POLICY IMPLICATIONS FOR CHILDREN'S LAW IN THE AFTERMATH OF *MARYLAND v. CRAIG*

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I. INTRODUCTION

State legislatures have passed a variety of laws to protect children who might suffer emotional distress as a result of confronting defendants at criminal trials.[1] These procedures generally involve a physical separation so that a child does not actually meet a defendant face to face, though it is still possible for the judge or jury to observe the child during the oath, testimony and cross-examination. Recently in *Maryland v. Craig*,[2] the United States Supreme Court upheld the constitutionality of these procedures. Specifically, the Court concluded that "a State's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court."[3]

Although the *Craig* opinion will have an immediate effect on child witness cases, the decision will also affect policy development in other areas of children's law. This article begins with a brief overview of the case law leading to the *Craig* decision. Next, the *Craig* decision is analyzed in light of its implications in child witness cases. Finally, this article reviews the policy considerations raised by the *Craig* decision with respect to children's law.

II. THE CONSTITUTIONALITY OF CHILD WITNESS LEGISLATION

State governments, out of concern for the psychological and physical well being of child abuse victims, have passed laws designed to make courtroom appearances less traumatic for a child.[4] An additional purpose behind enactment of these laws is to increase the number of successful prosecutions in child abuse cases.[5] Of these laws, those that implicate the confrontation clause of the sixth amendment essentially fall into one of three categories: (a) the use of videotaped depositions, (b) the use of one-way closed circuit television for testimony, and (c) the

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[1] *See infra* notes 4-6 and accompanying text.

[2] 110 S. Ct. 3157 (1990).

[3] *Id.* at 3167.

[4] *See* McGough & Hornsby, *Reflections Upon Louisiana's Child Witness Videotaping Statute: Utility and Constitutionality in the Wake of Stincer*, 47 LA. L. REV. 1255 (1987); State v. Vincent, 159 Ariz. 418, 768 P.2d 150 (1989).

[5] *See* Wildermuth v. State, 310 Md. 496, 517, 530 A.2d 275, 285 (1987) ("This [protective procedure] would both protect the child and enhance the public interest by encouraging effective prosecution of the alleged abuser.").

use of two-way closed circuit television.[6]

Thirty-seven states permit the use of videotaped testimony of sexually abused children;[7] twenty-four states have authorized the use of one-way closed circuit television testimony in child abuse cases;[8] and eight states authorize the use of a two-way system.[9] In states that authorize the use of a one-way system, the child is typically outside the courtroom, though the judge or jury may view the child on a video monitor during the testimony.[10] In states that authorize the use of a two-way system, the child-witness is able to see the courtroom and the defendant on a video monitor while the judge and jury view the child during testimony.[11] These procedures present the critical legal issue of whether these methods of eliciting testimony violate a defendant's sixth amendment right to confrontation of adverse witnesses.[12] In three pre-*Craig* cases, the Supreme Court laid the groundwork for its eventual analysis and resolution of this issue in *Craig*.[13] One conclusion that may be derived from a reading of these cases is that the state's interest in safeguarding the physical and psychological well-being of minors is "compelling," which may outweigh a defendant's confrontation right if

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[6] *Craig*, 110 S. Ct. at 3167-68.

[7] *Id.* at 3167 n.2.

[8] *Id.* at 3168 n.3.

[9] *Id.* at 3169 n.4.

[10] *See, e.g., id.* at 3163 n.1. (Maryland's statutory scheme provides for one-way closed circuit television under MD. CTS. & JUD. PROC. CODE ANN. § 9-102 (1989).). For a more detailed description of the § 9-102 procedure, see Wildermuth v. State, 310 Md. 496, 503-04, 530 A.2d 275, 278-79 (1987). For other state statutes invoking similar procedures, see ALA. CODE § 15-25-3 (Supp. 1989); ALASKA STAT. § 12.45.046 (Supp. 1989); ARIZ. REV. STAT. ANN. § 13-4253 (1989); FLA. STAT. § 92.54 (1989); ILL. REV. STAT. ch. 38 para. 10614-3 (1987); MASS. GEN. LAWS ANN., ch. 228 § 16D (West Supp. 1990); N.J. REV. STAT. § 2A:84A-32.4 (Supp. 1989); 42 PA. CONS. STAT. §§ 5982, 5985 (1988).

[11] *Craig*, 110 S. Ct. at 3168. *See also id.* at 3168 n.4 (citing as examples of states with a two-way system CAL. PENAL CODE ANN. § 1347 (West Supp. 1990); HAW. REV. STAT., § 626, RULE EVID. 616 (1985); IDAHO CODE § 19-3024A (Supp. 1989); N.Y. CRIM. PROC. LAW §§ 65.00-65.30 (McKinney Supp. 1990); VA. CODE ANN. § 18.2-67.9 (1988)).

[12] The sixth amendment provides, in part, that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witness against him." U.S. CONST. amend. VI.

[13] Specifically, the three pre-*Craig* cases were Globe Newspaper v. Superior Court, 457 U.S. 596 (1982), Kentucky v. Stincer, 482 U.S. 730 (1987), and Coy v. Iowa, 487 U.S. 1012 (1988). *See infra* notes 15-29 and accompanying text.

reliable testimony can be preserved.[14]

A. PRE-*CRAIG* CASES

In *Globe Newspaper v. Superior Court*,[15] the United States Supreme Court held that where a trial judge makes a finding that closure of a trial is necessary to protect the welfare of a particular minor, the press and public may be denied their constitutional right to attend criminal trials.[16] The Court recognized that "safeguarding the physical and psychological well-being" of minors constituted a "compelling" state interest that could outweigh certain constitutional rights.[17] The *Globe* Court noted, however, that "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."[18]

Five years later, in *Kentucky v. Stincer*,[19] the Supreme Court addressed the question of whether a defendant's exclusion at a pretrial hearing, convened to determine the competency of child witnesses, violated the defendant's sixth amendment right to confront the witnesses against him.[20] Noting that the functional purpose of the confrontation clause was to promote reliability by "ensuring a defendant an opportunity for cross-examination," the Court held that the defendant's sixth amendment right had not been not violated.[21] The *Stincer* Court reasoned that the defendant had ample opportunity to cross-examine the child witnesses during the actual trial,[22] and no showing was made that the defendant's presence at the hearing would have been useful in ensuring a more reliable competency determination.[23]

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[14] *See infra* notes 17 & 27 and accompanying text.

[15] 457 U.S. 596 (1982).

[16] *Id.* at 608. *See* Richmond Newspaper, Inc. v. Virginia, 448 U.S. 555, 580 (1980) ("[T]he right to attend criminal trials is implicit in the guarantees of the First Amendment; without the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and 'of the press could be eviscerated.'") (quoting Branzburg v. Hayes, 408 U.S. 665, 681 (1972) (footnote omitted)).

[17] *Globe Newspaper*, 457 U.S. at 607.

[18] *Id.* at 607-08 (emphasis in original).

[19] 482 U.S. 730 (1987).

[20] *Id.* at 732.

[21] *Id.* at 739.

[22] *Id.* at 744.

[23] *Id.* at 747.

Finally, in *Coy v. Iowa*,[24] the defendant challenged the Iowa court's procedure of placing a screen between the defendant and the two child witnesses who testified against him.[25] Although the Supreme Court held that this procedure violated the defendant's sixth amendment right to confrontation,[26] Justice O'Connor hinted in her concurrence that there may be exceptions to the right if the state could show that the procedures furthered an important public policy interest.[27] The Court, however, determined that Iowa's interest in the prevention of trauma to child witnesses was too general to outweigh the defendant's sixth amendment right.[28] The *Coy* Court did not reach the question of whether a case involving individualized findings that a child needed protection would create an exception to a defendant's sixth amendment right.[29]

B. *MARYLAND v. CRAIG*

In *Maryland v. Craig*,[30] the trial court made individualized findings based exclusively on expert testimony that the children involved in the case would be emotionally distressed if forced to testify in the presence of the defendant.[31] Despite objections that the defendant's sixth amendment right was being violated, the trial court allowed the use of a one-way closed circuit television to protect the children.[32] The defendant appealed to Maryland's highest court, which held that in order to invoke the statute's special procedures, the trial court must directly observe the child's inability to testify in the presence of the defendant.[33] Thus, because the trial court judge relied solely on experts rather than his own observations, the case was remanded for a new trial.[34]

The State of Maryland appealed to the United States Supreme

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[24] 487 U.S. 1012 (1988).

[25] *Id.* at 1014-15.

[26] *Id.* at 1022.

[27] *Id.* at 1025 (O'Connor, J., concurring).

[28] *Id.* at 1021-22.

[29] *Id.* at 1021.

[30] 110 S. Ct. 3157 (1990).

[31] *Id.* at 3161.

[32] *Id.* at 3161-62.

[33] *Id.* at 3171.

[34] *Id.* at 3162.

Court.[35] The Supreme Court specifically addressed the question of "whether the Sixth Amendment categorically prohibits a child witness in a child abuse case from testifying against a defendant at trial, outside the defendant's physical presence by one-way closed circuit television."[36]

In a five to four decision, the majority, in an opinion authored by Justice O'Connor, held that the confrontation clause does not guarantee a defendant an "*absolute* right to a face-to-face meeting with [the adverse] witnesses . . . at trial."[37] Justice O'Connor noted that precedent only established "a preference for face-to-face confrontation at trial," a preference which must occasionally give way to public policy considerations and the particular necessities of each case.[38] Where an important public policy is furthered, and where the reliability of testimony is otherwise assured, a defendant's right to confrontation may be satisfied without face-to-face confrontation.[39] Accordingly, the Court stated:

> [I]f the State makes an adequate showing of necessity, the state interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of a special procedure that permits a child witness in such cases to testify at trial against a defendant in the absence of face-to-face confrontation with the defendant.[40]

The showing of necessity required to permit a child to testify outside the presence of the defendant must meet three criteria. First, "the requisite finding of necessity must of course be a case-specific one: the trial court must hear evidence and determine whether use of the one-way closed circuit television procedure is necessary to protect the welfare of the particular child witness who seeks to testify."[41] Second, "[t]he trial court must also find that the child witness would be traumatized, not by the courtroom generally, but by the presence of the

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[35] *Id.*

[36] *Id.* at 3160.

[37] *Id.* at 3163 (emphasis in original).

[38] *Id.* at 3165 (quoting Ohio v. Roberts, 448 U.S. 56, 63 (1980)).

[39] *Id.* In a decision announced in tandem with *Craig*, the Court applied this principle to the admissibility of children's hearsay statements in Idaho v. Wright, 110 S. Ct. 3139, 3145-47 (1990).

[40] *Craig*, 110 S. Ct. at 3169.

[41] *Id.*

defendant."[42] Finally, "the trial court must find that the emotional distress suffered by the child witness in the presence of the defendant is more than *de minimis, i.e.*, more than 'mere nervousness or excitement or some reluctance to testify.'"[43]

Specifically, overruling the Maryland Court of Appeals, the Supreme Court held that the trial court is not required to base its decision on direct observation of the child in the presence of the defendant.[44] Justice O'Connor stated, "[t]he trial court in this case, for example, could well have found, *on the basis of expert testimony* before it, that testimony by the child witnesses in the courtroom in the defendant's presence 'will result in [each] child suffering serious emotional distress such that the child cannot reasonably communicate.'"[45]

The scope of the Court's requirement to explore less drastic alternatives to the one-way closed circuit television procedure is unclear. Although the Court specifically stated that a trial court is not required to explore less drastic alternatives,[46] the Court was careful to limit the circumstances under which the confrontation between a defendant and his accuser may be abridged. According to the standard established in *Craig*, a court must determine that a child would be traumatized by the presence of the defendant, "not by the courtroom generally."[47] If the courtroom itself is found to be causing trauma, "the child could be permitted to testify in less intimidating surroundings, albeit with the defendant present."[48]

In his dissent, Justice Scalia, joined by Justices Brennan, Marshall, and Stevens, accused the majority of failing to sustain "a categorical guarantee of the Constitution against the tide of prevailing current opinion."[49] Justice Scalia condemned the Court's use of policy analysis,[50]

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[42] *Id.*

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

[44] *Id.* at 3171.

[45] *Id.* (citation omitted) (emphasis added).

[46] *Id.* Although not required, the Court did not preclude trial courts from evaluating less drastic alternatives. *Id.* The Court noted that "such evidentiary requirements [such as a judge's direct observation and the exploration of less restrictive alternatives] could strengthen the grounds for use of protective measures." *Id.*

[47] *Id.* at 3169.

[48] *Id.*

[49] *Id.* at 3171 (Scalia, J., dissenting).

stating that "[t]he purpose of enshrining this protection in the Constitution was to assure that none of the many policy interests from time to time pursued by statutory law could overcome a defendant's right to face his or her accusers in court."[51] The Justice then criticized the majority for upholding the purposes of the right to confrontation and then eliminating the right itself by "cobbling together scraps of dicta from various cases that have no bearing here."[52]

The standard laid down in *Craig* may not be the definitive analysis of child witness procedures. Still to be decided are challenges to these procedures based on federal and state due process arguments.[53] In addition, state constitutions may afford greater protection than is provided under the federal Constitution. For example, upon remand, the Maryland Court of Appeals may declare Maryland's special procedures unconstitutional based on an interpretation of Maryland's constitutional right to confrontation.[54]

III. IMPLICATIONS FOR CHILD WITNESS CASES

Craig represents the latest child case to introduce the participation of mental health professionals into the legal process.[55] The Supreme

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[50] According to Justice Scalia, the Court "applied 'interest-balancing' analysis where the text of the Constitution simply does not permit it. We are not free to conduct a cost-benefit analysis of clear and explicit constitutional guarantees, and then adjust their meaning to comport with the findings." *Id.* at 3176 (Scalia, J., dissenting).

[51] *Id.* at 3171 (Scalia, J., dissenting).

[52] *Id.* at 3172 (Scalia, J., dissenting).

[53] *See* Coy v. Iowa, 487 U.S. 1012 (1988); Kentucky v. Stincer, 482 U.S. 730 (1987).

[54] Some state legislatures have already anticipated this development. For example, in Idaho, "the legislature is aware of the difference between the sixth amendment to the United States constitution and the corresponding provision found in article I, section 13 of the Idaho constitution. Specifically, it is the belief of the legislature that the right to confront witnesses is guaranteed only within the federal constitution." 1989 Idaho Sess. Laws 53 § 1.

[55] The utilization of professional judgment was primarily established in the area of children's law through two landmark decisions. In Parham v. J.R., 442 U.S. 584 (1979), the Court held that the due process clause does not require that the "neutral factfinder" in civil commitment proceedings for minors "be law trained or a judicial or administrative officer." *Id.* at 585, 607. Accordingly, an attending physician is sufficiently qualified to make the decision. *Id.* at 607.

In Youngberg v. Romeo, 457 U.S. 307 (1982), the Court for the first time ruled that involuntarily committed mentally retarded people have rights under the due process clause of the fourteenth amendment that include safety, freedom from undue restraint, and "minimally adequate or reasonable training" necessary to ensure these liberty interests.

Court's implicit approval of the use of mental health professionals in *Craig* is consistent with the Court's frequent reliance on professional judgments made in adult cases.[56] As a result of the increasing reliance on mental health professional judgments in both child and adult cases, the provision of psychological consultation for legal questions has fast become a cottage industry.[57] Unfortunately, the demand for expert consultation has generally outpaced both the development of a solid research base from which expertise can be drawn and the training of those called upon to render such expert testimony.[58] The scarcity of relevant research as well as the inadequacy of training underscores the importance of prudently scrutinizing the basis upon which professional opinions are formed. This means carefully examining the evaluation process which forms the foundation for these opinions.

A. EVALUATION ISSUES

It must first be noted that the ultimate determination of whether a child witness must confront a defendant is a legal judgment, not a

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Id. at 307, 315-19. Whether these rights have been violated must be resolved by balancing the individual's liberty interests against the state's interests. *Id.* at 320. Rather than charge judges and juries with the task of balancing these interests in each case, the Court held that the decision should be made by professionals. *Id.* at 322-23. According to the Court, a professional decision maker means "a person [who is] competent, whether by education, training or experience, to make [a] particular decision at issue." *Id.* at 323 n.30. Specifically, "long term treatment decisions made by persons with degrees in medicine or nursing, or with appropriate training in areas such as psychology, physical therapy, or the care and training of the retarded" are presumptively valid. *Id.*

Romeo's progeny has all but institutionalized deference to professional judgment, though there is some question as to what exactly that means. *Cf.* Society for Good Will to Retarded Children Inc. v. Cuomo, 572 F. Supp 1300 (E.D.N.Y. 1983); Thomas S. v. Morrow, 781 F.2d 367 (4th Cir. 1986), *aff'g* 601 F. Supp 1055 (W.D.N.C. 1984).

[56] Besides the obvious reliance on mental health professionals in civil commitment cases, psychologists' and psychiatrists' opinions are sought throughout the criminal process, from initial determinations of competency to stand trial to final determinations of competency to be executed. *See generally* G. MELTON, J. PETRILA, N. POYTHRESS & C. SLOBOGIN, PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS (1987) [hereinafter MELTON & PETRILA].

[57] Grisso, *The Economic and Scientific Future of Psychological Assessment*, 42 AM. PSYCHOLOGIST 831 (1987).

[58] *Id.* at 834.

psychological one.[59] Questions regarding whether the degree and type of trauma expected are significant enough to justify special procedures are legal matters which should be left to the trial judge.[60] The same caution applies to questions of what procedures may be adopted for use in the courtroom to allow children to testify. Psychological opinions masquerading as legal judgments adversely affect the integrity of the judicial process by usurping the role traditionally left to the trial judges.[61]

Although the decision of whether to deny a defendant the opportunity to confront a child accuser is properly left to the trial court, the court often defers to the judgment of a mental health professional.[62] The line between deferring completely to professional judgment and autonomously reviewing evidence is often blurred due, in part, to confusing messages sent out by the Court. For example, the *Craig* Court specifically stated that "the *trial court must hear evidence and determine* whether use of the one-way closed circuit television procedure is necessary to protect the welfare of the particular child witness who seeks to testify."[63] In contrast, the Court rejected the Maryland Court of Appeals' requirement that the trial court base its determination on its observations of the children's behavior in the defendant's presence.[64] Furthermore, the Court criticized the Maryland Court of Appeals for resting its conclusion on the trial court's failure to explore less drastic alternatives to the use of a one-way closed circuit television procedure.[65] Thus, the Supreme Court stated:

> Although we think such evidentiary requirements could strengthen the grounds for use of protective measures, we decline to establish, as a matter of federal constitutional law, any such categorical evidentiary prerequisites for the use of the one-

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[59] This is true of almost all clinical forensic questions. *See generally* MELTON & PETRILA, *supra* note 56.

[60] *See supra* notes 40-43 and accompanying text.

[61] Melton & Limber, *Psychologists' Involvement in Cases of Child Maltreatment*, 44 AM. PSYCHOLOGIST 1225, 1228 (1987).

[62] Maryland v. Craig, 110 S. Ct. 3157, 3169 (1990). This happens even when experts are unwilling to give "ultimate issue" testimony. Poythress, *Concerning Reform in Expert Testimony: An Open Letter from a Practicing Psychologist*, 6 LAW & HUM. BEHAV. 39 (1982).

[63] *Craig*, 110 S. Ct. at 3169 (emphasis added) (citing Globe Newspaper v. Superior Court, 457 U.S. 596, 698-09 (1982)).

[64] *Id.* at 3171.

[65] *Id.*

> way television procedure. The trial court in this case, for example, could well have found, on the basis of the expert testimony before it, that the testimony by the child witnesses in the courtroom in the defendant's presence will result in [each] child suffering serious emotional distress such that the child cannot reasonably communicate.[66]

In short, the Court noted that although the decision belongs to the trial court, a trial court may base its decision entirely upon an expert's testimony.[67] This conclusion, however, may be problematic. For example, in cases where cross-examination of an expert is insufficient or where an alternative opinion is not offered, the expert functionally and inappropriately becomes the judge.

B. Review of Empirical Literature

Because the *Craig* opinion permits courts to call upon mental health professionals to assess child witnesses for purposes of confronting criminal defendants, the scientific basis for such assessments should be examined. In both *Stincer* and *Craig*, the American Psychological Association (APA) submitted *amicus curiae* briefs reviewing the empirical literature on the effects on children who testify before the accused.[68]

The purpose of the APA's *amicus curiae* brief filed in *Stincer* in April of 1987, was to "inform the Court . . . of the extent to which current empirical and clinical mental health data support assumptions regarding the traumatic effects of such confrontation on child witnesses as a basis for dispensing with defendant's rights . . . ."[69] The APA argued that the current state of empirical and clinical findings regarding the effects of testifying on child sexual assault victims was "tentative."[70] Therefore, a defendant's confrontation right should only be abrogated in cases where the risk of trauma is documented and its nature and

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[66] *Id.*

[67] *Id.*

[68] *See infra* notes 69-80 and accompanying text.

[69] Brief for American Psychological Association at 3, Kentucky v. Stincer, 482 U.S. 730 (1987) (No. 86-572).

[70] *Id.* at 6.

potential duration are believed to be substantial.[71]

The APA went on to say that "not only is there very little evidence to support the general proposition that face-to-face confrontation by child victims of sexual abuse with their alleged abusers has any more negative psychological effects than such confrontation has for adults,"[72] but there is, in fact, some evidence to indicate that children actually benefit from the experience.[73] Because the Court held that the defendant's confrontation right was not violated by being excluded from the competency hearing, the Court never addressed the issues raised by APA.[74]

In March of 1990, the APA filed an *amicus curiae* brief in *Craig.*[75] Noting that the empirical evidence was much stronger than that presented almost three years earlier in *Stincer,* the APA stated that "[t]he resulting body of research supports the proposition that children as a class may be especially likely to be emotionally distressed by courtroom confrontation with their alleged abusers."[76] However, a "substantial number of children are capable of testifying fully and accurately under conventional criminal procedures without serious and lasting harm."[77] Unfortunately, conclusive means for determining which children require protection have not yet been developed[78] and evidence does not exist to suggest which procedures may ameliorate the harm most effectively.[79] The APA advocated the position eventually adopted by the Court which requires a case-by-case determination of whether the risk of trauma outweighs a defendant's right to confrontation.[80]

C. Review of Legal Questions

Successfully utilizing existing psychological research to determine a

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[71] *Id.* at 5.

[72] *Id.*

[73] *Id.*

[74] Kentucky v. Stincer, 482 U.S. 730, 744 (1987).

[75] Brief for American Psychological Association, Maryland v. Craig, 110 S. Ct. 3157 (1990) (No. 89-478).

[76] *Id.* at 3.

[77] *Id.*

[78] *Id.* at 14. As noted in the brief, "[g]iven ethical and practical constraints, systematic field research is extremely difficult to conduct in this area." *Id.* at 14 n.28.

[79] *Id.* at 4.

[80] *Id.*

child's ability to testify may be difficult because states differ in the standards applied to evaluate a child's capacity to testify. For example, the *Craig* Court declined to decide the minimum showing of trauma required to invoke special procedures because Maryland's statute, which required a showing that the child would suffer such serious emotional distress that he or she could not reasonably communicate, "clearly suffices to meet constitutional standards."[81] Whether other statutes with different standards would meet constitutional requirements is unclear. This is particularly true for statutes enacted more for the stated purpose of protecting children than for the encouragement of successful prosecutions. For example, to invoke Nebraska's special procedures for child victim-witnesses, a compelling need must be shown.[82] The compelling need is shown through a judicial finding of several factors including "the child's psychological maturity and understanding; and, . . . [t]he nature, degree, and duration of potential injury to the child from testifying."[83] No finding is necessary that the child will be unable to communicate. Thus, in Nebraska, the test turns on the level of potential injury to the child, not on the child's ability to communicate in the presence of the defendant. By declining to decide the minimum showing of trauma required to invoke special procedures, the Supreme Court left open the question of what degree of injury would suffice to meet the compelling need requirement.

Other questions left open in *Craig* require empirical answers: What are the effects on children of testifying in front of defendants? What are the best predictive factors for identifying children most at risk? What procedures work best to ameliorate the possible harm in testifying? And importantly, what are the prejudicial effects, if any, on the jury? To answer these questions, an interdisciplinary approach, combining the efforts of clinical, developmental and child psychologists with those in the field of psychology and law, seems appropriate. An interdisciplinary approach would also be appropriate to answer

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[81] Maryland v. Craig, 110 S. Ct. 3157, 3169 (1990). This finding by the Court is consistent with the rule of evidence which permits the admission of hearsay statements when a declarant is "unavailable" because of an existing mental illness. FED. R. EVID. 804.

[82] NEB. REV. STAT. § 29-1926 (1990).

[83] NEB. REV. STAT. § 29-1926(8)(e)-(f) (1990). Among other factors considered are the child's age, the nature of the offense and the need for the child's testimony. *Id.* at § 29-1926(8)(a), (b) & (d).

evaluation consulting questions which arose from the *Craig* case.[84] While mental health professionals are most likely to have expertise in the evaluation of a child, lawyers and other legal professionals are most able to identify available procedures in the legal processing of the case that may have an impact on the child. Thus, to evaluate a child's ability to testify in the presence of a defendant, mental health professionals will need to consult with lawyers as to the alternative procedures available.

IV. POLICY CONSIDERATIONS & THE LOBBYISTS' EFFECTS ON CHILDREN'S LAW

Although states have always had the power to enact legislation that protects those individuals who are unable to protect or care for themselves,[85] *Craig* elevates the state's interest in protecting children to a new status. *Craig* expanded a state's ability to legislate additional special procedures to protect children by establishing that the mental health and welfare of children constitute a compelling state interest that may outweigh even a defendant's constitutional right to confront his accuser as long as other indicia of reliability are present.[86]

A. THE CHILD SAVERS AND THE KIDDIE LIBBERS

The nature of future legislation will likely depend on the outcome of lobbying efforts conducted by different children's advocacy groups. The history of the advocacy groups sets the background for *Craig* and future policy developments. Thus far, two influential movements, sometimes characterized as "kiddie libbers" and "child savers," have had a hand in shaping children's law.[87] The two movements differ

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[84] *See supra* notes 55-58 and accompanying text.

[85] *See, e.g.*, Youngberg v. Romeo, 457 U.S. 307, 315 (1982) ("In the past, this Court has noted that the right to personal security constitutes a 'historic liberty interest' protected substantively by the Due Process Clause.") (quoting Ingraham v. Wright, 430 U.S. 651, 673 (1977)). The state may enact protective legislation under its *parens patriae* power. *Parens patriae* literally means parent of the country. BLACK'S LAW DICTIONARY 1003 (5th ed. 1979). The term refers to the state, as sovereign, in its role as guardian. *Id. Parens patriae* originated in English common law when the King acted as guardian to persons with legal disabilities such as infants, idiots, and lunatics. *Id.* For a discussion on the origin and nature of *parens patriae*, see Note, *Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1207-22 (1974).

[86] Maryland v. Craig, 110 S. Ct. 3157, 3163-64 (1990).

[87] Mnookin, *Children's Rights: Beyond Kiddie Libbers and Child Savers*, 7 J. CLIN. CHILD PSYCHOLOGY 163 (1978).

fundamentally in their conceptualization of childhood and in how they would balance various interests.[88] Additionally, at least three different perspectives regarding the proper balance between state and family interests exist within the child savers group alone.[89] These differences are most evident in cases of child maltreatment.

One sub-group of child savers contends that the state's ability to protect children from abuse and neglect is hampered by laws and policies aimed at protecting family privacy.[90] Children are conceptualized as a particularly vulnerable group in need of a state's special protective procedures.[91] Accordingly, this group supports aggressive state intervention in cases of suspected abuse based on the belief that a "family privacy interest" is merely a device that gives abusive and neglectful parents protection from public scrutiny.[92] Assigning paramount importance to child safety, this group displays a clear preference to err on the side of child protection in cases of suspected abuse.[93]

In contrast, two other sub-groups within the child savers movement advocate limited state intervention although for different reasons.[94] One sub-group, led by Professor Wald, believes that state intervention should be limited because of the state's failure to show the benefits of

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[88] *See generally* Melton, *The Clashing of Symbols: Prelude to Family Policy*, 42 AM. PSYCHOLOGIST 345 (1987) (discussing the effects of different political conceptualizations of childhood on legislative policies).

[89] *Id.*

[90] *See* Feshbach & Feshbach, *Child Advocacy and Family Privacy*, 34 J. SOC. ISSUES 168 (1978); Garbarino, Gaboury, Long, Grandjean & Asp, *Who Owns the Children? An Ecological Prospective on Public Policy Affecting Children* in LEGAL REFORMS AFFECTING CHILDREN & YOUTH SERVICES 60 (G. Melton ed. 1982).

[91] *See* Feshbach & Feshbach, *supra* note 90, at 169-70 (discussing a variety of physical and psychological punishments to which children are subjected at home and in school). Further, while "[b]oth custom and law recognize that . . . the family is the primary socializing agency, the state and society have a significant interest in the child's rights and welfare." *Id.* at 171.

[92] *See id.* at 172 ("Without knowledge of the manner in which the child is reared, individuals and institutions in the society cannot exercise their legitimate interest in the child's welfare.").

[93] *Id.* at 176 ("The response of 'none of your business,' which some privacy advocates feel is used too infrequently, should give way to the recognition that child rearing is the business of the community.").

[94] *See* Wald, *State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards*, 27 STAN. L. REV. 985, 987 (1975).

intervention.[95] Believing more harm will likely occur as a result of state intervention than if the state ignores child maltreatment, this group argues that states should only be allowed to intervene on a clearly defined, strictly limited basis.[96] Specifically, the state should intervene only if there is clear evidence that a child will be seriously harmed by a state's failure to act.[97]

A third child savers sub-group's philosophy is based on Freudian psychoanalytic theory and also advocates limited state intervention.[98] This group believes that primary importance should be placed on maintaining continuity in the child's "psychological parent" and respect for the authority of that parent.[99] Thus, they would set a higher standard for state intervention than that advocated by Professor Wald.[100] Once that standard has been met, however, this group of child savers would make it easy for the state to terminate parental rights.[101] This approach accomplishes the goal of ensuring a minimal level of uncertainty and unpredictability in the child's life.[102]

Although the three groups within the child savers movement differ as to when they would allow the state to intervene, each implicitly supports legislation aimed at protecting children. In three early twentieth-century children's cases, the Supreme Court focused almost exclusively on the constitutionality of "child saving" legislation, balancing state and parental interests. In *Meyer v. Nebraska*,[103] the Court held that

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[95] *See* Wald, *supra* note 94, at 987; *see generally* Wald, *State Intervention on Behalf of Neglected Children: A Proposed Legal Response*, 6 CHILD ABUSE & NEGLECT 3 (1982); M. WALD, J. CARLSMITH & P. LEIBERMAN, PROTECTING ABUSED & NEGLECTED CHILDREN (1988).

[96] *See* Wald, *supra* note 94, at 991-1000.

[97] *See*, INSTITUTE OF JUDICIAL ADMINISTRATION/AMERICAN BAR ASSOCIATION, JUVENILE JUSTICE STANDARDS RELATING TO CHILD ABUSE & NEGLECT (1981) (Professor Wald was the reporter for this pertinent volume which reflects this child savers group's position. Although this volume was never adopted by the American Bar Association as its official policy, it remains an important reference in debates on child policy.).

[98] *See generally* J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD (1973); J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEFORE THE BEST INTERESTS OF THE CHILD (1979) [hereinafter BEFORE THE BEST INTERESTS OF THE CHILD].

[99] BEFORE THE BEST INTERESTS OF THE CHILD, *supra* note 98, at 194.

[100] *Id.*

[101] *See* MELTON & PETRILA, *supra* note 56, at 311.

[102] *Id.*

[103] 262 U.S. 390 (1923).

Nebraska's statute, which prohibited teaching in any language other than English, violated the fourteenth amendment.[104] Ostensibly, the legislation was enacted to benefit children by promoting "civic development by inhibiting training and education of the immature in foreign tongues and ideals before they could learn English and acquire American ideals."[105] The Court held that such legislation interfered with the rights of parents to instruct their children.[106]

Two years later, in *Pierce v. Society of Sisters*,[107] the Court similarly upheld parents' rights to educate their children in private schools.[108] "Under the doctrine of *Meyer v. Nebraska*, we think it entirely plain that the [legislation] unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control."[109] Finally, in *Prince v. Massachusetts*,[110] the Court was called on to balance a child's first amendment right to practice religion and a mother's right to raise her child according to her own dictates against the state's interest in protecting children through its child labor laws.[111] Noting the propriety of the state legislation, the Court upheld its constitutionality.[112] Although *Prince* raises the issue of the scope of a child's religious right, the Court actually decided the case on its determination that the *state's* interest in socializing children outweighs

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[104] *Id.* at 401-03.

[105] *Id.* at 401.

[106] *Id.* at 400.

[107] 268 U.S. 510 (1925).

[108] *Id.* at 534-35. The challenged statute required every parent to send their children between the ages of eight and sixteen to public schools. *Id.* at 530.

[109] *Id.* at 534-35 (citation omitted).

[110] 321 U.S. 158 (1944).

[111] *Id.* at 164-65. The challenged statute prohibited a parent to compel a child to work under certain conditions. *Id.* at 161.

[112] *Id.* at 165-70. The Court stated:

> Among evils most appropriate for such action are the crippling effects of child employment, more especially in public places, and the possible harms arising from other activities subject to all the diverse influences of the street. It is too late now to doubt that legislation appropriately designed to reach such evils is within the state's police power, whether against the parent's claim to control of the child or one that religious scruples dictate contrary action.

Id. at 168-69.

parents' rights.[113]

All three cases employed a relatively straight-forward balancing test, weighing a parent's interest in child-rearing against various state interests aimed at protecting children from numerous evils.[114] Additionally, the central issue in all three cases was control over a child's upbringing.[115] Nonetheless, by the time the Court heard the next line of children's cases, both these issues and the balancing equation utilized to resolve these issues changed due, in part, to the influence of the kiddie libbers who advocated increased child autonomy.

In contrast to child savers whose focus is on the balance between state and family interests, kiddie libbers focus on fostering children's autonomy.[116] This group conceptualizes children as "more like than unlike adults and favors public policies designed to protect the autonomy and privacy of children and youth. Although not denying that changes in competence accompany maturation, child liberationists attribute much of the purported incompetence of children and youth to a lack of opportunity to exercise self-determination."[117] One strategy of this group has been to empirically demonstrate that, in a variety of legal decision making contexts, adolescents' processing of information is similar to that of adults.[118] Thus, they argue that because there is no significant difference between adolescent and adult reasoning, adolescents should be accorded the same rights as adults.[119]

B. Resolving Conflicting Interests

Only recently have the advocacy efforts of kiddie libbers clashed with those of child savers, most notably in the area of adolescent abortion.[120] Typically, when the interests represented by these groups conflict, the state takes the position that its procedures serve the interest of

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[113] *Id.* at 170. Although the Court favored the state in this case, the Court nonetheless narrowed its holding by stating that the ruling did not extend beyond the facts of the case. *Id.* at 171.

[114] *See supra* notes 103-13 and accompanying text.

[115] *Id.*

[116] Melton, *supra* note 88, at 347.

[117] *Id.*

[118] *See generally* G. Melton, G. Koocher & M. Saks, Children's Competence To Consent (1983).

[119] *Id.*

[120] *See* Hodgson v. Minnesota, 110 S. Ct. 2926 (1990); Ohio v. Akron Center for Reproductive Health, 110 S. Ct. 2972 (1990).

protecting children. For example, the state has argued that the overall welfare of children is being served, or at least not inconvenienced, by requiring notification of parents for abortion decisions,[121] permitting searches by school officials,[122] requiring parental consent for "voluntary" psychotherapy,[123] and restricting free speech in school.[124]

Armed with the Supreme Court's statement that children are persons within the meaning of the Constitution,[125] kiddie libbers challenged such procedures on the constitutional grounds that they infringe upon children's autonomy.[126] Thus, they argue that adolescents are competent to make autonomous abortion and psychotherapy treatment decisions,[127] that school searches infringe upon privacy rights,[128] and that children are in the best position to identify disruptions that occur in school.[129] When available, kiddie libbers have offered empirical evidence in support of these assertions.[130]

In deciding these cases, the Court's prior application of the simple balancing test of weighing parents' interests against state interests no longer proved practical. In settling children's law in the latter half of the twentieth-century, the Court has found it necessary to balance

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[121] *Hodgson*, 110 S. Ct. at 2933 & n.11; Ohio v. Akron Center for Reproductive Health, 110 S. Ct. at 2983-84 (discussing judicial bypass provisions).

[122] New Jersey v. T.L.O., 469 U.S. 325, 339-40 (1985) (involving a search of a high school student's purse by the assistant vice principal after the student was discovered smoking cigarettes in the school lavatory in violation of a school rule).

[123] Parham v. J.R., 442 U.S. 584, 603 (1979) ("Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment. Parents can and must make those judgments.").

[124] Bethel School District v. Fraser, 478 U.S. 675, 683 (1986).

[125] In re Gault, 387 U.S. 1, 13 (1967) (stating that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone").

[126] *See, e.g.*, Tremper, *Organized Psychology's Effort to Influence Judicial Policy-Making*, 42 AM. PSYCHOLOGIST 496, 499 (1987).

[127] Melton, *supra* note 88, at 347.

[128] *See* Rosenberg, New Jersey v. T.L.O.: *Of Children and Smoke Screens*, 19 FAM. L. Q. 311, 313 (1985).

[129] Bethel School District v. Fraser, 478 U.S. 675, 692 (1986) (Stevens, J., dissenting) (Justice Stevens wrote that Fraser "was probably in a better position to determine whether an audience composed of 600 of his contemporaries would be offended by the use of a four-letter word - or a sexual metaphor - than is a group of judges who are at least two generations and 3,000 miles away from the scene of the crime.").

[130] *See generally* Tremper, *supra* note 126 (The empirical evidence frequently reaches the Court by way of *amicus curiae* briefs.).

possible autonomous interests of children and to consider empirical evidence offered by professional groups, such as the kiddie libbers and the child savers.[131] From a policy perspective, a distinct conceptualization of children has emerged from these latter cases. Since the Court essentially views children as a vulnerable class in need of special protection,[132] its approach in balancing these various interests has generally been to defer to either legislative or professional judgment of the child's best interest.[133]

The Court decided *Craig* in light of these developments in children's law. *Craig*, however, differs from the typical children's case in that it is a defendant's sixth amendment right, rather than a family's interest or child's autonomy interest, that weighs in the balance against the state's interest in protecting children. Moreover, Maryland's legislation reflected a compromise between kiddie libbers and child savers. Children are presumed to be autonomous legal actors unless it can be shown that they are at risk.[134] Only then are protective procedures invoked. Presented with such a unified front of child advocates,[135] it is not surprising that the Court, having chosen to balance, balanced the equation in favor of the legislation and against the right of the criminal defendant.

C. The Effectiveness of Judicial and Legislative Reforms

Even before *Craig*, courts and legislatures began instituting procedural and evidentiary reforms designed to successfully combat the

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[131] *Id.*

[132] Melton, *supra* note 88, at 350.

[133] *See supra* note 98 and accompanying text.

[134] As noted earlier, the *Craig* Court has left unsettled the question of what constitutes a necessary finding to invoke the procedures. *See supra* notes 59-67 and accompanying text.

[135] The Court acknowledged both empirical and legislative grounds in holding that:

> Given the States's traditional and "transcendent interest in protecting the welfare of children," and buttressed by the growing body of academic literature documenting the psychological trauma suffered by child abuse victims who must testify in court, . . . [it would] not second-guess the considered judgment of the Maryland Legislature regarding the importance of its interest in protecting child abuse victims from the emotional trauma of testifying.

Maryland v. Craig, 110 S. Ct. 3157, 3168-69 (1990).

rise of child maltreatment.[136] A summary of these reforms includes the enactment of child abuse reporting statutes,[137] special hearsay exemptions,[138] exclusion of spectators during testimony by child victims,[139] videotaped depositions, and the use of closed circuit television and special courtrooms.[140] All of these reforms facilitate children's testimony in order to increase the number of successful child abuse prosecutions. Given the holding in *Craig* and the probable coalition of child advocates, states will most likely continue either to modify or enact new protective procedures.

Unfortunately, these reforms lack an empirical foundation to support assertions as to their effectiveness. Given the tentative state of empirical knowledge concerning child legal actors, caution should be the guiding principle in drafting such legislation. Accordingly, this article offers certain guidelines. First, in cases where the particular welfare of a child is at stake, there should be a case-by-case determination of the child's vulnerability. Legislatures should recognize that there are a great deal of individual differences present among children. As the *Craig* Court recognized, a case-by-case determination of possible effects on each child should be made before protective procedures are invoked.[141] This is especially true given the finding that some children are actually benefited by participating in the normal legal process.[142]

As a second requirement, states should empirically document the deleterious effects of proposed procedures before reform is undertaken. Unfortunately, legislation is often enacted without the benefit of

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[136] The incidents of child maltreatment are now reaching epidemic proportions. During 1989, the United States Advisory Board on Child Abuse & Neglect estimated that 2.4 million reports of physical, sexual, or emotional abuse of children were filed in the United States. CHILD ABUSE AND NEGLECT: CRITICAL FIRST STEPS IN RESPONSE TO A NATIONAL EMERGENCY (1990).

[137] *See* Agatstein, *Child Abuse Reporting in New York State: the Dilemma of the Mental Professional*, 34 N.Y.L. SCH. L. REV. 115 (1989); Kennedy, *Sexual Abuse - A Conspiracy of Silence*, 46 ALA. LAWYER 30 (1985).

[138] Idaho v. Wright, 100 S. Ct. 3139, 3145-47 (1990).

[139] Globe Newspaper v. Superior Court, 457 U.S. 596, 608 (1982).

[140] *See* Maryland v. Craig, 110 S. Ct. 3157 (1990).

[141] *Id.* at 3169.

[142] *See supra* notes 73 & 77 and accompanying text.

empirical data.[143] In general, but particularly in cases where constitutional rights are at stake, there should be empirical support for behavioral assumptions inherent in various laws. Before legislation tailored to prevent harm is enacted, legislatures should have concrete proof of the nature and type of harm sought to be avoided.

Finally, legislatures should demand empirical support for any assumptions that proposed protective legal procedures would in fact alleviate harm. Even if legislatures enact protective statutes based on intuitive hunches rather than empirical facts, an ancillary provision should be added to such legislation to measure the outcome of the proposed protective procedures. The least one can ask for giving up a constitutional right is that the procedures designed to protect a child's well-being actually accomplish that goal.

V. CONCLUSION

Craig raises several evaluation, empirical, and policy issues for future cases involving children as legal actors. Foremost is the extent to which mental health professionals can accurately predict which children are most likely to be harmed or benefited from the experience of testifying. This determination may be difficult because state-of-the-art research is not yet fully developed. Moreover, any further research should be of an interdisciplinary nature.

Along with problems of evaluation, additional research is needed to address the fundamental question of whether children are harmed at all by testifying. Specifically, a need exists to examine the short and long term consequences of testifying and not testifying. Similarly, no current research addresses the effectiveness of lesser intrusive alternative procedures. Finally, future legislation aimed at protecting the well-being of children should be based on an empirical showing that such legislation is necessary and ultimately beneficial.

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[143] The notion that law generally tends to be policy analysis without benefit of data is discussed in Saks, *Legal Policy Analysis and Evaluation*, 44 AM. PSYCHOLOGIST 1110, (1989).