

# Washington's Closed-Circuit Testimony Statute: An Exception to the Confrontation Clause to Protect Victims in Child Abuse Prosecutions

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## I. INTRODUCTION

In 1990, the Washington State Legislature enacted Engrossed Substitute House Bill (E.S.H.B.) 2809, which permits a child abuse victim in certain circumstances to testify via one-way closed-circuit television at the trial of an accused child abuser.<sup>1</sup> The legislature enacted the statute in an attempt to deter future child abuse by facilitating the prosecution of abusers.<sup>2</sup> Child abuse cases, particularly child sexual abuse cases, are some of the most difficult cases to prosecute, in part because frequently no witnesses exist except the child victim. In addition, when child abuse is prosecuted, a child victim may suffer serious emotional and mental trauma from exposure to the abuser or from testifying in open court. The statute, however, raises the problem of how to mitigate the trauma for the child victim without abridging the constitutional rights of the defendant.<sup>3</sup>

Under the Sixth Amendment to the United States Constitution, the defendant in a criminal prosecution is entitled to a public trial and an opportunity to confront the accuser.<sup>4</sup> In

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1. Engrossed Substitute House Bill 2809, 51st Leg., 1990 Wash. Laws ch. 150 (codified at WASH. REV. CODE § 9A.44.150 (Supp. 1990-91)) [hereinafter E.S.H.B. 2809].

2. E.S.H.B. 2809, *supra* note 1, at § 1.

3. Unlike similar statutes from other states, the Washington statute does not distinguish between physical abuse and sexual abuse but permits child abuse victims to testify via closed-circuit television in either type of case. Nevertheless, the particularized findings of emotional distress necessary for use of this procedure are more likely to occur in cases of sexual abuse. Therefore, this Comment will focus primarily on child sexual abuse.

4. U.S. CONST. amend. VI. The Sixth Amendment to the U.S. Constitution provides, in pertinent part, that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . [and the right] to be confronted with the witnesses against him."

contrast, "child witnesses, even if they were themselves the victims, have no constitutional rights to protection during the investigation of a crime or during the trial, despite the horror already done and the potential trauma caused by future legal involvement."<sup>5</sup> Consequently, a balance must be struck between society's interests in justice and the protection of its child victims and the criminal defendant's constitutional right to confrontation. The survival of E.S.H.B. 2809 depends upon the views of the United States Supreme Court and the Washington Supreme Court regarding the scope of confrontation rights.

This Comment argues that E.S.H.B. 2809 should be recognized as an exception to the Confrontation Clause by the Supreme Courts of the United States and Washington. This argument rests upon the premise that E.S.H.B. 2809 falls within the boundaries set by previously recognized exceptions to the hearsay rule and by federal and Washington case law. Indeed, the reliability and trustworthiness of the victim's testimony should not turn on the child's ability to withstand the additional psychological trauma often induced by in-court testimony.<sup>6</sup> Rather, the special problems that these children bring to the courtroom demand compliance with a statute such as the Washington closed-circuit testimony statute to increase the requirements of reliability and trustworthiness. Thus, the statute satisfies the strict constitutional requirements of the Confrontation Clause.

This Comment begins with a general outline of the problem of child abuse and the current protections available to child witnesses. Part III analyzes the Sixth Amendment right to confrontation and the various exceptions to the Confrontation Clause. Part IV addresses the Washington State Constitution and Washington State case law, concluding that the statute is likely to sustain constitutional challenge. Part V examines various provisions of the statute and concludes that E.S.H.B. 2809 satisfies the essential elements of the right to confrontation and is a viable exception to the Confrontation

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5. Goodman, *The Child Witness: Conclusions and Future Directions For Research and Legal Practice*, 40 J. SOC. ISSUES 157, 169 (1984).

6. Hearsay statutes permit admissibility of child victims' hearsay statements when the particularized guarantees of trustworthiness (sometimes referred to as indicia of reliability) required under the Confrontation Clause are present. Michael H. Graham, *The Confrontation Clause, The Hearsay Rule, and Child Sexual Abuse Prosecutions: The State of the Relationship*, 72 MINN. L. REV. 523, 536 (1988).

Clause. Part VI specifies the areas in which E.S.H.B. 2809 falls short of its underlying purpose and proposes the adoption of an additional statute authorizing the use of videotaped testimony to provide additional protection for victims of child abuse.

## II. DOUBLE VICTIMIZATION: ABUSED BY THE ABUSER AND THE SYSTEM

### A. *The Problem of Child Abuse*

Abuse of children is an intractable problem of menacing proportions. Awareness and concern over child abuse, particularly child sexual abuse, has escalated greatly in recent years.<sup>7</sup> Increased frequency of child sexual abuse,<sup>8</sup> along with increased awareness of the extensiveness of the psychological scarring this type of abuse causes,<sup>9</sup> has contributed to public outcry on the subject.<sup>10</sup> Nevertheless, once child sexual abuse is reported, legal barriers often block the successful prosecution of these cases.<sup>11</sup>

The low conviction rate of child sexual abusers has been attributed to several causes.<sup>12</sup> First, because child sexual abuse is rarely witnessed by anyone other than the victim, it is often difficult to prove. Consequently, many offenders who are arrested plea bargain to lesser charges and are often released

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7. National data published by the *American Humane* stated that 2.2 million child abuse and neglect reports were filed in 1987 (40 to 45% were confirmed). In the State of Washington, 1986 data shows that more than 43,000 incidents of abuse or neglect were reported to Children's Protective Services. WASHINGTON COUNCIL FOR PREVENTION OF CHILD ABUSE & NEGLECT, REPORT NO. 88-5 (1989). Another study estimates that each year, over 750,000 children between ages 3 and 17 are severely abused by their parents. Richard J. Gelles & Murray A. Straus, *Is Violence Toward Children Increasing?*, 2 J. OF INTERPERSONAL VIOLENCE 212, 217-18 (1987). In a six-month period during 1988, 1,701 cases of physical abuse against children and 2,485 sexual assaults against children were reported to law enforcement in the state of Washington. GOVERNOR'S JUVENILE JUSTICE ADVISORY COMM., WASHINGTON ASS'N OF SHERIFFS & POLICE CHIEFS, & OFFICE OF THE ATTORNEY GENERAL, CRIMES AGAINST CHILDREN: SPECIAL CHILD ABUSE REPORT (1988).

8. See SELECT COMM. ON CHILDREN, YOUTH & FAMILIES, ABUSED CHILDREN IN AMERICA: VICTIMS OF OFFICIAL NEGLIGENCE, H.R. Rep. No. 260, 100th Cong., 1st Sess. (1987).

9. ROBERT L. GEISER, HIDDEN VICTIMS: THE SEXUAL ABUSE OF CHILDREN 27, 29 (1979) (stating that victims of child sexual abuse often suffer from a time-bomb effect of emotional and psychological harm).

10. David Libai, *The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System*, 15 WAYNE L. REV. 977, 980-81 (1969).

11. Sol Gothard, *The Admissibility of Evidence In Child Sexual Abuse Cases*, 66 CHILD WELFARE 13, 13-14 (1987).

12. Lucy Berliner & Mary Kay Barbieri, *The Testimony of the Child Victim of Sexual Assault*, 40(2) J. SOC. ISSUES 125, 127 (1984).

and repeat the offenses.<sup>13</sup> Second, many people within the criminal justice system believe that sexual abusers have mental disorders and therefore should be treated by the mental health system.<sup>14</sup> Third, many parents fear that the pursuit of these cases would further traumatize the child. Hence, parents frequently elect not to prosecute in order to spare the child the emotional trauma of repeated interviews and of testifying in court.<sup>15</sup> Finally, prosecutors are often reluctant to undertake sexual abuse cases that rest primarily on the testimony of child victims.<sup>16</sup> One problem frequently cited by prosecutors is that the child freezes when asked to testify in front of the defendant.<sup>17</sup>

Despite the low conviction rate of child sexual abusers, children are increasingly called upon to testify in open court as a result of greater incidences of reported abuse among children. Frequently, no witnesses exist except the child victim.<sup>18</sup> Therefore, as traumatic as the experience may be, the child must testify or prosecution will likely be halted.

When a child victim of sexual assault testifies at trial, he or she may suffer serious emotional or psychological harm.<sup>19</sup> Many researchers believe that requiring a child, who may

13. Gothard, *supra* note 11, at 13-14.

14. Berliner & Barbieri, *supra* note 12, at 127.

15. *Id.*

16. *Id.*

17. See *State v. Sheppard*, 484 A.2d 1330, 1333 (N.J. Super. Ct. Law Div. 1984); see also Catherine M. Mahady-Smith, Comment, *The Young Victim as Witness for the Prosecution: Another Form of Abuse?*, 89 DICK. L. REV. 721, 730-35 (1985). See generally DEBRA WHITCOMB, ET AL., *WHEN THE VICTIM IS A CHILD: ISSUES FOR JUDGES AND PROSECUTORS* (1985) (addressing issues involving child victim-witnesses and recommending reforms).

18. Maira H. Bainor, Note, *The Constitutionality of the Use of Two-Way Closed Circuit Television to Take the Testimony of Child Victims of Sex Crimes*, 53 FORDHAM L. REV. 995, 1000 (1985).

19. Gary B. Melton, *Psycholegal Issues in Child Victims' Interaction With the Legal System*, 5 VICTIMOLOGY 274, 275 (1980). Melton cites Burgess and Holstrom, authors of studies at Boston City Hospital in 1978, who noted four common psychological responses to the legal process by child victims and their families. First, time is suspended. Given the delays that are often experienced within the process, the family may find itself preoccupied with the assault and the ensuing legal process, and they may have difficulty returning to normal activities. Second, the legal process requires the psychological recapitulation of the assault. The child must repeatedly tell authorities about the assault he or she experienced and do so in great detail. If the case goes to trial, the child will most likely face the alleged offender. Furthermore, the child must do so in an atmosphere and a setting that will probably be fear-producing and confusing. Third, victims become aware that people are skeptical about their story and fear violent suspicion. And fourth, the child and family may feel betrayed by people previously considered supportive.

already be traumatized by the attack, to face the defendant in the courtroom is a major cause of such emotional harm.<sup>20</sup> In fact, some investigators believe that the child is traumatized more by the defendant's presence in the courtroom and the formality of the situation than by the actual assault.<sup>21</sup> Others believe that the process of bringing the abuser to justice can be a healthy part of the child's recovery.<sup>22</sup>

In *State v. Sheppard*,<sup>23</sup> the Superior Court of New Jersey recognized the potential trauma to children when it noted:

An adult witness, testifying in court, surrounded by the usual court atmosphere, aware of the black-robed judge, a jury, attorneys, members of the public, uniformed attendants, a flag, and religious overtones, is more likely to testify truthfully. The opposite is true of a child, particularly when the setting involves a relative accused by her of sexual abuse. She becomes fearful, guilty, anxious, and traumatized. In most cases, she will have been exposed to both pleasant and abusive associations with the accused. As a consequence, she has ambivalent feelings. . . . These mixed feelings, accompanied by the fear, guilt and anxiety, mitigate the truth, producing inaccurate testimony.<sup>24</sup>

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20. See Colly J. Frissell-Durley, Comment, *Abandoning Trial by Ordeal: Missouri's New Videotaping Statute*, 51 MO. L. REV. 515 (1986). Note, *The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations*, 98 HARV. L. REV. 806, 807 (1985) [hereinafter Note, *Two Legislative Innovations*] (stating that children sometimes recant to absolve a relative or family friend).

21. See Frissell-Durley, *supra* note 20, at 516 n.5. See generally Carol Marks, Note, *Victimizing the Child Victim: Vermont Rule of Evidence 807 and the Trauma in the Courtroom*, 11 VT. L. REV. 631, 646-47 (1986) (stating that testifying in court is thought to be more traumatic for the child than the assault itself because of the repeated interrogations, cross-examination, confrontation, formality of the courtroom, possibility that the defendant may be acquitted, hearing the defendant's version of the events, and the length of the trial); Bainor, *supra* note 18, at 997 n.6 ("recounting the events and details of the crime may be as damaging to the child victim of a sex offense as the crime itself"). Fear and reluctance to testify may result from the child's recollection of the authority and superior physical strength the perpetrator had during the attack and continues to have over the child. See Berlinger & Barbieri, *supra* note 12, at 126 (noting that larger, stronger, more sophisticated offenders can control and abuse children by threatening or pressuring the child to remain silent). An attacker is frequently in a position of authority or responsibility over the child. *Id.* These factors frequently make the child both powerless to prevent the attack and fearful of reporting it, even to a parent. *Id.* at 128. If the abuser is someone close to the child, the child is often badly torn between loyalty to the abuser and the desire to escape the situation.

22. Carl M. Rogers, *Child Sexual Abuse and the Courts: Preliminary Findings*, J. SOC. WORK & CHILD SEXUAL ABUSE 145, 145-47 (1982).

23. 484 A.2d 1330 (N.J. Super. Ct. Law Div. 1984).

24. *Id.* at 1332.

In addition to problems with inaccurate testimony, numerous other problems face child victims who testify in court. The child must reveal the intimate details of the attack.<sup>25</sup> The child may be obligated to make repeated court appearances. And once in court, the child will eventually be confronted by the accused. The problems of the judicial process are often compounded by deeper psychological problems. In cases of known abusers, "[i]t is likely that the child is already psychologically disturbed as a result of emotional deprivation in a disturbed home, the trauma of sexual molestation, and guilt about his or her own part in the offense."<sup>26</sup>

The realities of giving courtroom testimony often result in parents' unwillingness to allow children to testify.<sup>27</sup> Thus, while reported cases are on the increase, relatively few result in convictions.<sup>28</sup> This leaves many child abusers on the streets and not receiving help. More importantly, children continue to be sexually assaulted and thus are not being as well protected as they could be with judicial intervention. Legal commentators, and those who work closely with abused children, advocate changes in the legal treatment of child abuse victims to spare them further psychological damage caused by the criminal trial process and its emphasis on the defendant's rights.<sup>29</sup>

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25. See Marks, *supra* note 21, at 647.

26. Barry Nurcombe, *The Child As Witness: Competency and Credibility*, 25 J. AM. ACAD. CHILD PSYCHIATRY 473, 475 (1986).

27. Berliner & Barbieri, *supra* note 12, at 128. (noting that parents may be reluctant to report the crime or follow up its prosecution for fear of further injuring either the child or the perpetrator who is a family member).

28. See *State v. Sheppard*, 484 A.2d 1330 (N.J. Super. Ct. Law Div. 1984), where the court's review of the state's case-in-chief testimony reveals:

In most cases, prosecutions are abandoned or result in generous plea agreements, either because the child's emotional condition prevents her from testifying or makes the testimony obviously inaccurate or inadequate. One attorney, who had handled 30 to 40 of these cases for the State, was able to complete a trial in only one. In most, while the child victim was able to provide her with information sufficient to support a prosecution and was sometimes able to appear with difficulty before a grand jury, she could not testify in court face-to-face with the accused and other relatives.

*Id.* at 1333.

29. BILLIE WRIGHT DZIECH & CHARLES B. SCHUDSON, ON TRIAL: AMERICA'S COURTS AND THEIR TREATMENT OF SEXUALLY ABUSED CHILDREN 169 (1989); Lucy Berliner, *Counseling and Follow-up Interaction for the Sexually Abused Child*, in MANAGEMENT OF THE PHYSICALLY AND EMOTIONALLY ABUSED 281, 284 (Carmen G. Warner & G. Richard Braen eds. 1982); Richard N.W. Lambert, *Victims Have Rights Too*, 1986 UTAH L. REV. 449, 455; Jacqueline Y. Parker, *The Rights of Child Witnesses: Is the Court a Protector or Perpetrator?*, 17 NEW ENG. L. REV. 643 (1981-82); see also Libai, *supra* note 10.

*B. Current Protections Available to Child Witnesses*

Children stand in need of certain protections and privileges when the legal system requires that they participate by taking the stand and offering their testimony. Protections designed to shield child victims from the trauma of exposure to the abuser and the courtroom will facilitate prosecution of child abusers.

In response to the problem of courtroom trauma, many states have enacted legislation that attempts to minimize the psychological trauma child victims undergo in the court system while increasing the effectiveness of prosecuting child abusers. At present, thirty-one states have enacted laws providing for closed-circuit television testimony of child witnesses in lieu of testimony in the courtroom,<sup>30</sup> thirty-eight states have enacted statutes that permit the introduction of videotaped testimony,<sup>31</sup>

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30. Provisions allowing for one-way closed-circuit television: ALA. CODE § 15-25-3 (Supp. 1989); ALASKA STAT. § 12.45.046 (Supp. 1989); ARIZ. REV. STAT. ANN. § 13-4253(A) (1989); CONN. GEN. STAT. § 54-86g (1989); FLA. STAT. ch. 92.54 (1989); GA. CODE ANN. § 17-8-55 (Harrison Supp. 1989); ILL. ANN. STAT. ch. 38 ¶ 106A-3 (Smith-Hurd 1987); IND. CODE ANN. § 35-37-4-8 (Burns Supp. 1991); IOWA CODE ANN. § 910A.14(I) (West Supp. 1989); KAN. STAT. ANN. § 38-1558 (1986); KY. REV. STAT. ANN. § 421.350(3) (Baldwin Supp. 1989); LA. REV. STAT. ANN. § 15:283 (West Supp. 1989); MD. CTS. & JUD. PROC. CODE ANN. § 9-102 (1989); MASS. GEN. LAWS ANN. ch. 278, § 16D(b)(2) (West Supp. 1989); MICH. COMP LAWS § 600.2163a (1989); MINN. STAT. ANN. § 595.02 (West 1988); MISS. CODE ANN. § 13-1-405 (Supp. 1989); N.J. STAT. ANN. § 2A:84A-32.4 (West Supp. 1989); OKLA. STAT. ANN. tit. 22, § 753(B) (West Supp. 1989); 42 PA. CONS. STAT. ANN. § 5985 (Supp. 1989); R.I. GEN. LAWS § 11-37-13.2 (Supp. 1988); TEX. CODE CRIM. PROC. ANN. art. 39.071, § 3 (West Supp. 1989); and UTAH CODE ANN. § 77-35-15.5(2) (Supp. 1989).

Provisions allowing for use of two-way closed-circuit television: CAL. PENAL CODE § 1347 (West Supp. 1989); HAW. R. EVID. 616; IDAHO CODE § 19-3024A (Supp. 1989); MINN. STAT. ANN. § 595.02 (4) (West 1988); N.Y. CRIM. PROC. LAW § 65.10 (McKinney Supp. 1990); OHIO REV. CODE ANN. § 2907.41(c) (Anderson 1987); VT. R. EVID. § 807(e) (Supp. 1989); and VA. CODE ANN. § 63.1-248.13:1 (Michie 1991).

31. Provisions allowing for use of videotaped depositions and prior testimony of child abuse victims: ALA. CODE § 15-25-2 (Supp. 1989); ARIZ. REV. STAT. ANN. §§ 13-4252 to -4253(B) (Supp. 1988); ARK. CODE ANN. § 16-44-203 (Michie 1987); CAL. PENAL CODE § 1346 (West Supp. 1990); COLO. REV. STAT. §§ 18-3-413, 18-6-401.3 (1986); CONN. GEN. STAT. ANN. § 54-86g (West Supp. 1989); DEL. CODE ANN. tit. 11, § 3511 (1987); FLA. STAT. ANN. § 92.53 (West Supp. 1989); HAW. R. EVID. 616; ILL. ANN. STAT. ch. 38, ¶ 106A-2 (Smith-Hurd Supp. 1989); IND. CODE ANN. § 35-37-4-8-(d) (Burns Supp. 1991); IOWA CODE ANN. § 910A.14(2) (West Supp. 1991); KAN. STAT. ANN. § 38-1557 (1986); KY. REV. STAT. ANN. § 421.350(4) (Baldwin Supp. 1989); MASS. GEN. LAWS ANN. ch. 278, § 16D(b)(2) (West Supp. 1989); MICH. COMP. LAWS ANN. § 600.2163a(13) (West Supp. 1989); MINN. STAT. ANN. § 595.02(4) (West 1988); MISS. CODE ANN. § 13-1-407 (Supp. 1989); MO. ANN. STAT. § 491.680 (Vernon Supp. 1989); MONT. CODE ANN. §§ 46-15-401 to -403 (1989); NEB. REV. STAT. §§ 29-1925 to -1926 (Supp. 1988); NEV. REV. STAT. ANN. § 174.227 (Michie 1986); N.H. REV. STAT. ANN. § 517:13-a (Supp. 1989); N.M. STAT. ANN. § 30-9-17 (Michie Supp. 1989); OHIO REV. CODE ANN. § 2907.41(A) (Anderson

and twenty states have enacted special hearsay exceptions for statements made by children.<sup>32</sup> Generally, the objective of such statutes is to remove the inhibiting aspects of courtroom testimony, thus permitting the child to speak more freely and with less fear in relating the details of the ordeal.<sup>33</sup>

Washington is one such state that has recognized child abuse as an urgent problem. Washington was the first of several states to enact a child sexual abuse hearsay exception.<sup>34</sup> The child hearsay exception permits the admission of an out-of-court statement about sexual abuse made by a child under the age of ten. Such statements, however, are only admitted if the court finds that the statement contains sufficient indicia of reliability and that, if the child is unavailable, evidence of the criminal act is corroborated.<sup>35</sup>

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1987); OKLA. STAT. ANN. tit. 22, § 753(C) (West Supp. 1989); 42 PA. CONS. STAT. ANN. § 5984 (Supp. 1989); R.I. GEN. LAWS § 11-37-13.2 (Supp. 1989); S.C. CODE ANN. § 16-3-1530(G) (Law. Co-op. Supp. 1988); S.D. CODIFIED LAWS ANN. § 23A-12-9 (1988); TENN. CODE ANN. § 24-7-116 (Supp. 1989); TEX. CODE CRIM. PROC. ANN. art. 38.071, § 4 (West Supp. 1989); VT. R. EVID. 807(d); VA. CODE ANN. § 63.1-248.13:3 (Michie Supp. 1989); WIS. STAT. ANN. § 967.04 (West 1985 & Supp. 1989); and WYO. STAT. § 7-11-408 (1987).

32. Provisions allowing for admission of child victim hearsay statements: ALASKA STAT. § 12.40.110 (1990); ARIZ. REV. STAT. ANN. § 13-1416 (1989); ARK. CODE ANN. § 28-1001 (Michie 1987); CAL. EVID. CODE § 1228 (West Supp. 1992); COLO. REV. STAT. § 13-25-129 (1989); FLA. STAT. ANN. § 90.803(23) (West Supp. 1992); IDAHO CODE § 19-3024 (1987); ILL. ANN. STAT. ch. 38, ¶ 115-10 (Smith-Hurd 1987); IND. CODE ANN. § 35-37-4-6 (Burns Supp. 1991); KAN. STAT. ANN. § 60-460(dd) (Supp. 1990); ME. REV. STAT. ANN. tit. 15, § 1205 (West Supp. 1991); MINN. STAT. § 260.156, 595.02(3) (Supp. 1992); MISS. CODE ANN. § 13-1-403 (Supp. 1991); MO. ANN. STAT. § 491.075 (Vernon 1992); OKLA. STAT. ANN. tit. 12, § 2803.1 (West Supp. 1992); 42 PA. CONS. STAT. ANN. § 5986 (1991); S.D. CODIFIED LAWS ANN. § 19-16-38 (1987); TEXAS CODE CRIM. PROC. ANN. art. 38.072 (West Supp. 1992); UTAH CODE ANN. § 76-5-411 (1990); and WASH. REV. CODE § 9A.44.120 (Supp. 1990-91).

33. See Marks, *supra* note 21, at 808.

34. See WASH. REV. CODE § 9A.44.120 (Supp. 1990-91); see also WASH. REV. CODE § 9A.64.020, 9A.04.080 (Supp. 1990-91) (amended in 1982 to expand statutory definition of incest and to extend the statute of limitations for child sexual abuse prosecutions, see Act of Apr. 1, 1982, ch. 129, § 1, 3, 1982 Wash. Laws 559-60).

35. WASH. REV. CODE § 9A.44.120 (1987) provides:

A statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another, not otherwise admissible by statute or court rule, is admissible in evidence in dependency proceedings under Title 13 RCW and criminal proceedings in the courts of the state of Washington if:

- (1) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and
- (2) The child either:
  - (a) Testifies at the proceedings; or
  - (b) Is unavailable as a witness: *Provided*, That when the child is unavailable as a witness, such statement may be admitted only if there is corroborative



Nevertheless, the current child hearsay exception only allows for the admission of past, out-of-court statements if the child is unavailable and, thus, may deprive defendants of any chance to cross-examine their accuser. Therefore, during the 1990 session, the Washington State Legislature enacted E.S.H.B. 2809 that allows closed-circuit transmission of testimony of child witnesses by adding a new section to chapter 9A.44 of the Revised Code of Washington.<sup>36</sup> This new section permits child abuse victims to testify via one-way closed-circuit television at the trial court's discretion.<sup>37</sup> In addition to protecting child victims from the trauma of exposure to the

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evidence of the act. A statement may not be admitted under this section unless the proponent of the statement makes known to the adverse party his intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings to provide the adverse party with a fair opportunity to prepare to meet the statement.

36. E.S.H.B. 2809, *supra* note 1.

37. E.S.H.B. 2809 provides in pertinent part:

On motion of the prosecuting attorney in a criminal proceeding, the court may order that a child under the age of ten may testify in a room outside the presence of the defendant and the jury while one-way closed-circuit television equipment simultaneously projects the child's testimony into another room so the defendant and the jury can watch and hear the child testify if:

- (a) The testimony will describe an act or attempted act of sexual contact performed with or on the child by another or describe an act or attempted act of physical abuse against the child by another;
- (b) The testimony is taken during the criminal proceeding;
- (c) The court finds by substantial evidence, in a hearing conducted outside the presence of the jury, that requiring the child to testify in the presence of the defendant will cause the child to suffer serious emotional or mental distress that will prevent the child from reasonably communicating at the trial. If the defendant is excluded from the presence of the child, the jury must also be excluded;
- (d) As provided in subsection (1) (a) and (b) of this section, the court may allow a child to testify in the presence of the defendant but outside the presence of the jury, via closed-circuit television, if the court finds, upon motion and hearing outside the presence of the jury, that the child will suffer serious emotional distress that will prevent the child from reasonably communicating at the trial in front of the jury, or, that although the child may be able to reasonably communicate at trial in front of the jury, the child will suffer serious emotional or mental distress from testifying in front of the jury. If the child is able to communicate in front of the defendant but not the jury, the defendant will remain in the room with the child while the jury is excluded from the room;
- (e) The court finds that the prosecutor has made all reasonable efforts to prepare the child for testifying, including informing the child or the child's parent or guardian about community counseling services, giving court tours, and explaining the trial process. If the prosecutor fails to demonstrate that preparations were implemented or the prosecutor in good faith attempted to implement them, the court shall deny the motion;
- (f) The court balances the strength of the state's case without the testimony

abuser and the courtroom, this procedural device is designed to enhance the truth seeking process.<sup>38</sup> Although the primary purpose of the new provision is to protect children, the primary issue raised is whether the defendant's Confrontation Clause rights are violated by the provision.

### III. THE RIGHT TO CONFRONTATION

The Sixth Amendment to the United States Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ."<sup>39</sup> Confrontation generally requires that the witnesses be present at trial and that the defendant be allowed to cross-examine each witness.<sup>40</sup> Confrontation is a fundamen-

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of the child against the defendant's constitutional rights and the degree of infringement of the closed-circuit television procedure on those rights;

(g) The court finds that no less restrictive method of obtaining the testimony exists that can adequately protect the child from the serious emotional or mental distress;

(h) When the court allows the child to testify outside the presence of the defendant, the defendant can communicate constantly with the defense attorney by electronic transmission and be granted reasonable court recesses during the child's testimony for person-to-person consultation with the defense attorney;

(i) The court can communicate with the attorneys by an audio system so that the court can rule on objections and otherwise control the proceedings;

(j) All parties in the room with the child are on camera and can be viewed by all other parties. If viewing all participants is not possible, the court shall describe for the viewers the location of the prosecutor, defense attorney, and other participants in relation to the child;

(k) The court finds that the television equipment is capable of making an accurate reproduction of and the operator of the equipment is competent to operate the equipment; and

(l) The court imposes reasonable guidelines upon the parties for conducting the filming to avoid trauma to the child or abuse of the procedure for tactical advantage.

The prosecutor, defense attorney, and a neutral and trained victim's advocate, if any, shall always be in the room where the child is testifying. The court in the court's discretion depending on the circumstances and whether the jury or defendant or both are excluded from the room where the child is testifying, may remain or may not remain in the room with the child.

E.S.H.B. 2809, *supra* note 1, at § 2.

38. *Id.* at § 1.

39. U.S. CONST. amend. VI.

40. See *Pointer v. Texas*, 380 U.S. 400, 406-07 (1965) (reversing conviction because State introduced the transcript of a witness's testimony given at the preliminary hearing at which the defendant was not represented by counsel and had no opportunity to cross-examine); *Douglas v. Alabama*, 380 U.S. 415 (1965) (petitioner's inability to cross-examine the alleged accomplice denied petitioner the right of cross-examination secured by the Confrontation Clause of the Sixth Amendment).

tal right essential to a fair trial.<sup>41</sup> The right to confront adverse witnesses is applied to the states through the Due Process Clause of the Fourteenth Amendment.<sup>42</sup>

The Confrontation Clause reflects a belief that face-to-face confrontation at trial enhances the truth-seeking process. In *California v. Green*,<sup>43</sup> the United States Supreme Court set forth three purposes behind the right to confrontation: to ensure that the witness will give his or her statements under oath; to force the witness to submit to cross-examination; and to permit the jury to observe the demeanor of the witness, thereby helping the jury assess his or her credibility.<sup>44</sup>

In assessing the purpose of the Confrontation Clause, however, the Supreme Court has concluded that a defendant's right to confront his accuser is not absolute.<sup>45</sup> In *Mattox v. United States*,<sup>46</sup> for example, the Court stated that general constitutional provisions "must occasionally give way to consideration of public policy and the necessities of the case."<sup>47</sup> Accordingly, rights conferred by the Confrontation Clause are not absolute and may give way to other important interests.<sup>48</sup>

Because the rights conferred by the Confrontation Clause are not absolutely guaranteed, the Supreme Court has pronounced a number of exceptions to the clause that are concurrent exceptions to the hearsay rule. The exceptions demonstrate the flexibility of the Confrontation Clause. Rather than interpreting the clause literally and rigidly, the Court permits these exceptions to "further the Confrontation Clause's very mission which is to 'advance the "accuracy of the truth determining process in criminal trials."'"<sup>49</sup>

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41. See *Pointer v. Texas*, 380 U.S. 400, 404 (1965) (stating that the right to confrontation is "[o]ne of the fundamental guarantees of life and liberty" and "a right long deemed so essential for the due protection of life and liberty that it is guarded against legislative and judicial action by provisions in the Constitution of the United States and in the constitutions of most if not all the States composing the Union.")

42. *Id.* at 403. The Due Process Clause of the Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV.

43. 399 U.S. 149 (1970).

44. *Id.* at 175 (Harlan, J., concurring).

45. *Coy v. Iowa*, 487 U.S. 1012, 1016 (1988).

46. 156 U.S. 237 (1895).

47. *Id.* at 243.

48. See *Coy*, 487 U.S. at 1016.

49. *United States v. Inadi*, 475 U.S. 387, 396 (1986) (quoting *Tennessee v. Street*, 471 U.S. 409, 415 (1985) (quoting *Dutton v. Evans*, 400 U.S. 74, 89 (1970))).

*A. Exceptions to the Right to Confrontation*

Cases interpreting the Confrontation Clause tend to fall into two general categories: those involving the admission of hearsay statements and those involving limitations on cross-examination.<sup>50</sup> The Supreme Court has developed a number of exceptions in assessing the purpose of the clause in both types of cases.

An early exception to the right of confrontation was recognized by the Supreme Court in *Mattox v. United States*.<sup>51</sup> In *Mattox*, the Court noted that dying declarations traditionally have been admitted into evidence as an exception to the Confrontation Clause even though such statements often are made out of the presence of the accused and the jury and are made without benefit of cross-examination.<sup>52</sup> The Court found that the admission of dying declarations into evidence is necessary because of the declarant's subsequent demise and, therefore, is required "to prevent a manifest failure of justice."<sup>53</sup>

Two additional exceptions to the Confrontation Clause were recognized by the Supreme Court in *California v. Green*.<sup>54</sup> In *Green*, an available declarant's prior inconsistent statements were introduced at trial.<sup>55</sup> At trial, the witness recanted his prior statement, claiming a lapse of memory when confronted with the preliminary hearing transcript.<sup>56</sup> To refresh the witness's recollection, the prosecution introduced the preliminary hearing testimony, which the trial judge admitted.<sup>57</sup> The Supreme Court held that the admission did not violate the defendant's right to confrontation.<sup>58</sup>

In so holding, the Court found that "the Confrontation Clause is not violated by admitting a declarant's out-of-court statements, as long as the declarant is testifying as a witness and is subject to full and effective cross-examination."<sup>59</sup> The Court also held that a declarant's preliminary hearing statements are admissible at trial even if the declarant is unavaila-

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50. *Delaware v. Fensterer*, 474 U.S. 15, 18 (1985).

51. 156 U.S. 237 (1895).

52. *Id.* at 243-44.

53. *Id.* at 244.

54. 399 U.S. 149 (1970).

55. *Id.* at 151.

56. *Id.* at 151-52.

57. *Id.* at 152.

58. *Id.* at 164-65.

59. *Id.* at 158.

ble to testify when the "statement at the preliminary hearing . . . [was] given under circumstances closely approximating those that surround the typical trial."<sup>60</sup> Accordingly, a declarant's preliminary hearing statements are admissible at the later trial if the declarant is an unavailable witness and if at the preliminary hearing: (1) the declarant was under oath; (2) the defendant was represented by counsel; (3) the defendant had every opportunity to cross-examine the declarant; and (4) the hearing took place before a judge and was recorded.<sup>61</sup> Thus, the Court permitted the introduction of the declarant's statements even though the defendant was unable to actually "confront" the declarant when the statements against him were made.

Drawing upon the above exceptions, the Supreme Court once again addressed the Confrontation Clause in *Ohio v. Roberts*.<sup>62</sup> In *Roberts*, a hearsay declarant, present at the defendant's preliminary hearing, was unavailable to testify at trial.<sup>63</sup> The Court upheld the admission of the statements into evidence, finding that the prosecution had satisfied both the necessity and reliability requirements necessary for a Confrontation Clause exception.<sup>64</sup> In so holding, the Court established a two-prong test to determine whether statements made at preliminary hearings would be allowed into evidence in exception to the Confrontation Clause.<sup>65</sup> Specifically, this test set out the two essential components of Confrontation Clause exceptions: "unavailability"<sup>66</sup> and "indicia of reliability."<sup>67</sup>

As to the unavailability requirement, the *Roberts* Court held that the prosecution may circumvent the Confrontation Clause's "preference for face-to-face accusation"<sup>68</sup> if it demonstrates that the out-of-court statement is the sole source of the information and that the declarant is unavailable for trial.<sup>69</sup> Applying this principle to the facts in *Roberts*, the Court found that the prosecution had attempted to locate the declarant

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60. *Id.* at 165.

61. *Id.*

62. 448 U.S. 56 (1980).

63. *Id.* at 58.

64. *Id.* at 74-75.

65. *Id.* at 67-77.

66. *Id.* at 65.

67. *Id.* at 65-66 (citing *Mancusi v. Stubbs*, 408 U.S. 204, 212-13 (1972)).

68. *Id.* at 65.

69. *Id.* at 74-75.

before trial but without success.<sup>70</sup> In this way, the prosecution had met the unavailability requirement.<sup>71</sup>

After demonstrating that the declarant is unavailable, the prosecution must then show that the out-of-court statement bears adequate indicia of reliability.<sup>72</sup> Reliability may be inferred either when "the evidence falls within a firmly rooted hearsay exception,"<sup>73</sup> or when the evidence contains a "particularized guarantee of trustworthiness."<sup>74</sup> Writing for the majority, Justice Blackmun noted that because the defendant's counsel cross-examined the witness at the preliminary hearing as a matter of "form"<sup>75</sup> and "purpose,"<sup>76</sup> the defendant was afforded the requisite protection envisioned under the Confrontation Clause.<sup>77</sup> In fact, the Court in *Roberts* found that "the opportunity to cross-examine . . . even absent actual cross-examination . . . satisfies the Confrontation Clause."<sup>78</sup>

The Supreme Court provided further guidance on permissible limitations on the right to confrontation in *Delaware v. Fensterer*.<sup>79</sup> The Court held that "the Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish."<sup>80</sup> In *Fensterer*, the state's expert witness testified that, in his opinion, a hair found on the alleged murder weapon had been forcibly removed from the victim.<sup>81</sup> But on direct and cross-examination, the expert could not recall which of three methods had been employed to

70. *Id.* at 75-77. Five subpoenas for four different trial dates were issued to the out-of-court declarant at her parents' residence. She was not at the residence when these were executed and no one, including her parents, knew her whereabouts. *Id.*

71. *Id.* at 77.

72. *Id.* at 65-66.

73. *Id.* at 66. The rule against hearsay is riddled with exceptions developed over three centuries. See EDWARD W. CLEARY, MCCORMICK ON EVIDENCE 244 (2d ed. 1972) (discussing the history of the hearsay rule); *id.* at 252-324 (discussing exceptions to the hearsay rule). See also, FED. R. EVID. 803, 804 (expressly codifying over 20 specified exceptions to the hearsay rule).

74. *Roberts*, 448 U.S. at 66. A statement contains a particularized guarantee of trustworthiness if the trier of fact is afforded "a satisfactory basis for evaluating the truth of the prior statement." *California v. Green*, 399 U.S. 149, 161 (1970).

75. *Roberts*, 448 U.S. at 70-71.

76. *Id.* at 71.

77. *Id.* at 73.

78. *Id.* at 70 (emphasis in original). See, e.g., *Green*, 399 U.S. at 166.

79. 474 U.S. 15 (1985).

80. *Id.* at 20 (emphasis in original) (citation omitted).

81. *Id.* at 16.

determine whether the hair had been forcibly removed.<sup>82</sup> The Court held that the admission of the expert's testimony did not violate the Confrontation Clause.<sup>83</sup> In so doing, the Court stated that although cross-examination effectuates the defendant's purpose, the defendant's right to confrontation was not offended because the defendant was able to probe and expose the weaknesses in the expert's testimony through cross-examination.<sup>84</sup>

The many accepted exceptions to the Confrontation Clause illustrate that the Supreme Court has "never embraced the view that the right to confrontation unconditionally mandates that all witnesses" must testify in the presence of the accused and confront him or her face-to-face.<sup>85</sup> To the contrary, the Supreme Court has said that "a technical adherence to the letter of a constitutional provision may occasionally be carried farther than is necessary to the just protection of the accused, and farther than the safety of the public will warrant."<sup>86</sup>

### B. Furtherance of an Important Public Policy

Although the Court fashions concrete rules upon which to graft exceptions to the Confrontation Clause, public policy considerations also underlie Confrontation Clause exceptions,<sup>87</sup> which are allowed when necessary to further an important public policy. For example, in *Globe Newspaper Co. v. Superior Court*,<sup>88</sup> the Supreme Court recognized safeguarding the physical and psychological well-being of a minor as "compelling" policy.<sup>89</sup> The State argued that a statute excluding the general public from sexual offense trials involving children

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82. *Id.* at 17.

83. *Id.* at 22.

84. *Id.*

85. *Commonwealth v. Ludwig*, 531 A.2d 459, 461 (Pa. Super. Ct. 1987), *rev'd*, 594 A.2d 281 (Pa. 1991) (reversed on state constitutional grounds).

86. *Mattox v. United States*, 156 U.S. 237, 242 (1895). *See also* *Mancusi v. Stubbs*, 408 U.S. 204 (1972).

87. *Mattox*, 156 U.S. at 240.

88. 457 U.S. 596 (1982).

89. *Id.* The Court granted certiorari to determine whether a Massachusetts statute that excluded the public from sexual offense trials involving children violated the First Amendment. *Id.* at 599. The majority applied a strict scrutiny standard of review and held that, in order to justify the exclusion of the public from criminal trials, the state must show that the closure of the courtroom is necessitated by a "compelling governmental interest" and is narrowly tailored to serve that interest. *Id.* at 607.

would protect minor victims from further trauma or embarrassment and encourage victims to come forward and testify in a truthful and credible manner.<sup>90</sup> The Supreme Court agreed with the State:

[T]he first interest—safeguarding the physical and psychological well-being of a minor—is a compelling one. But as compelling as that interest is, it does not justify a *mandatory* closure rule, for it is clear that the circumstances of the particular case may affect the significance of the interest. A trial court can determine on a case-by-case basis whether closure is necessary to protect the welfare of a minor victim.<sup>91</sup>

Although the Court went on to hold the Massachusetts statute unconstitutional because it was not sufficiently tailored to account for the facts of each individual case, the “compelling interest” analysis provides a framework in which statutes designed to protect child abuse witnesses can be examined.

Moreover, the Supreme Court’s express averment that protection of children is a “compelling interest” fits directly into that framework. In *New York v. Ferber*,<sup>92</sup> a bookstore owner sold films depicting sexual acts involving young boys.<sup>93</sup> The bookstore owner was subsequently convicted under a New York statute for knowingly promoting a sexual performance by a child.<sup>94</sup> In upholding the conviction, the Supreme Court noted that a state has an interest in safeguarding the physical and psychological well-being of minors.<sup>95</sup> The Court in *Ferber* emphasized that the prevention of sexual abuse of children is a governmental interest of surpassing importance and consequently, the balance of competing interests is struck in favor of the child.<sup>96</sup> Thus, *Globe* and *Ferber* suggest that the Supreme

90. *Id.*

91. *Id.* at 607-08 (emphasis in original).

92. 458 U.S. 747 (1982).

93. *Id.* at 751-52.

94. *Id.* at 752.

95. *Id.* at 756-57. Writing for the majority, Justice White stated:

It is evident beyond the need for elaboration that a state’s interest in “safeguarding the physical and psychological well-being of a minor” is “compelling.” “A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens.” Accordingly, we have sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights.

*Id.* (citations omitted).

96. *Id.* at 757.



Court is willing to abridge constitutionally protected rights in order to protect the welfare of children in certain situations.

### C. Face-to-Face Confrontation

The crux of any defense argument in cases involving laws protecting child witnesses is that the defendant has a right to view his or her accuser face-to-face.

In *Coy v. Iowa*,<sup>97</sup> the Supreme Court acknowledged that "the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact."<sup>98</sup> However, the Court expressly left for another day "the question whether any exceptions exist. Whatever they may be, they would surely be allowed only when necessary to furnish an important public policy."<sup>99</sup>

The procedure challenged in *Coy* was the placement of a screen between the defendant and the child witness.<sup>100</sup> At trial, the State moved, pursuant to Iowa Code section 910A.14, to allow one of the alleged victims to testify against the defendant behind the large screen in the courtroom.<sup>101</sup> The screen allowed the defendant to see the child witnesses, but the child witnesses could not see the defendant.<sup>102</sup> The defendant argued that the use of the screen violated his confrontation rights; the trial court rejected the argument.<sup>103</sup> The defendant appealed his conviction to the Iowa Supreme Court, and that court affirmed the conviction.<sup>104</sup>

On further appeal, the Supreme Court reversed the trial court decision.<sup>105</sup> The Court held that use of the screen at trial violated the defendant's right to confront witnesses against him.<sup>106</sup> In disallowing this procedure, the majority emphasized that something more than a generalized finding of trauma in the statute is needed when the Confrontation Clause exception is not "firmly . . . rooted in our jurisprudence."<sup>107</sup> The Court

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97. 487 U.S. 1012 (1988).

98. *Id.* at 1016.

99. *Id.* at 1021.

100. *Id.* at 1014.

101. *Id.* at 1014-15.

102. *Id.*

103. *Id.* at 1015.

104. *Id.*

105. *Id.* at 1022.

106. *Id.*

107. *Id.* at 1021 (quoting *Bourjaily v. United States*, 483 U.S. 171, 183 (1987), citing *Dutton v. Evans*, 400 U.S. 74 (1970)).

concluded that because there had been "no individualized findings that these particular witnesses need special protection," the procedure could not be upheld.<sup>108</sup> In so holding, the Court hinted that a child abuse testimony exception to the Confrontation Clause might be possible if the exception was based on individualized findings.<sup>109</sup>

Justice O'Connor rejected the majority's suggestion that a defendant's right to physically face those that testify against him or her is absolute.<sup>110</sup> In concurrence, Justice O'Connor specifically stated her belief that the confrontation right "may give way in an appropriate case to other competing interests so as to permit the use of certain procedural devices designed to shield a child witness from the trauma of courtroom testimony."<sup>111</sup> Justice O'Connor recognized that one-half of the states permit the use of one- or two-way closed-circuit television in child abuse cases.<sup>112</sup> Noting the high incidence of child abuse in our society and, in particular, the problems of prosecution of child abuse cases, Justice O'Connor explicitly stated that "nothing in today's decision necessarily dooms such efforts by state legislatures to protect child witnesses."<sup>113</sup>

Thus, Justice O'Connor clearly stated that the protection of child witnesses is an important public policy that calls for something other than face-to-face confrontation. Justice O'Connor may have seen this protection as the important public policy warranting a possible Confrontation Clause exception, which the majority left for "another day."<sup>114</sup> The Court's suggestion is that, in order for the strictures of the Confrontation Clause to give way, a court must make a case-specific finding of need to utilize an alternative method of presenting testimony.<sup>115</sup> Interestingly, although the majority opinion made reference to the dissent, it made no effort to dispute Justice O'Connor's concurring position.<sup>116</sup>

The Supreme Court decided the question of exceptions to

108. *Id.*

109. *Id.*

110. *Id.* at 1024 (O'Connor, White, JJ., concurring).

111. *Id.* at 1022.

112. *Id.* at 1023.

113. *Id.*

114. *See id.* at 1021.

115. *Id.* The Court concluded that "[s]ince there have been no individualized findings that these particular witnesses needed special protection, the judgment here could not be sustained by any conceivable exception." *Id.*

116. *Id.* at 1018-19 & n.2.

face-to-face confrontation reserved in *Coy* when it examined such confrontation in *Maryland v. Craig*.<sup>117</sup> In *Craig v. State*,<sup>118</sup> the defendant, who owned and operated a preschool, was charged with sexually abusing several of her students.<sup>119</sup> At trial, the State moved to have the child witnesses testify via one-way closed-circuit television pursuant to section 9-102 of the Maryland Courts & Judicial Proceedings Article.<sup>120</sup> The trial judge granted the motion, and the children testified by closed-circuit television.<sup>121</sup> Craig subsequently was convicted.<sup>122</sup>

On appeal to the Maryland Special Court of Appeals, Craig contended that section 9-102 was unconstitutional in light of the Supreme Court decision in *Coy*.<sup>123</sup> Nevertheless, the Court of Special Appeals affirmed the conviction.<sup>124</sup> The appeals court held that the trial judge's particularized finding of the children's psychological unavailability satisfied the requirements of *Coy*.<sup>125</sup> Moreover, the court found that section 9-102 did indeed "further an important public policy."<sup>126</sup>

Craig appealed to the Court of Appeals, and the court agreed with the Court of Special Appeals that section 9-102 is constitutional.<sup>127</sup> However, the court held that exceptions to

117. 110 S. Ct. 3157 (1990).

118. 544 A.2d 784 (Md. Ct. Spec. App. 1988), *rev'd*, 560 A.2d 1120 (Md. 1989), *vacated sub nom.*, 110 S. Ct. 3157 (1990).

119. *Craig v. State*, 544 A.2d at 786.

120. *Id.* at 787. See MD. CTS. & JUD. PROC. CODE ANN. § 9-102 (1989). Section 9-102 provides in pertinent part:

(a)(1) In case of abuse of a child . . . a court may order that the testimony of a child victim be taken outside the courtroom and shown in the courtroom by means of closed-circuit television if: (i) The testimony is taken during the proceeding; and (ii) The judge determines that testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate.

121. *Craig v. State*, 544 A.2d at 787.

122. *Id.* *Craig* was convicted on counts of child abuse, first and second degree sexual offenses, unnatural and perverted sexual practice, assault, and battery. *Id.* at 786.

123. See *id.* at 796.

124. *Id.* at 807.

125. *Id.* at 800-02.

126. *Id.* at 800. According to the Court of Special Appeals, that policy is two-fold: (1) to protect children generally from traumatic events, and (2) to further the truth-finding process. If a child by testifying in court is so traumatized as to be unable to communicate, "the truth of the matter might never be revealed, . . . and a dangerous person might be turned loose to continue his or her predation, perhaps . . . upon the same helpless victim."

127. *State v. Craig*, 560 A.2d 1120, 1121 (Md. 1989), *vacated*, 110 S. Ct. 3157 (1990). The court found that for Sixth Amendment and state constitution confrontation

the Confrontation Clause, including section 9-102, may only be invoked in the narrowest of circumstances.<sup>128</sup> In reversing Craig's conviction, the Court of Appeals held that the State did not meet the "high threshold required . . . before section 9-102 may be invoked."<sup>129</sup> In response, the state of Maryland appealed to the United States Supreme Court.<sup>130</sup>

The Supreme Court rejected Craig's contention that the use of one-way closed-circuit testimony violated the Confrontation Clause of the Sixth Amendment and held that one-way closed-circuit television can be used in child abuse cases when a case-specific showing of necessity is made.<sup>131</sup> Nevertheless, the Court acknowledged in *Craig* that *Coy* affirmed physical, face-to-face confrontation as an important aspect of confrontation<sup>132</sup> with historic roots in criminal jurisprudence.<sup>133</sup>

Although the Court recognized that face-to-face meeting forms "the core of the values furthered by the Confrontation Clause, . . . it is not the *sine qua non* of the confrontation right."<sup>134</sup> In fact, the Court noted many instances of recognized exceptions to actual face-to-face encounters at trial where testimony can be admitted against a defendant.<sup>135</sup> The

purposes, the defendant can be denied the right to "eyeball-to-eyeball" confrontation where necessary to obtain the trial testimony of the child. *Id.* at 1127.

128. *Id.* at 1125. The Court of Appeals held that the trial judge must first see the child testifying in the defendant's presence. *Id.* at 1127. The child must show signs of so much emotional distress that he or she is unable to testify before the one-way closed-circuit television can be used. *Id.*

129. *Id.* at 1121. The Court of Appeals ordered the case to be remanded for a new trial. *Id.* at 1129.

130. *Maryland v. Craig*, 110 S.Ct. 3157, 3162 (1990). The Court granted certiorari to resolve the Confrontation Clause issues raised by the case. *Id.*

131. *Id.* at 3170.

132. *Id.* at 3162 (citing *Kentucky v. Stincer*, 482 U.S. 730, 748-50 (1987)). The Court noted that the central concern of the Confrontation Clause is to ensure the reliability of evidence by subjecting it to rigorous testing before the trier of fact. *Id.* at 3163. This testing is accomplished through the elements of physical presence, oath, cross-examination, and observation of demeanor by the trier of fact. *Id.*

133. *Id.* at 3162 (citing *Mattox v. United States*, 156 U.S. 237, 242 (1895) (the primary objective of the constitutional provision for confrontation is to prevent depositions or *ex parte* affidavits from being used against the accused instead of in-court testimony with an opportunity for cross-examination) (also citing *California v. Green*, 399 U.S. 149, 156 (1970)).

134. *Id.* at 3164 (citation omitted).

135. The right of confrontation can be waived when the defendant engages in disruptive behavior in the courtroom. *Id.* at 3166 (citing *Illinois v. Allen*, 397 U.S. 337, 342-43 (1970) (stating that trial judge must use the clear and convincing standard of proof in determining whether defendant has by his conduct waived his constitutional right to confrontation)). The right to confrontation has been restricted by limits on the availability of cross-examination, *id.* (citing *Pennsylvania v. Ritchie*, 480 U.S. 39,

Court then concluded that although there is a preference for face-to-face confrontation at trial, such a preference "must occasionally give way to considerations of public policy and the necessities of the case."<sup>136</sup>

The Court went on to acknowledge its suggestion in *Coy* that "a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where reliability of the testimony is otherwise assured."<sup>137</sup> The Court viewed the Maryland statute and the procedure employed by the trial court as preserving all aspects of confrontation: the witness testified under oath; a full opportunity was provided for the defendant to cross-examine the witness; and the witness's demeanor was observed by the judge and the jury in the courtroom and by the defendant on a television monitor.<sup>138</sup> The Court stated that the presence of these elements ensures that "the testimony is both reliable and subject to rigorous adversarial testing in a manner functionally equivalent to that accorded live, in-person testimony."<sup>139</sup> The Court also noted that the procedure is "a far cry from the undisputed prohibition of the Confrontation Clause: trial by *ex parte* affidavit or inquisition."<sup>140</sup> Thus, the Court concluded that the Maryland procedure was reliable.

After examining the Confrontation Clause protections present in the Maryland procedure, the Court weighed the State's interest in promulgating the statute. The Court concluded that "a State's interest in the physical and psychological

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51-52 (1987) (holding that denial of access to the files of a protective service agency did not violate the Confrontation Clause)), the scope of cross-examination, *id.* at 3164 (citing *Delaware v. Fensterer*, 474 U.S. 15, 22 (1985) (holding that the Confrontation Clause is satisfied by an opportunity to cross-examine even when frustrated by the lapse of memory of a prosecution expert witness)), and hearsay exceptions, *id.* at 3165 (citing *Ohio v. Roberts*, 448 U.S. 56, 63 (1980) (providing for the admission of prior testimony based on a test of reliability and necessity)). See also *Chambers v. Mississippi*, 410 U.S. 284 (1973) (barring the use of evidence rules regarding hearsay to prevent a defendant from using third party admissions against penal interest in his defense if the defendant would be denied a fair trial); *United States v. Inadi*, 475 U.S. 387 (1986) (providing for a co-conspirator's admission against interest to be admitted against a defendant).

136. *Craig*, 110 St. Ct. at 3165 (quoting *Mattox v. United States*, 156 U.S. 237, 243 (1895)).

137. *Id.* at 3166.

138. *Id.*

139. *Id.*

140. *Id.*

well-being of child abuse victims may be sufficiently important to outweigh . . . a defendant's right to face his or her accusers in court."<sup>141</sup> The Court noted that a majority of states have enacted similar statutes, indicating the widespread belief in the importance of such a public policy.<sup>142</sup> The Court further noted that the state interest is "buttressed by the growing body of academic literature documenting the psychological trauma suffered by child abuse victims who must testify in court."<sup>143</sup> Thus, the Maryland statute furthered a compelling state interest.<sup>144</sup>

In holding the state interest in protecting child witnesses from the trauma of testifying in a child abuse case sufficiently important to justify the use of one-way closed-circuit testimony, the Court indicated that the state must make a case-specific showing of necessity.<sup>145</sup> A finding of necessity requires three inquiries: (1) Is the use of one-way closed-circuit television necessary to protect a particular child witness? (2) Would the child be traumatized by the presence of the defendant, and not by the courtroom generally? and (3) Is the emotional distress suffered by the child so significant that the child's ability to communicate is impaired?<sup>146</sup> The majority, however, declined to establish any procedure for the courts to use in finding necessity. Rather, the Supreme Court left the states to determine the evidentiary requirements that must be met to establish necessity.<sup>147</sup> As long as a trial court makes a case-specific finding of necessity, the Confrontation Clause is satisfied. Thus, the Court held that the Maryland statute satisfied the Confrontation Clause.

In conclusion, the majority in *Craig*, although noting the importance of face-to-face confrontation, held that such confrontation is not always constitutionally mandated. Face-to-

141. See *id.* at 3169.

142. *Id.* Thirty-seven states permit videotaped testimony of sexually abused children; twenty-four states permit one-way closed-circuit television testimony in such cases; and eight states authorize two-way television systems in the same type of cases. *Id.* at 3167-68.

143. *Id.* at 3168 (citing the Brief for American Psychological Association as Amicus Curiae 7-13). See also Gail S. Goodman et al., Emotional Effects of Criminal Court Testimony on Child Sexual Assault Victims, Final Report to the National Institute of Justice (presented as conference paper at annual convention of American Psychological Ass'n, Aug. 1989).

144. *Id.* at 3167-69.

145. *Id.* at 3169.

146. *Id.*

147. See *id.* at 3171.

face confrontation is not required if the denial of confrontation is necessary and carries with it the necessary indicia of reliability as defined by *Roberts*.<sup>148</sup> Protecting the child witness from the trauma of testifying in the presence of the defendant qualifies as necessity if that trauma impairs the child's ability to communicate. Where this necessity is coupled with standards for indicia of reliability, face-to-face confrontation may be denied by the use of one-way closed-circuit testimony.

#### IV. WASHINGTON'S RIGHT TO CONFRONTATION

##### A. *Washington's Interpretation of the Face-to-Face Requirement*

Article I, section 22, of the Washington State Constitution requires that "[i]n all criminal prosecutions, the accused shall have the right . . . to meet witnesses against him face-to-face. . . ."<sup>149</sup> The United States Constitution's language is not as explicit as Washington's "face to face" language.<sup>150</sup> Nevertheless, the Washington Supreme Court has adopted the reasoning of the United States Supreme Court in analyzing confrontation issues.<sup>151</sup> The Washington Supreme Court thus addresses Confrontation Clause issues by relying on federal precedent rather than by adopting its own analysis specific to the State's Confrontation Clause.<sup>152</sup> Therefore, Confrontation Clause issues in Washington State are governed by the federal standard.<sup>153</sup>

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148. *Ohio v. Roberts*, 448 U.S. 56 (1980). See *supra* text accompanying notes 73-79.

149. WASH. CONST. art. I, § 22.

150. The Sixth Amendment to the United States Constitution only requires that "the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI.

151. See, e.g., *State v. Ryan*, 103 Wash. 2d 165, 691 P.2d 197 (1984) (court sets out the text of the Confrontation Clause for both the U.S. and Washington Constitutions but does not address the differences in the language).

152. See, e.g., *State v. Anderson*, 107 Wash. 2d 745, 733 P.2d 517 (1986) (applying the Confrontation Clause analysis and application of the *Roberts* unavailability test to determine whether the admission of declaration against penal interest was proper); *State v. Hieb*, 107 Wash. 2d 97, 727 P.2d 239 (1986) (applying unavailability test to excited utterance); *State v. Parris*, 98 Wash. 2d 140, 654 P.2d 508 (1982) (applying unavailability test to declaration against penal interest).

153. See, e.g., *State v. Hieb*, 107 Wash. 2d 97, 727 P.2d 239 (1986); *State v. Terrovona*, 105 Wash. 2d 632, 716 P.2d 295 (1986); *State v. Ryan*, 103 Wash. 2d 165, 691 P.2d 197 (1984); *State v. Dictado*, 102 Wash. 2d 277, 687 P.2d 172 (1984); *State v. Valladares*, 99 Wash. 2d 663, 664 P.2d 508 (1983); *State v. Parris*, 98 Wash. 2d 140, 654 P.2d 508 (1982); *State v. Griffith*, 45 Wash. App. 728, 727 P.2d 247 (1986); *State v. Edmondson*, 43 Wash. App. 443, 717 P.2d 784 (1986); *State v. Ross*, 42 Wash. App. 806, 714 P.2d 703 (1986); *State v. Slider*, 38 Wash. App. 689, 688 P.2d 538 (1984); *State v.*

Although Washington cases have stated that the right to confrontation is not absolute in other contexts, the Washington Constitution could be construed as granting greater protection to defendants on the issue of closed-circuit testimony.<sup>154</sup> The Washington Supreme Court has held that Washington courts have the power to interpret independently the state constitutional provisions as more protective of individual rights than the parallel provisions of the United States Constitution.<sup>155</sup> Note, however, that the argument for independent interpretation must be made by counsel before the court will take up the issue.<sup>156</sup>

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Bockman, 37 Wash. App. 474, 682 P.2d 925 (1984); *State v. Murphy*, 35 Wash. App. 658, 669 P.2d 891 (1983); *State v. York*, 28 Wash. App. 33, 621 P.2d 784 (1980); *State v. Roberts*, 25 Wash. App. 830, 611 P.2d 1297 (1980); *State v. Whittington*, 27 Wash. App. 422, 618 P.2d 121 (1980); *State v. Pickens*, 27 Wash. App. 97, 615 P.2d 537 (1980); *State v. Wilder*, 25 Wash. App. 568, 608 P.2d 270 (1980); *State v. Carter*, 23 Wash. App. 297, 596 P.2d 1354 (1979); *State v. Firven*, 22 Wash. App. 703, 591 P.2d 869 (1979).

154. See *State v. Valladares*, 99 Wash. 2d 663, 664 P.2d 508 (1983), in which the majority only addressed the federal right to confrontation. The concurring opinion of Chief Justice Williams stated:

[T]he "face-to-face" language of Const. art. 1, § 22 seems to require actual *physical* confrontation between the accused and any adverse witnesses. And while the impracticality of actual physical confrontation is not disputed, it also cannot be disputed that this language at least provides greater protection than is afforded under both hearsay rules and the Sixth Amendment. Though I by no means believe that the right of confrontation is absolute, I do believe that under the Washington Constitution, this right must be more jealously guarded than similar rights under the Sixth Amendment. To this end, any examination of the extent of this protection must include a careful balancing of the competing interests of the State and the accused with added weight being placed upon the accused's side of the scale.

*Id.* at 674, 664 P.2d at 514-15.

155. See, e.g., *State v. Coe*, 101 Wash. 2d 364, 679 P.2d 353 (1984) (interpreting WASH. CONST. art. I, § 5); *State v. Simpson*, 95 Wash. 2d 170, 622 P.2d 1199 (1980) (interpreting WASH. CONST. art. I, § 7). In *State v. Gunwall*, 106 Wash. 2d 54, 720 P.2d 808 (1986), the Washington Supreme Court enunciated several factors to be considered when determining if a different interpretation of the state constitution is required. The court stated:

The following nonexclusive neutral criteria are relevant in determining whether, in a given situation, the Washington State Constitution should be considered as extending broader rights to its citizens than the United States Constitution: (1) the textual language; (2) differences in the texts; (3) constitutional history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or local concern.

*Id.* at 58, 720 P.2d at 811. These factors are not determinative but merely "relevant" to the decision regarding independent interpretation. *Id.* at 61, 720 P.2d at 812.

156. See, e.g., *State v. Jones*, 112 Wash. 2d 488, 498 n.11, 772 P.2d 496, 501 n.11 (1989) (declining to examine the issue of independent state constitutional analysis because defense counsel did not argue for an independent analysis of the state and federal Confrontation Clauses).

Because the Washington Supreme Court has never been asked to independently



Nevertheless, it is useful to examine how other states have interpreted their Confrontation Clauses, in order to determine how Washington may interpret its Confrontation Clause relating to closed-circuit testimony of children in child abuse cases.

*B. Interpretation of the Face-to-Face Requirement in Other Jurisdictions*

Some states, analyzing the same constitutional language as that present in Washington's constitution, have interpreted the right guaranteed by the state constitution as identical to the right of confrontation guaranteed by the federal constitution. For example, the Confrontation Clauses contained in the state constitutions of both Kentucky and Pennsylvania contain wording identical to that of Washington's constitution.<sup>157</sup> Yet the courts in those states have refused to construe the express language as strictly as might be suggested, holding that the face-to-face requirement does not provide any greater protection for the defendant than that guaranteed by the federal Constitution.<sup>158</sup> Thus, the stricter language in the Kentucky and Pennsylvania constitutions merely provides the same protection as the United States Constitution. Each state's interpretation of its respective Confrontation Clause will be examined in turn.

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interpret the Washington Confrontation Clause, the Washington State Legislature proposed an amendment to the Washington State Constitution, article I, section 22 during both the 1991 and 1992 legislative sessions. The amendment provides that in criminal prosecutions involving sexual contact with a child ten years of age or younger, the court may order the testimony of the victim to be taken outside the courtroom and televised live into the courtroom. S.J. Res. 8217, 52d Leg. (1991). Proponents of the amendment expressed concern about the constitutional validity of E.S.H.B. 2809 stating that families (as well as prosecutors) do not want their case to be the test case. Indeed, prosecutors apparently are not using the procedure.

Opponents argued that anticipating constitutional invalidation of the statute was unwise and premature. They reasoned that the constitutional rights of an accused person should not be contingent on the crime alleged. Noting that the topic of sexual abuse is highly charged and emotional, the opponents contended that the legislature should place a limit on intervention and allow the courts do to their job without unnecessarily changing the constitution. The opponents prevailed during both sessions when the resolution died in the House Rules Committee.

157. The Kentucky and Pennsylvania Constitutions guarantee a person accused in a criminal prosecution the right "to meet witnesses face to face." The specific language of both constitutions is as follows: "In all criminal prosecutions, the accused has the right . . . to meet the witness face to face . . ." KY. CONST. § 11; PA. CONST. art. I, § 9.

158. See *Commonwealth v. Willis*, 716 S.W.2d 224, 229 (Ky. 1986); *Commonwealth v. Ludwig*, 531 A.2d 459, 461 (Pa. Super. Ct. 1987).

In *Commonwealth v. Willis*,<sup>159</sup> the prosecution requested that the testimony of a five-year-old sexual abuse victim be taken pursuant to a Kentucky statute that permits the use of one-way closed-circuit televised testimony in sex abuse cases of children under the age of twelve.<sup>160</sup> The trial court sustained the defense motion to exclude the testimony of the child witness, holding the statute unconstitutional as a violation of the defendant's right to confrontation.<sup>161</sup> The Kentucky Supreme Court reversed, thereby upholding the constitutionality of the Kentucky statute.

Kentucky's highest court observed that the Confrontation Clause contained in the Kentucky Constitution guaranteed to a defendant the right to meet witnesses "face to face."<sup>162</sup> Nevertheless, the court stated that "[t]here is no authority to support the proposition that the right of confrontation guaranteed by the Kentucky Constitution should be construed more stringently than the same right in the United States Constitution."<sup>163</sup> Thus, even though the Kentucky State Constitution specifically states that the accused has the right "to meet the witnesses face to face," the court held that a statute allowing the closed-circuit televised testimony of a child victim satisfies that constitutional requirement. In so holding, the court reasoned that the closed-circuit testimony statute was constitutional because it (1) did not unduly inhibit the defendant's right of cross-examination; (2) applied to a narrow class of witnesses (children twelve years old or younger who were victims of sex offenses); and (3) was in the interest of the truth determining process.<sup>164</sup>

The Kentucky Supreme Court further recognized that there is no constitutional right to "eyeball to eyeball" confrontation<sup>165</sup> and that the choice of the words face-to-face were a possible result of an inability to foresee technological advances, which today permit cross-examination without actual physical confrontation.<sup>166</sup> The use of such technology, according to the court, should be implemented to enhance truth-determination

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159. 716 S.W.2d 224 (Ky. 1986).

160. *Id.* at 226.

161. *Id.*

162. *Id.* at 227.

163. *Id.* at 229.

164. *Id.* at 227-28.

165. *Id.* at 230.

166. *Id.*

at trials.<sup>167</sup> Thus, the Kentucky Confrontation Clause, identical to the Washington Confrontation Clause, did not afford the defendant protection from the use of closed-circuit testimony.

Similarly, the Pennsylvania Superior Court found that the right of confrontation guaranteed by the Pennsylvania Constitution did not exceed the right of confrontation guaranteed by the federal constitution. In *Commonwealth v. Ludwig*,<sup>168</sup> the defendant was charged with sexually molesting his six-year-old daughter.<sup>169</sup> At trial, the child was permitted to testify via one-way closed-circuit television.<sup>170</sup> On appeal, Ludwig contended that the right to confront his accuser, as guaranteed by the United States and Pennsylvania Constitutions, was violated by the use of this procedure.<sup>171</sup> The Pennsylvania Superior Court approved the trial court's use of closed-circuit testimony on the basis that "there is no constitutional right to eyeball-to-eyeball confrontation."<sup>172</sup>

In reaching its decision, the superior court emphasized the difference between confrontation and intimidation: the right to confront does not confer upon an accused the right to intimidate.<sup>173</sup> Further, the reliability of an abused child's testimony does not depend upon her ability to withstand the psychological trauma of testifying in a courtroom under the unwavering gaze of a parent who, although a possible abuser, has also been provider, protector, and parent.<sup>174</sup> Rather, the reliability of the child's testimony can be assured by requiring the child to submit to cross-examination while the jury and the accused observe the demeanor of the witness as he or she responds to questions. In the case under consideration, such observation was accomplished by closed-circuit television.<sup>175</sup> Hence, the Pennsylvania court found that the closed-circuit testimony procedure did not violate the defendants' right to confront witnesses against him but rather served to enhance the fact-

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167. *See id.* at 230-31.

168. 531 A.2d 459 (Pa. Super. Ct. 1987).

169. *Id.* at 459.

170. *Id.* The trial court, within its discretion, permitted use of closed-circuit television. *Id.* Following the trial, the Pennsylvania Legislature enacted 42 PA. CONST. STAT. § 5985(a) allowing for the use of closed-circuit testimony by child abuse victims for good cause shown. *Id.* at 463, n.7.

171. *Id.* at 460.

172. *Id.* at 462 (quoting *Commonwealth v. Willis*, 716 S.W.2d 224 (Ky. 1986)).

173. *Id.*

174. *Id.*

175. *Id.* at 463.

finding process.<sup>176</sup>

Courts in other jurisdictions also reject a restrictive view of the right to confrontation. In *State v. Sheppard*,<sup>177</sup> the New Jersey Superior Court reiterated that the Confrontation Clause is subject to exceptions when the court granted the state's motion to allow the closed-circuit testimony of a child sexual abuse victim.<sup>178</sup> In reaching its conclusion to allow the child to testify by closed-circuit television, the New Jersey court stated:

[k]nown abusers are not being prosecuted because evidence against them cannot be presented. Children who are prevailed upon to testify may be more damaged by their traumatic role in the court proceedings than they were by their abuse. These considerations must be weighed and balanced against the right of confrontation in child abuse cases.<sup>179</sup>

Furthermore, the court stated that only a "modest erosion" of the clause, if any, would take place in this case because the defendant was able to view the witness during her testimony and to participate in the cross-examination of the witness.<sup>180</sup> The court also emphasized that the modified arrangement would enhance, not diminish, the prospect of the child testifying truthfully.<sup>181</sup> Thus, the New Jersey court found that because the "ultimate quest" in all judicial proceedings is truth, the closed-circuit procedure was constitutional.<sup>182</sup>

Judicial interpretation of the protection afforded defendants on the issue of closed-circuit testimony under Washington's Confrontation Clause is questionable. Although the Washington Supreme Court could interpret the clause to provide greater protection to defendants, such a result is unlikely because of the court's current method of relying on federal precedent, which permits child witnesses to testify via closed-circuit testimony so long as there is a case-specific finding of

176. *Id.* at 464.

177. 484 A.2d 1330 (N.J. Super. Ct. Law Div. 1984).

178. The New Jersey Superior Court interpreted the Confrontation Clauses of the U.S. CONST. amend. VI and of the N.J. CONST. art. I, § 10, both of which guarantee that the accused has the right to be confronted with the witnesses against him. *Id.*

179. *Id.* at 1342.

180. *Id.* at 1343. Because the defendant, as well as the judge, jury and spectators, could clearly see and hear the witness, adequate opportunities for cross-examination were provided.

181. *Id.* at 1344.

182. *Id.*

necessity. Furthermore, other states with identical Confrontation Clause language have not interpreted their Confrontation Clauses to provide greater protection to defendants.

## V. ANALYSIS OF E.S.H.B. 2809

With the preceding principles of interpreting the Confrontation Clause in mind, we turn to an analysis of Washington's closed-circuit testimony provision, E.S.H.B. 2809. E.S.H.B. 2809 satisfies the essential elements of confrontation and also satisfies the requirements of necessity and reliability set out in *Maryland v. Craig*. Furthermore, other issues raised by the use of the E.S.H.B. 2809 procedure are not impediments to the statute's constitutional validity.

### A. Requirements for the Use of Closed-Circuit Testimony as Stated in *Maryland v. Craig*

In *Maryland v. Craig*,<sup>183</sup> the Supreme Court articulated three findings of necessity that the trial court must make in order to take a child's testimony via one-way closed-circuit television. First, the Court held that the requisite finding of necessity must be determined on a case-specific basis.<sup>184</sup> Second, the trial court must find that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant.<sup>185</sup> And third, the trial court must find that the emotional distress suffered by the child witness is more than "mere nervousness or excitement or some reluctance to testify."<sup>186</sup>

E.S.H.B. 2809 can be analyzed under each of the *Craig* requirements. First, the statute explicitly restricts the use of closed-circuit testimony to cases in which the necessity has been particularly demonstrated.<sup>187</sup> Furthermore, the statute applies only to a narrow class of witnesses: children under the age of ten who are victims of abuse.<sup>188</sup> In order to utilize closed-circuit testimony, the trial court must also find that no less restrictive method of obtaining the testimony can adequately protect the child.<sup>189</sup> Thus, the statute satisfies the first

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183. 110 S. Ct. 3157 (1990).

184. *Id.* at 3169.

185. *Id.*

186. *Id.* (quoting *Wildermuth v. State*, 530 A.2d 275, 289 (Md. 1987)).

187. E.S.H.B. 2809, *supra* note 1, at § 2.

188. *Id.* at § 2(1)(a).

189. *Id.* at § 2(1)(g).

requirement for a finding of necessity under *Craig*.

Second, E.S.H.B. 2809 allows a child to testify outside the presence of the jury when the trial court finds that requiring the child to testify in front of the jury will cause the child to suffer serious emotional distress.<sup>190</sup> In *Craig*, the Court stated that the trauma suffered by the child must be caused by the presence of the defendant in order to deny face-to-face confrontation. Thus, E.S.H.B. 2809 appears inconsistent with *Craig*.

Upon closer examination, however, the Washington statute is not inconsistent. The rationale for the trauma requirement is that denial of face-to-face confrontation is unnecessary if the child could testify in less intimidating surroundings with the defendant present.<sup>191</sup> The Washington State Legislature avoided conflict with this requirement by providing that, where the child is allowed to testify outside the presence of the jury, the child will nevertheless testify in the presence of the defendant.<sup>192</sup> By adding a provision allowing for testimony outside the presence of the jury but in the presence of the defendant, the legislature recognized that a child may also suffer emotional distress from testifying in front of the jury to such an extent that the child cannot reasonably communicate. Such a procedure does not place the defendant's right of confrontation at issue because the defendant is present even though the jury is not. Thus, E.S.H.B. 2809 satisfies the second finding of necessity established in *Craig*.

Third, E.S.H.B. 2809 requires a determination that the child will suffer "serious emotional or mental distress that will prevent the child from reasonably communicating."<sup>193</sup> This requirement is consistent with the third requirement of *Craig*. Indeed, where face-to-face confrontation causes significant emotional distress for the child, the possibility of effective testimony may be prevented, thereby undermining the truth-seeking goal of the Confrontation Clause.<sup>194</sup> Moreover, some researchers in the mental health community believe that the assumption that cross-examination is the best way to arrive at the truth is an incorrect assumption when applied to chil-

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190. *Id.* at § 2(1)(d).

191. *Maryland v. Craig*, 110 S. Ct. 3157, 3189 (1990).

192. E.S.H.B. 2809, *supra* note 1, at § 2(1)(d).

193. *Id.* at § 2(1)(c).

194. *See, e.g., Coy v. Iowa*, 487 U.S. at 1032 (Blackmun, J., dissenting).

dren.<sup>195</sup> Several commentators argue that the use of closed-circuit testimony may actually enhance the reliability of victims' testimony.<sup>196</sup> The utilization of closed-circuit television may actually enable the jury to better assess the child's testimony. Thus, E.S.H.B. 2809 satisfies the third requirement of *Craig*.

In sum, E.S.H.B. 2809 fulfills all of the requirements set forth in *Maryland v. Craig*.

### B. E.S.H.B. 2809 Satisfies the Elements of the Right to Confrontation

In addition to satisfying the necessity requirement of *Craig*, Washington's E.S.H.B. 2809 also satisfies the elements of the confrontation right and thereby meets the standards for indicia of reliability. According to the Supreme Court, the essential elements of confrontation include oath, cross-examination, and observation of the witness's demeanor.<sup>197</sup>

First, E.S.H.B. 2809 requires that the child witness, whose testimony is taken by use of one-way closed-circuit television, testify under oath<sup>198</sup> during the criminal proceeding. Second, E.S.H.B. 2809 does not unduly inhibit the right of cross-exami-

195. Gail S. Goodman & Vicki S. Helgeson, *Child Sexual Assault: Children's Memory and the Law*, 40 U. MIAMI L. REV. 181, 201 (1985). The authors write:

High levels of stress can be expected to interfere with a person's ability to retrieve information and to make accurate eye witness identifications. The child may have greater difficulty understanding the questions asked. Psychological research indicates that high levels of stress reduce short-term memory capacity, a capacity needed to comprehend sentences. Testifying in a courtroom is likely to be stressful for any witness, but there are several reasons to predict greater stress for children . . . . When placed in a novel, stressful situation, children may also be more susceptible to suggestion. Because stress interferes with the retrieval process, and because retrieval failures in turn predict heightened suggestibility, it is possible that courtroom questioning will make children more susceptible to suggestion. The court's liberal allowance of leading questions can be expected to aggravate this problem . . . . In sum, many factors point to the conclusion that, if the goal is to determine the truth, the adversary process may not be the best means of obtaining the truth from children.

*Id.* at 203-04 (footnotes omitted).

196. See Ira C. Colby & Deborah N. Colby, *Videotaped Interviews in Child Sexual Abuse Cases: The Texas Example*, in 66 CHILD WELFARE 25, 28 (1987) (noting that videotape interviews provide a more accurate account of the child's report than a written statement); Sol Gothard, *The Admissibility of Evidence in Child Sexual Abuse Cases*, 66 CHILD WELFARE 13, 17 (1987) (explaining that child victims often produce contradictory and unreliable evidence; some courts are setting a precedent by modifying courtroom procedures to accommodate such contradictions, memory lapses, or discrepancies).

197. *Maryland v. Craig*, 110 S. Ct. 3157, 3166 (1990).

198. E.S.H.B. 2809, *supra* note 1, at § 2(1)(b).

nation. The defendant still has the right to hear and observe the witness testify. Moreover, the defendant is not precluded from presenting evidence to attack the credibility of the witness. To further satisfy the Confrontation Clause right to an opportunity for effective cross-examination, E.S.H.B. 2809 allows the defendant to be in constant communication with his or her attorney during the child's testimony.<sup>199</sup> Thus, the defendant's opportunity for cross-examination is not impaired.

Third, the jury's ability to assess the demeanor of the witness appearing before it will not be sacrificed by Washington's closed-circuit testimony statute even though the jury must assess demeanor based solely on what it is able to see on a television screen. Indeed, in *Craig*, the Supreme Court addressed the issue of demeanor. The Court noted that use of the closed-circuit testimony procedure permitted the judge, jury, and defendant to view the demeanor of the witness while he or she testified, even though by video monitor.<sup>200</sup> Furthermore, the highest courts of at least two states have held that videotaped testimony is a constitutionally adequate substitute for the purpose of assessing demeanor by the trier of fact.<sup>201</sup>

In fact, the jury's ability to assess demeanor is enhanced by the Washington statute because the statute addresses sound and picture quality as well as the viewing conditions under which the defendant and jury will observe the testimony of the child. The statute specifically entrusts the judge with the responsibility of assuring that the sound and picture are of

199. *Id.* § 2(1)(h). Not only is the defendant able to communicate constantly with the defense attorney by electronic transmission, but also the defendant is granted reasonable court recesses during the child's testimony for person-to-person consultation with the defense attorney.

200. *Craig*, 110 S. Ct. at 3166.

201. *State v. Sheppard*, 484 A.2d 1330 (N.J. Super. Ct. Law Div. 1984). The court gave formal authorization to the use of videotaped depositions as evidence in criminal trials stating that "it is apparent to this court from the demonstration of the equipment to be used in this matter and the expert testimony that the use of a videotaped presentation has the capacity to present clear, accurate, and evidentially appropriate transmissions of images and sounds to defendant, the judge, the jury, and the public." *Id.* at 1342. *Accord Commonwealth v. Willis*, 716 S.W.2d 224 (Ky. 1986). The court stated:

Confrontation does not require live presentation of evidence to the trier of fact. A photographic or electronic presentation is not perfect as a substitute for live testimony but it will suffice. Video tape cannot be any less helpful in enabling a jury to assess credibility than a bare transcript read by the prosecutor.

*Willis*, 716 S.W.2d at 230 (citing *United States v. King*, 552 F.2d 833, 846 (9th Cir. 1976), *cert. denied*, 430 U.S. 996 (1977)).



such quality that the child's facial expression and voice are clear enough to be useful in evaluating the truth of the testimony.<sup>202</sup> Furthermore, E.S.H.B. 2809, section 2(1)(j), requires that where possible, all parties in the room with the child must be on camera. If viewing all participants is not possible, this section requires the court to describe for the viewers the location of the prosecutor, defense attorney, and other participants in relation to the child. Thus, the trier of fact is not impaired, and may even be aided, in observing the child witness's demeanor.

E.S.H.B. 2809 thus bears significant indicia of reliability and satisfies the elements of the right to confrontation. First, the closed-circuit procedure is utilized when the child witness is under oath. Second, the enactment does not abridge the defendant's opportunity for cross-examination because the defendant can hear and observe the witness testify, and the defendant remains in constant communication with counsel. Finally, the E.S.H.B. 2809 procedure provisions make the child witness's demeanor readily observable.

### C. Other Issues That May Raise Confrontation Clause Challenges

The use of one-way closed-circuit testimony may raise other challenges under the Confrontation Clause. For example, the use of one-way closed-circuit testimony itself, being a deviation from ordinary courtroom procedure, may have an inherently prejudicial impact upon the jury.<sup>203</sup> A convicted defendant may claim that merely using the procedure compromised the defendant's right to the presumption of innocence.<sup>204</sup> Defendants' claims that undue prejudice results from the employment of extraordinary procedures are not uncommon and are often upheld on appeal.<sup>205</sup> However, appellate courts

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202. E.S.H.B. 2809, *supra* note 1, at § 2(1)(k).

203. *See, e.g., Estes v. Texas*, 381 U.S. 532, 542-43 (1965) (stating that "at times a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking due process.").

204. *See, e.g., Estelle v. Williams*, 425 U.S. 501 (1976). "Courts have, with few exceptions, determined that an accused should not be compelled to go to trial in prison or jail clothing because of the possible impairment of the presumption [of innocence] so basic to the adversary system." *Id.* at 504 (footnote omitted).

205. *See, e.g., Turner v. Louisiana*, 379 U.S. 466 (1965) (reversing murder conviction on due process grounds where deputy sheriffs, who gave key prosecution testimony at defendant's murder trial, also had charge of jury during three-day trial); *In re Murchison*, 349 U.S. 133 (1955) (holding that defendant's due process rights were

assess such claims not in absolute terms but by scrutinizing the necessity for extraordinary measures in the particular case.<sup>206</sup> Because E.S.H.B. 2809 includes provisions requiring that the trial court make particularized findings in order to take a child's testimony via one-way closed-circuit television, a court is unlikely to find a violation of a defendant's confrontation rights.

Another potential issue of closed-circuit testimony involves the unavailability and reliability criteria required by *Roberts* and alluded to in *Coy*. In determining whether admission of a hearsay statement violated the Confrontation Clause, the Court in *Roberts* stated that hearsay statements are admissible only if the state can show the declarant is "unavailable" and if the hearsay evidence bears adequate "indicia of reliability."<sup>207</sup>

E.S.H.B. 2809 satisfies the unavailability criterion by requiring that the trial court make a specific finding that the child could not reasonably communicate. Specifically, the court must find that the child's testimony in the courtroom in the presence of the defendant or the jury would cause such serious emotional distress that the child could not reasonably communicate. If the child cannot reasonably testify because she is too frightened or inarticulate to allow any meaningful examination, then a finding of unavailability would be justified.

E.S.H.B. 2809 also satisfies the second *Roberts* element of reliability because the child witness is: (1) under oath; (2) open to full cross-examination by defense counsel present with the child; and (3) before a judicial proceeding that is equipped to provide records of the proceeding.<sup>208</sup> In addition, the judge or

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violated where same judge who tried contempt charge also had presided over grand jury hearing where defendant was adjudged in contempt). *But see* Illinois v. Allen, 397 U.S. 337 (1970) (holding that Sixth Amendment confrontation rights were not violated where defendant was removed from trial because his disruptive conduct interfered with courtroom decorum); State v. Williams, 501 P.2d 328 (Or. Ct. App. 1972) (holding that defendant's Confrontation Clause rights were not violated where defendant's chanting disrupted proceedings, requiring his removal from courtroom to jury room, where he was able to watch trial on closed-circuit television).

206. *See, e.g.*, *Coy v. Iowa*, 487 U.S. 1012, 1021 (1988) (stating that "something more than the type of generalized finding underlying such a statute is needed when the exception is not 'firmly . . . rooted in our jurisprudence.'" (quoting *Bourjaily v. United States*, 483 U.S. 171, 183 (1987) (citation omitted)). *See also* *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607, n.19 (1982).

207. *Ohio v. Roberts*, 448 U.S. 56, 66 (1980).

208. *Id.* at 69 (1980).

jury may observe the demeanor of the child witness during testimony to determine "whether he is worthy of belief."<sup>209</sup> The defendant may also observe the testimony and communicate with his or her attorney by an audio system. Thus, E.S.H.B. 2809 fulfills the requirements of unavailability and reliability.

The only component of the right to confrontation absent from the list of elements encompassed by E.S.H.B. 2809 is that of the child witness seeing the defendant. Precedent from the Supreme Court, however, indicates that this component is expendable if a compelling state interest exists.<sup>210</sup> E.S.H.B. 2809 fulfills a compelling state interest by successfully discovering and prosecuting child abuse. Therefore, none of the potential issues raised by the use of a closed-circuit testimony procedure is likely to present serious challenges to the constitutional validity of E.S.H.B. 2809.

#### VI. DOES E.S.H.B. 2809 FALL SHORT OF ITS PURPOSE?

Although the constitutional validity of E.S.H.B. 2809 is well founded, a few areas exist in which E.S.H.B. 2809 may fall short of its underlying purpose<sup>211</sup> and may require revision.<sup>212</sup> First, the statute should prohibit either party from later calling the child to testify in court unless the court rules that the interests of justice require further direct or cross-examination. Otherwise, the statute's purpose would be defeated by permitting the child to be later subjected to the trauma that the court has already found unacceptable.<sup>213</sup> This allows children to know that the court is finished with them so that they can put the traumatic experience behind them.<sup>214</sup> However, the high rate of retraction by child sexual abuse victims cannot be ignored. The goal of E.S.H.B. 2809 is to obtain reliable testimony as well as to protect children from emotional trauma. To preserve an objective record, many commentators suggest

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

210. See *Coy*, 487 U.S. at 1021; *Maryland v. Craig*, 110 S. Ct. 3157, 3169 (1990).

211. E.S.H.B. 2809, § 1 declares that the purpose of the statute is the protection of child witnesses in sexual and physical abuse cases as well as the facilitation of prosecution in such cases.

212. Legislators in Washington have twice pushed for constitutional amendment because prosecutors are not using the procedure provided for in E.S.H.B. 2809. However, the constitution may not be the barrier, but rather the statute itself may be too stringent.

213. Note, *The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations*, 98 HARV. L. REV. 806, 827 (1985).

214. *Id.* at 825-26.

videotaping pretrial child witness interviews.<sup>215</sup>

Second, the age qualification of the child witness in the Washington provision is restrictively low because it leaves too many children between the ages of eleven and seventeen unprotected. The provision requires that the child be ten years old or younger to utilize the closed-circuit testimony procedure.<sup>216</sup> Other states using similar procedures require that the child be seventeen years old or younger.<sup>217</sup> There is no reason to assume that children between the ages of eleven and seventeen would be less subject to psychological harm than children eleven and under. The minor's age should be irrelevant, as long as the victim is a minor as described by state law and the child will suffer serious emotional or mental distress. Hence, the age limit for utilization of closed-circuit testimony should be expanded.

Third, E.S.H.B. 2809 does not have adequate safeguards to help circumvent claims of inherent prejudice and abuse of discretion. E.S.H.B. 2809 states that one-way closed-circuit testimony will be allowed only if the court finds that requiring the child to testify in the presence of the defendant or the jury "will cause the child to suffer serious emotional or mental distress that will prevent the child from reasonably communicating at the trial."<sup>218</sup> However, the provision merely requires that the court determine the necessity for the procedure by "substantial evidence."

The statute should be more explicit. One suggestion is the use of expert testimony. An adequate showing of the probability of emotional or mental trauma can be made at the pretrial hearing by using expert psychological evaluation and testimony.<sup>219</sup> The use of expert testimony would have a dual effect. First, it would remove some of the pressure that anxious parents or relatives may exert on the trial judge when

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215. See, e.g., John R. Christiansen, *Washington Survey: The Testimony of Child Witnesses: Fact, Fantasy and the Influence of Pretrial Interviews*, 62 WASH. L. REV. 705, 714 (1987); Kee MacFarlane, *Diagnostic Evaluations and the Use of Videotapes in Child Sexual Abuse Cases*, 40 U. MIAMI L. REV. 135, 141 (1985).

216. E.S.H.B. 2809, *supra* note 1, at § 2(1).

217. See, e.g., ALA. CODE § 15-25-3 (1988); FLA. STAT. ch. 92.54 (1989); HAW. R. EVID. 616; MD. FAM. LAW CODE ANN. § 5-701(d) (Supp. 1989); N.J. STAT. ANN. § 2A:84A-32.4 (West 1989); and R.I. GEN. LAWS § 11-37-13.2 (1988).

218. E.S.H.B. 2809, *supra* note 1, at § 2(1)(c).

219. See, Dirk Lorenzen, Comment, *The Admissibility of Expert Psychological Testimony in Cases Involving the Sexual Misuse of a Child*, 42 U. MIAMI L. REV. 1033 (1988).

they encourage the judge to act unilaterally to spare their child the ordeal of testifying in open court. Second, the expert testimony requirement would allow appellate courts to assess more adequately defendants' claims that the trial court abused its discretion in utilizing the closed-circuit procedure. Employment of the procedure would thus not be based solely upon a judge's determination of the child's condition; the procedure would become a discretionary decision founded on an expert's assessment that a substantial likelihood of trauma exists. An expert testimony standard would exceed a "generalized presumption of harm" and establish the "case-specific finding of necessity . . . [under which] the strictures of the Confrontation Clause may give way to the compelling state interest of protecting child witnesses."<sup>220</sup> Thus, E.S.H.B. 2809 could provide for expert witnesses to substantiate a claim that a child witness would suffer emotional harm from testifying in the presence of the defendant.<sup>221</sup>

E.S.H.B. 2809 also raises the question of which factors the courts should use in evaluating a witness's ability to testify. In propounding that procedural modifications are a "minimal intrusion" of a defendant's right of confrontation, the American Bar Association (ABA) suggests various factors for trial judges to consider.<sup>222</sup> These include the age of the child, the nature of the offense, the relationship of the child to the defendant, and possible threats to the child.<sup>223</sup> The ABA asserts that in protecting the child's interest, the methods of assessing each child's case should not themselves subject the child to further psychological harm.<sup>224</sup> Such factors should be incorporated into E.S.H.B. 2809 in order to standardize the trial court's considerations.

Finally, closed-circuit testimony is not the only alternative procedure available to child witnesses. In fact, in some circumstances it may not be the best alternative. A provision permit-

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220. *Coy v. Iowa*, 487 U.S. 1012, 1025 (1988) (O'Connor, J., concurring).

221. However, in providing for expert witnesses, there is a strong need to avoid a battle of experts, which ultimately may increase the odds of trauma to a child.

222. Brief for the American Bar Association at 6-7, *Coy v. Iowa*, 487 U.S. 1012 (1988) (No.86-6757).

223. *Id.*

224. *Id.* at 7. According to the ABA, "the child victim should neither be subjected to lengthy voir dire or psychological evaluations, nor should the proceedings be delayed after the child has been called to testify. The judge may rely upon information from lay persons which provide[s] credible evidence that a child may suffer harm if required to testify with a full view of the defendant." *Id.*

ting the use of videotaped testimony would provide additional protection for child victims of sexual abuse. At least thirty-eight states have enacted videotaping statutes.<sup>225</sup> Most statutes treat videotaped testimony as the functional equivalent of testimony at trial.<sup>226</sup>

Once the child's testimony and cross-examination has been recorded, the child victim is not expected to testify at trial.<sup>227</sup> These statutes do not call for a court determination that the child be designated as unavailable.<sup>228</sup> The statutes simply ask the court to find that the child will suffer some emotional trauma if required to testify in open court or in front of the accused.<sup>229</sup>

Although these statutes do not require the usual unavailability finding, they have other safeguards. Indeed, statutes that permit videotaped testimony provide full opportunity for cross-examination and alert the defendant that the videotaped testimony may be offered in lieu of the child's testimony at trial. Furthermore, the videotaping statutes preserve the essential elements of confrontation: the oath, the opportunity to

225. See *supra* note 31.

226. See, e.g., N.M. STAT. ANN. § 30-9-17(A) (Michie Supp. 1989), which provides in pertinent part that:

In any prosecution for criminal sexual penetration or criminal sexual contact of a minor, upon motion of the district attorney and after notice to the opposing counsel, the district court may, for a good cause shown, order the taking of a videotaped deposition of any alleged victim under the age of sixteen years. . . . Examination and cross-examination of the alleged victim shall proceed . . . in the same manner as permitted at trial . . . . Any videotaped deposition taken under the provisions of this act . . . shall be viewed and heard at the trial and entered into the record in lieu of the direct testimony of the alleged victim.

227. The following states have statutes that include similar provisions: Alabama, Alaska, California, Colorado, Connecticut, Delaware, Florida, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Mexico, Ohio, Pennsylvania, Rhode Island, South Carolina, South Dakota, Vermont, Wisconsin, Wyoming. See Bainor, *supra* note 18.

228. Only the statutes in California, Colorado, Indiana, Oklahoma, and South Dakota require a specific finding of unavailability. For instance, the California statute requires a finding that "further testimony would cause the victim emotional trauma so that the victim is medically unavailable . . ." CAL. PENAL CODE § 1346(d) (West 1982 & Supp. 1989).

229. See, e.g., ME. REV. STAT. ANN. tit. 15, § 1205 (West Supp. 1987) (requiring a finding that the mental or physical well-being of that person will more likely than not be harmed if that person were to testify in open court); MASS. GEN. LAWS ANN. ch. 278, § 16D (West Supp. 1989) (requiring a finding that the child witness is likely to suffer psychological or emotional harm); and S.D. CODIFIED LAWS ANN. § 23A-12-9 (1988) (requiring a finding that testifying would be substantially detrimental to the well-being of the victim).

observe the witness's demeanor, and the right to cross-examine.<sup>230</sup>

Videotaped testimony is an effective alternative to requiring the child to testify in person. Videotaped testimony resolves the problems of live testimony by enabling the child's story to be heard in the courtroom while at the same time making the child's experience less traumatic. The greatest advantages of videotaping include protecting the child from endless repetition of testimony, allowing the child to withdraw from the court system at an early stage in the proceedings, and securing the child's testimony against forgetfulness and retraction.<sup>231</sup> Videotaping also provides a permanent record of exactly what transpired in the interview, both verbally and nonverbally. Moreover, seeing and hearing the original version of the child's disclosure may transmit a sense of validity to the jury that later repeated questioning may not.

In addition to minimizing the number of times the victim must testify, the videotape better reflects the content of the testimony and the demeanor of the child witness.<sup>232</sup> For example, "[t]he tape can detect whether the child's reaction was hurried or deliberate, angry or satisfied, calm or excited. Spontaneous statements can easily be distinguished from responses to leading questions and hesitant voices can be identified and compared to confident ones."<sup>233</sup>

Although many advantages to videotaping the testimony of a child witness exist, videotaping undeniably alters the nature of confrontation and renders it a marginally less effective defensive tool. Videotapes may not faithfully convey the witness's demeanor and may impede the jury's determination of credibility.<sup>234</sup> Technical criticisms of videotaped testimony undoubtedly have some merit. But these criticisms are not so weighty as to curtail further development of videotaped testimony. Indeed, similar objections were raised when videotaped depositions were introduced in civil litigation; however, experi-

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230. See *Ohio v. Roberts*, 448 U.S. 56, 69 (1980).

231. The reliability of initial interview statements made by the child under nonthreatening circumstances may be used to refute later retractions often resulting from the succession of negatively associated events that frequently follow disclosure. See MacFarlane, *supra* note 216, at 145.

232. Libai, *supra* note 10, at 992.

233. *Id.* at 990.

234. See Charles W. German, et al., *Videotape Evidence at Trial*, 6 AM. J. TRIAL ADVOC. 209, 210 (1982).

ence with the process, evolution of standards, and technical refinement led to general acceptance of the technology.<sup>235</sup> The same outcome may be predicted for video testimony.

Standards similar to the technical standards required in E.S.H.B. 2809 could reduce many of the problems of conveying witness demeanor. With such standards in place, the reasons for enacting a videotape statute in child abuse cases far outweigh the reasons for not enacting such a statute.

Although the Supreme Court has yet to consider the question of whether the use of videotaped testimony in a criminal prosecution violates the defendant's rights to confrontation, the question has been addressed in numerous lower court decisions.<sup>236</sup> These decisions almost unanimously approve the use of videotaped depositions of unavailable witnesses at trial. The approving courts analogize videotaped depositions to preliminary hearings or pretrial testimony, which are considered constitutionally admissible at trial if the witness is truly unavailable to appear in person. In fact, the courts consider a videotape of an unavailable witness's testimony preferable to reading a manuscript of the same testimony to the jury.<sup>237</sup> As long as the defendant has an adequate opportunity to cross-examine the witness in the pretrial stage, a statute declaring the child witness unavailable would probably survive constitutional challenge.

Although videotaped testimony has a good chance of withstanding constitutional attack, such testimony may not be widely used. A child's testimony on video tape is rarely as convincing as the real thing. Prosecutors usually prefer live testimony to prerecorded testimony unless they are convinced that the child will suffer harm or the case will collapse without the substitution of prerecorded testimony.<sup>238</sup> Videotaped testi-

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235. See 8 CHARLES A. WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2115 (Supp. 1985).

236. See, e.g., *United States v. Binder*, 769 F.2d 595 (9th Cir. 1985); *In re R.C. Jr.*, 514 So. 2d 759 (La. Ct. App. 1987); *State v. Cooper*, 353 S.E.2d 451 (S.C. 1987); *State v. Johnson*, 729 P.2d 1169 (Kan. 1986); *Long v. State*, 694 S.W.2d 185 (Tex. Ct. App. 1985); *State v. Melendez*, 661 P.2d 654 (Ariz. Ct. App. 1982).

237. Deborah Clark-Weintraub, Note, *The Use of Videotaped Testimony of Victims in Cases Involving Child Sexual Abuse: A Constitutional Dilemma*, 14 HOFSTRA L. REV. 261, 263-64 (1986).

238. Gary B. Melton, *Procedural Reforms to Protect Child Victims/Witnesses in Sex Offense Proceedings*, in NATIONAL LEGAL RESOURCE CENTER FOR CHILD ADVOCACY AND PROTECTION, AMERICAN BAR ASSOCIATION, CHILD SEXUAL ABUSE AND THE LAW 184, 189 (J. Buckley ed. 1983).



mony of child witnesses fits the goals of preventing both harm and collapsing cases.

The question then becomes which type of videotaped testimony statute might better serve all the interests involved. The laws of Pennsylvania,<sup>239</sup> Nevada,<sup>240</sup> Rhode Island,<sup>241</sup> Vermont,<sup>242</sup> Minnesota,<sup>243</sup> Oklahoma,<sup>244</sup> Delaware,<sup>245</sup> Florida,<sup>246</sup> and Kansas<sup>247</sup> attempt to preserve the defendant's confrontation right yet also consider the damage it can do to a child victim of sexual abuse and to the child's testimony. These statutes allow the defendant to see and hear the child and to communicate with counsel during the testimony although the defendant is generally not allowed to be within the child's sight or hearing. This approach allows the defendant the right to confront physically the witness to some degree while permitting the child to testify outside of the ominous stare of the accused.

The laws of Massachusetts,<sup>248</sup> Mississippi,<sup>249</sup> and Missouri<sup>250</sup> permit the defendant to attend the giving of his accuser's testimony. This right is not absolute, however, and the judge may restrict attendance if the circumstance requires.<sup>251</sup> The defendant retains the right to cross-examine during the giving of the testimony.<sup>252</sup> The court retains discretion to remove the defendant completely from the proceedings if the particular circumstances warrant that action.<sup>253</sup> Because

239. PA. STAT. ANN. tit. 42, §§ 5981-88 (1989).

240. NEV. REV. STAT. § 174.227(3) (1986).

241. R.I. GEN. LAWS §§ 11-37-13.1 to -13.2 (Supp. 1988).

242. VT. R. EVID. 807 (Supp. 1986).

243. MINN. STAT. ANN. § 595.02 (West 1988).

244. OKLA. STAT. ANN. tit. 22, § 753 (West Supp. 1989).

245. DEL. CODE ANN. tit. 11, § 3511 (1987).

246. FLA. STAT. ANN. §§ 92.53-54 (West Supp. 1989).

247. KAN. STAT. ANN. §§ 22-3433 to -34 (1986).

248. MASS. GEN. LAWS ANN. ch. 278, § 16D (West Supp. 1989) (specifically allowing defendant to attend proceeding unless deposition ordered to avoid necessity of having child testify in presence of defendant).

249. MISS. CODE ANN. §§ 13-1-401 to -15 (Supp. 1989) (requiring that defendant be allowed to attend unless court finds that his presence will cause child to suffer traumatic emotional or mental distress).

250. MO. ANN. STAT. § 491.675-93 (Vernon Supp. 1989). This statute does not specifically allow the defendant to attend the proceeding but contains a provision allowing the judge to exclude him from all proceedings at which the child will testify. The implication is that the defendant is allowed to attend unless the court exercises this option.

251. *See supra* notes 248-50.

252. *Id.*

253. *Id.*

each of these videotape deposition statutes, in varying ways and to varying degrees, permit the judge to balance the constitutional considerations with the facts of the specific case, they arguably represent the best balance between the rights of the defendant and the well-being of the victim.

Many existing videotape statutes reserve to the prosecutor the option of calling the child at trial if the videotaped testimony proves inadequate.<sup>254</sup> This option denies child victims the potential benefits of videotaping. Videotaping statutes should therefore provide that once the child has testified on videotape, neither party may call the child to testify at trial unless the judge rules that the interests of justice require further direct or cross-examination. In such cases, the court should permit the child to give further testimony on videotape or by one-way closed-circuit television.

Overall, a provision allowing for videotaped testimony in child abuse cases would be a welcome addition to closed-circuit testimony as provided for in E.S.H.B. 2809. Videotaping statutes serve the interests of justice and the needs of child victims. Furthermore, given the stance of the courts on existing videotape statutes, the Washington Supreme Court is unlikely to find that such a statute violates the Confrontation Clause of either the federal or the state constitutions.

Although E.S.H.B. 2809 is likely to pass constitutional challenge, it is not perfect. Several questions still remain concerning the statute's ability to truly protect child witnesses, the underlying purpose of E.S.H.B. 2809. A variety of revisions to the statute may increase the likelihood of the statute fulfilling its underlying purpose. First, the statute should be revised to prohibit either party from later calling the child to testify unless the trial court rules that the interests of justice require further direct or cross-examination. Videotaping pretrial interviews with children will assure that this provision is fair to both prosecution and defense. Second, the age limits for the utilization of closed-circuit testimony should be expanded to include children up to the age of seventeen. Third, the statute should explicitly delineate the means by which a showing of harm is determined. A valuable tool for implementing this

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254. The Arkansas and Wisconsin statutes explicitly allow testimony of the child at trial in addition to presentation of the videotaped deposition. See ARK. CODE ANN. § 43-2036 (Michie Supp. 1987); and WIS. STAT. ANN. § 967.04 (7)(b) (West 1985 & Supp. 1989). The Montana statute apparently allows both recorded and live testimony. See MONT. CODE ANN. §§ 46-15-401 to -402 (1987).

showing is the use of expert witnesses. Fourth, the statute should include a list of factors for determining the witness's ability to testify. Finally, E.S.H.B. 2809 should include the option of videotaping a child's testimony.

Although the aforementioned revisions to E.S.H.B. 2809 may shore up the statute, several questions still remain concerning the statute's ability to fulfill its underlying purpose of protecting child witnesses. Despite the importance of these questions, the answers will be neither immediate nor easily found.

## VII. CONCLUSION

Child abuse victims who testify at trial risk psychological damage caused by the criminal trial process. As a result, changes in the legal treatment of child abuse victims is imperative. E.S.H.B. 2809 is a positive step in that direction. Although the primary purpose of E.S.H.B. 2809 is to protect victims of child abuse, the primary issue raised by the enactment is whether it violates the defendant's right to confrontation.

Although the Sixth Amendment to the United States Constitution guarantees an accused the right to confront adverse witnesses, the Supreme Court has pronounced a number of exceptions to the Confrontation Clause that illustrate the court's willingness to disregard technical adherence to the Confrontation Clause, particularly where other important interests exist. The Supreme Court has expressly declared that protection of children is such an important interest.

In *Maryland v. Craig*, the Supreme Court confirmed that face-to-face confrontation is not constitutionally mandated in a child abuse case when trauma to a child would impair the child's ability to communicate. Although the Washington Supreme Court has not independently interpreted the Washington Confrontation Clause, it is unlikely that Washington's clause will be held to provide greater protection to defendants.

E.S.H.B. 2809 satisfies the essential elements of confrontation as well as the requirements of necessity and reliability set out in *Maryland v. Craig*. Furthermore, none of the potential issues raised by the use of a closed-circuit testimony procedure is likely to present serious challenges to the constitutional validity of E.S.H.B. 2809.

Although E.S.H.B. 2809 falls short of its underlying pur-

pose in some respects, one-way closed-circuit testimony adheres closely to the giving of testimony in the traditional courtroom setting except that the child is not in the defendant's physical presence. Televised one-way closed-circuit testimony is thus the functional equivalent of testimony within the courtroom. The use of closed-circuit testimony is a slight infringement on a defendant's right to confrontation; however, the protection of America's most valued resource, our children, is a "compelling" interest, making the Confrontation Clause exception appropriate under certain circumstances. By enhancing the quality and veracity of child witness's testimony, E.S.H.B. 2809 can facilitate achieving the ultimate goal of the judicial system: the acquisition of the truth.

Washington's closed-circuit testimony provision is a small step toward reducing the trauma that some children may suffer when faced with testifying in the intimidating atmosphere of the courtroom. The provision is not a radical innovation and may not have an immediate impact on a large number of prosecutions. However, this law is the first in Washington to alter materially the manner in which courtroom testimony is taken and, it is hoped, it will not be the last.

The door is now open to additional procedural innovations. Videotaping statutes also protect children from victimization within the court system, and the Washington State Legislature should therefore enact such a statute to operate in tandem with the closed-circuit testimony statute. However, while new procedures can and must be implemented, such procedures can only be valid to the extent that they truly protect the child witness and do not infringe at the same time upon the defendant's right to confront accusers. Thus, when drafting these statutes, the legislature must take care to avoid serious impairment of the defendants' right to confrontation.