological well-being of a minor is compelling."<sup>115</sup> Statutes enacted by a majority of states to protect child witnesses from the trauma of giving testimony in child abuse cases manifest the widespread belief in the importance of such a public policy.<sup>116</sup> Consequently, Justice O'Connor's declaration that the protection of child victims of sex crimes from further trauma and embarrassment reflects a compelling state interest<sup>117</sup> is a widely held view in our society.

Although Justice O'Connor stated that only an "important" state interest must be found, she also frequently characterized the stan-

112. H. F. Salsbery, *Brief of the Dissent Regarding the Proposed Amendments to the West Virginia Rules of Evidence Relating to the Testimony of Child Victims and Witnesses* 3 (1988). For a discussion of abridgement of the presumption of innocence see *Hochheiser v. Superior Court*, 161 Cal. App. 3d 777, 786, 208 Cal. Rptr. 273, 278 (1984). See also *Graham, Indicia of Reliability and Face to Face Confrontation: Emerging Issues in Child Sexual Abuse Prosecutions*, 40 U. MIAMI L. REV. 19, 74-75 (1985).

113. See *supra* note 112.

114. *Craig*, 110 S. Ct. at 3165.

115. *Id.* at 3167 (quoting *New York v. Ferber*, 458 U.S. 747, 756-57 (1982)).

116. *Id.*; see also *Coy*, 487 U.S. at 1022-23 (1988).

117. See *id.*

dard as a “compelling” state interest instead. Throughout Justice O’Connor’s analysis she refers to the states’ compelling interests in child abuse cases.<sup>118</sup> Thus, although the holding only appears to require an important state interest, Justice O’Connor’s use of a compelling state interest clouds the clarity of the important state interest requirement.

### C. Using a Case Specific Approach

General statutory findings will apparently fail a constitutional challenge. General statutory findings do not consider the specific facts of each case, but instead make a finding applicable to all cases, regardless of the circumstances. Thus, case specific findings are necessary to the constitutional soundness of closed circuit child testimony statutes. Case specific findings require the court in each case to hear testimony and make findings based on the testimony they heard.

In her opinion, Justice O’Connor declared that three requirements must be satisfied under the case-specific approach. First, the trial court must hear evidence which establishes that the one-way-closed-circuit television procedure is necessary to protect the welfare of the child witness.<sup>119</sup> Second, the trial court must find that the child witness would be traumatized by the presence of the defendant, and not by the courtroom generally. In other words, the state’s interest cannot be merely to protect the child witness from courtroom trauma generally.<sup>120</sup> If general trauma from the courtroom itself was the only problem, then the defendant’s right to confrontation could be fulfilled by permitting the child to testify in less intimidating surroundings with the defendant present.<sup>121</sup> Third, the trial court must find that the child would suffer more than *de minimis* emotional trauma if required to testify in the defendant’s presence.<sup>122</sup> More specifically, the emotional distress suffered must be

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118. *Id.*

119. *Id.* at 3169.

120. *Id.*

121. *Id.*

122. *Id.*

“more than mere nervousness or excitement or some reluctance to testify.”<sup>123</sup>

In the future, states will have to provide evidence proving the three above-mentioned requirements to the trial court in order to justify the use of one-way-closed-circuit televised testimony. These case specific requirements, which avoid a general statutory finding of fact, will enhance the constitutional soundness of statutes which restrict the right of confrontation.

#### D. Further Analysis

Although there is no precedent directly on point in this case, the majority has properly extended what precedent exists. As stated previously, the majority followed previous cases which allowed the defendant's right to face-to-face confrontation to be overcome by an important state interest.<sup>124</sup> Furthermore, Justice O'Connor's non-absolute interpretation of the Sixth Amendment reflects analogous Supreme Court interpretations by the Court of other Sixth Amendment rights.<sup>125</sup> The majority interpreted and applied prior case law in a fair and consistent manner. The majority extended earlier decisions which also avoided the literal meaning of the Sixth Amendment. There is no existing Supreme Court precedent regarding one-way television taping procedures denying the defendant's right to face-to-face confrontation. Overall, the majority opinion follows the precedent set by the Supreme Court.

After analyzing the majority opinion, it is this writer's opinion that the legal basis of Justice O'Connor's opinion rests on prior case law which is speckled with moral overtones. Although Justice O'Connor correctly interpreted Supreme Court precedent, this precedent constitutes constitutional interpretations that also avoid the literal text of the constitution due to reliance on moral beliefs.

As Justice Scalia notes, the Sixth Amendment's text of “the accused shall enjoy the right . . . to be confronted with the witnesses

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123. *Id.* (quoting *Wildermuth v. State*, 310 Md. 496, 524, 530 A.2d 275, 289, (1987)); *see also* *State v. Mannion*, 19 Utah 505, 511- 12, 57 P. 542, 543-44 (1899).

124. *See id.* at 3164, *see supra* note 105.

125. *Id.* at 3166, *see supra* notes 106 & 107.

against him”<sup>126</sup> constitutes a literal, unavoidable text<sup>127</sup> which unqualifiedly guarantees the defendant the right to be confronted by witnesses who appear at trial against him.<sup>128</sup> An interpretation or compromise of the defendant’s constitutionally guaranteed right to confrontation reflects judicial legislation where the “irreducible literal meaning of the Clause”<sup>129</sup> does not allow such legislation. Thus, the majority’s moral judgement clouds the unmistakable clarity of the Sixth Amendment.<sup>130</sup> It is clear that the majority believes that the state interest in protecting sexually abused child witnesses from further trauma should outweigh this constitutional guarantee. Considering the horrifying and rising child sexual abuse statistics, it is hard to view such judicial interpretation as misplaced.

Although not expressed by Justice O’Connor, one possible reason the Court upheld one-way-televised testimony may be the Court’s underlying desire to increase the number of successfully prosecuted cases. By addressing and aiding a child’s emotional needs, this type of statute should increase the quantity, and, more importantly, the quality of the testimony by each child witness. Consequently, an increase in the successful prosecution rate would be a beneficial ramification of this type of procedure. Thus, such a deterrence factor may be an underlying reason behind the Court’s decision.

Currently, of the thirty-seven states that have statutes which permit the use of videotaped testimony of sexually abused children,<sup>131</sup> not one such statute meaningfully addresses technical aspects of taping procedures. Therefore, it is not surprising that the majority also failed to address these critical technical variables such as room lighting, camera angle, room temperature, etc. Without some meaningful technical and procedural regulations, videotaped testimony could have the same effect as watching television. Images can be distorted,

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126. *See supra* note 42.

127. *Craig*, 110 S. Ct. at 3173.

128. *Id.*

129. *Id.* at 3174.

130. *Id.* at 3171.

131. *See supra* note 88.

the perspective can be limited, and most importantly the jury's eyes become limited to the narrow view permitted by the camera.<sup>132</sup>

If meaningful regulations are not implemented by the states, then a child's testimony could unjustifiably be credited or discredited by a viewing jury because of external variables. For instance, if an extremely hot and bright taping room causes a child witness to appear sweaty, uncomfortable, and shy to the camera's eye, the witness may not be viewed as credible by the jury. Similar scenarios can easily be imagined.

Additionally, a procedural regulation which declares that once a child testifies, then both parties should be barred from calling the child at trial is necessary. This type of regulation will limit the exposure of the child to the harmful effects of testifying. More importantly, it will prevent the jury from concluding that anything out of the norm is happening and, thus, prevent any prejudicial conclusions from being drawn against either side. Moreover, videotaping should not be allowed until the trial has begun.<sup>133</sup> A regulation of this type prevents the prosecution from obtaining a powerful weapon in plea bargaining and from having the luxury of planning trial strategy based on the familiarity of the recorded testimony of its chief witness.<sup>134</sup> In order for such videotaping statutes to withstand future constitutional challenges, meaningful technical quality and procedural regulations must be implemented as part of the working statutes.

In light of the large number of actions brought on the right to confrontation, the *Craig*<sup>135</sup> decision will have a significant impact. The *Craig*<sup>136</sup> decision appears to place a constitutional stamp of approval on statutes which allow the defendant's right for face-to-face confrontation to be denied through one-way-closed-circuit-televised testimony, at least in the context of child sexual abuse cases.

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132. H. Salsbery, *supra* note 112, at 12.

133. *Id.*

134. See *The Testimony of Child Victims in Sex Abuse Prosecutions*, *supra* note 12, at 826-27.

135. 110 S. Ct. 3157.

136. *Id.*

As long as the State demonstrates an important state interest, the presence of the four reliability elements of confrontation,<sup>137</sup> and the three requirements of a case specific finding,<sup>138</sup> similar statutes will be upheld. But, as a result of *Craig*,<sup>139</sup> branching or off-shoot litigation appears to be just around the corner. First, challenges relating to procedural and technical aspects of taping appear imminent. The court or legislature must specify taping procedure to deal with variables such as room lighting, camera angle, room temperature, etc. Second, other important public-policy interests are sure to be brought to the court's attention as interests which should similarly outweigh the defendant's right of face-to-face confrontation. Cases involving other state interests, such as the protection of rape victims, will be brought raising similar right to confrontation questions. Thus, although the court's decision should justifiably be relied on in child sexual abuse cases, future litigation is on the horizon.

#### IV. CONCLUSION

The *Craig*<sup>140</sup> decision as a whole, reflects moralistic reasoning which is in-tune with the present and future needs of society. The Court kept the central issue of balancing a child's emotional well-being against a defendant's right to confrontation foremost in its decision. In *Craig*,<sup>141</sup> the majority of the Supreme Court decided that the time had come to curtail the overreaching of the defendant's right to confrontation. The Court curtailed this right by holding that the defendant's right to a face-to-face confrontation is not an absolute right, but is a right which may be defeated by an important public policy. The majority's upholding of Maryland's closed-circuit-child-testimony statute reflects the belief that protecting the well-being of a sexually abused child witness is just such an important public policy.

Finally, the *Craig*<sup>142</sup> decision should pave the way for state legislatures to enact similar child testimony statutes. Therefore, the time

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137. See *supra* notes 109 and accompanying text.

138. See *supra* notes 119-23 and accompanying text.

139. 110 S. Ct. 3157.

140. *Id.*

141. *Id.*

has come for the West Virginia legislature to join the majority of other states and enact a similar child-testimony statute. In enacting such a statute, West Virginia should consider specific technical taping requirements in order to avoid future problems. However, the Supreme Court has not yet addressed what specific technical taping requirements will be adequate under the Sixth Amendment Confrontation Clause.

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