PROTECTION OF CHILD WITNESSES AND THE RIGHT OF CONFRONTATION: A BALANCING OF INTERESTS*

I. INTRODUCTION

Alaska has joined the growing number of states[1] seeking to protect child witnesses from the trauma often associated with testifying in court. The Alaska statute[2] provides alternative procedures by which the child may testify in certain criminal proceedings. The Alaska statute is designed in part to shield the child from the defendant, whose presence may intimidate the child and render the child unable to communicate. In so doing, however, the statute may compromise the constitutional right of the criminal defendant to physically confront his accuser.[3]

This note will consider the impact of the Alaska statute on the defendant's sixth amendment right of confrontation. It will analyze the United States Supreme Court decision in *Coy v. Iowa,*[4] the Court's sole pronouncement on this issue. It will suggest that in light of *Coy* and the states' response to *Coy,* the Alaska statute will survive constitutional challenge. This note will propose contours for the construction of the Alaska statute which will best safeguard it from constitutional attack. For purposes of illustration, this note will briefly examine an application of child-protective procedures in Alaska pre-dating enactment of the Alaska statute in a case now pending on appeal.[5] Finally, this note will examine the issues the United States Supreme Court will consider in *Maryland v. Craig,*[6] the Court's first encounter with a statute similar to Alaska's.

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1. Approximately 26 states, including Alaska, have provided for the use of closed circuit television or one-way obstructions to the view of child witnesses. Approximately 34 states have provided for the use of videotaped testimony of child witnesses. *See infra* notes 65-66.

2. ALASKA STAT. § 12.45.046 (Supp. 1989).

3. U.S. CONST. amend. VI.

4. — U.S. —, 108 S. Ct. 2798 (1988).

5. State v. Blume (Alaska Super.) (Nos. 3ANS-86-2547 Cr., 3ANS-86-1847 Cr.), *appeal docketed,* Nos. A-1799, A-1902 (Alaska Ct. App. Sept. 19, 1989).

6. Craig v. State, 316 Md. 551, 560 A.2d 1120 (1989), *cert. granted sub nom.* Maryland v. Craig, — U.S. —, 110 S. Ct. 834 (Jan. 16, 1990).

II. THE ALASKA STATUTE

In 1988, Alaska enacted a child witness protection statute designed to minimize the trauma experienced by children who testify in certain criminal proceedings. In providing alternative procedures for eliciting the testimony of child witnesses, the Alaska legislature has sought:

> (1) to balance the need for the victim's or witness's testimony against the right of the defendant to confront witnesses;
> (2) to mitigate the mental and emotional distress that may arise as the child is required to testify; and
> (3) to minimize possible victim harrassment by limiting the opportunities for unnecessary examination of the child by the parties' counsel.[7]

The statute empowers a court to permit children under the age of thirteen to testify either by closed circuit television or from behind one-way mirrors. The court must first determine, however, that the child witness would be unable to communicate effectively if required to testify under traditional courtroom procedures.[8] The statute identifies certain factors the court should consider in deciding whether the case warrants the use of these measures, specifically:

> (1) the child's chronological age;
> (2) the child's level of development;
> (3) the child's general physical health;
> (4) any physical, emotional, or psychological injury experienced by the child; and
> (5) the mental or emotional strain that will be caused by requiring the child to testify under normal courtroom procedures.[9]

When the child testifies outside the courtroom by means of closed circuit television, those entitled to be present, in addition to the operators of the television equipment, are the prosecuting attorney, the defendant's attorney and other persons whose presence the court believes will contribute to the child's well-being.[10] The defendant, the court and the jury contemporaneously view the child from the courtoom.[11] Upon request of the defendant, the court shall excuse the defendant from the courtroom and allow the defendant to observe the televised testimony from another location.[12]

The court shall allow the defendant to communicate with his attorney throughout the proceeding.[13] While only the court and counsel

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7. 1988 Alaska Sess. Laws ch. 92, § 1.
8. ALASKA STAT. § 12.45.046(a)(2) (Supp. 1989).
9. *Id.* § 12.45.046(b)(1)-(5).
10. *Id.* § 12.45.046(c)(1)-(2).
11. *Id.* § 12.45.046(c).
12. *Id.* § 12.45.046(d).
13. *Id.*

may question the child, the defendant or his attorney may request a recess to confer. The court shall provide a procedure by which it may communicate with the attorneys as the child is questioned. It may consider objections to questions from the courtroom if necessary.[14]

When the child is permitted to testify from behind a one-way mirror, the child will see the attorneys as he or she is questioned by them, but the mirror shall be placed so that the child cannot see the defendant or the jurors.[15] These measures thus shield the child from the gaze of the defendant, yet allow the defendant to consult with his attorney as the child is questioned.[16]

III. THE SUPREME COURT IN *COY V. IOWA*

The United States Supreme Court invalidated an Iowa child witness protection statute in its 1988 landmark decision in *Coy v. Iowa.*[17] The Court held that the placement of a screen between two child witnesses and the defendant violated the defendant's sixth amendment right of confrontation. The Court therefore struck down the Iowa statute.[18]

The defendant in *Coy* was charged with sexually assaulting two thirteen-year-old girls. At trial the state moved to allow the girls to testify behind a screen or via closed circuit television pursuant to a recently enacted Iowa statute. The trial court permitted a screen to be placed between the defendant and the witness stand during the girls' testimony. The lighting was adjusted to allow the defendant to dimly perceive the girls but to prevent the girls from seeing the defendant.[19] The defendant objected to the use of the screen on confrontation grounds, alleging that, though it might ease the tensions of the girls as they testified, it violated his sixth amendment right to confront his accusers.[20] He also objected to the use of the screen on due process

14. *Id.*

15. *Id.* § 12.45.046(e).

16. The statute also provides that, where the court does not find that the child would be unable to communicate effectively under normal court procedures, the court may nonetheless control the spatial arrangements of the courtroom and the location, movement and deportment of those present in order to minimize emotional harm or stress to the child. The court may also permit the child to testify while sitting on the floor or in a suitably sized chair. It may schedule the procedure in a room that provides privacy, freedom from distractions, informality and comfort appropriate to the child's developmental age, and order a recess when the child's energy, comfort or attention span warrants it. *Id.* § 12.45.046(f)(1)-(3). The statute also provides that the court may appoint a guardian ad litem. *Id.* § 12.45.046(a)(1).

17. — U.S. —, 108 S. Ct. 2798 (1988).

18. *Id.* at —, 108 S. Ct. at 2803.

19. *Id.* at —, 108 S. Ct. at 2799.

20. *Id.*

grounds, alleging that its placement next to him would make him appear guilty and erode his presumption of innocence.[21] The trial court rejected these claims, but instructed the jury not to consider the use of the screen in its consideration of guilt or innocence.[22]

The defendant was convicted on two counts of engaging in lascivious acts with a child. On appeal, the Iowa Supreme Court affirmed his convictions. The court rejected the defendant's confrontation claim on the ground that the screen did not impair the defendant's ability to cross-examine the girls. The court also dismissed the defendant's due process claim, ruling that the placement of the screen between the girls and the defendant did not inherently prejudice the defendant.[23]

The United States Supreme Court, finding it unnecessary to reach the defendant's due process claim, held that use of the screen violated the defendant's right of confrontation. It therefore reversed the judgment of the Iowa Supreme Court and remanded the case for the state court to determine whether the error was harmless beyond a reasonable doubt.[24]

Justice Scalia wrote the opinion for the majority.[25] He placed very strong emphasis on the need of the criminal defendant "to be confronted with the witnesses against him," as guaranteed by the sixth amendment.[26] He sought to convey in his opinion that "there is something deep in human nature that regards face-to-face confrontation between accused and accuser as 'essential to a fair trial in a criminal prosecution.' "[27]

Justice Scalia saw the right of face-to-face confrontation as important because he believed it served to " 'ensur[e] the integrity of the fact-finding process.' "[28] He emphasized repeatedly the belief that it is far more difficult to tell a lie, or to tell a lie convincingly, when confronted by the accused.[29] The balance he struck was in favor of the

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21. *Id.*

22. *Id.* at —, 108 S. Ct. at 2799-2800.

23. *Id.* at —, 108 S. Ct. at 2800.

24. *Id.* at —, 108 S. Ct. at 2803.

25. Justice Scalia's opinion was ostensibly joined by five Justices, though Justice O'Connor, joined by Justice White, wrote separately to qualify their support for his opinion. Justice Blackmun and Chief Justice Rehnquist dissented, while Justice Kennedy took no part in the decision.

26. — U.S. —, 108 S. Ct. at 2800 (quoting U.S. CONST. amend. VI).

27. *Id.* at —, 108 S. Ct. at 2801 (quoting Pointer v. Texas, 380 U.S. 400, 404 (1965)). In support of this proposition, Justice Scalia made reference to passages from Shakespeare, the Bible and the Code of Abilene, Kansas. *Id.* at —, 108 S. Ct. at 2800-02.

28. *Id.* at —, 108 S. Ct. at 2802 (quoting Kentucky v. Stincer, 482 U.S. 730, 736 (1987)).

29. *Id.*

defendant: "That face-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult. It is a truism that constitutional protections have costs."[30]

Justice Scalia distinguished what he believed to be the core right of the confrontation clause, the right to face-to-face confrontation at trial, from those rights the Court has construed as reasonably implicit within the right of confrontation, such as the right to cross-examine witnesses and the right to exclude out-of-court statements. He argued that this core right to face-to-face confrontation at trial reflects "the irreducible literal meaning of the clause," and therefore is not subject to the several exceptions that the Court has identified where the right of confrontation encounters important competing interests.[31] He declined to speculate whether there could be exceptions to this core right of confrontation, but insisted that any such exception would have to be "necessary to further an important public policy."[32]

Justice Scalia found that the Iowa statute failed to satisfy the requirement of necessity.[33] He therefore did not consider whether the protection of child witnesses was an important public policy sufficient to create an exception to the defendant's right of confrontation. The Iowa statute, unlike the Alaska statute, did not require a trial court to make a case-specific showing that the use of a screen was necessary to protect the child from trauma or to enable the child to testify.[34] Instead, the statute simply created a legislative presumption that trauma would result.[35] Justice Scalia wrote: "Our cases suggest, however, that even as to exceptions from the normal implications of the Confrontation Clause, as opposed to its most literal application, something more than the type of generalized finding underlying such a statute is needed when the exception is not 'firmly . . . rooted in our jurisprudence.' "[36] The judgment therefore "could not be sustained by any conceivable exception."[37]

Justice O'Connor, joined by Justice White, wrote separately. Justice O'Connor expressed support for Justice Scalia's opinion insofar as it did not conflict with the view that, while the defendant's right of confrontation was violated in this case, there exist appropriate circumstances in which that right may yield to other competing interests so

30. *Id.* at —, 108 S. Ct. at 2802.
31. *Id.* at —, 108 S. Ct. at 2802-03.
32. *Id.* at —, 108 S. Ct. at 2803.
33. *Id.*
34. *Id. See* ALASKA STAT. § 12.45.046(a)(2) (Supp. 1989).
35. *Coy,* — U.S. at —, 108 S. Ct. at 2803.
36. *Id.* (quoting Bourjaily v. United States, 483 U.S. 171, 183 (1987)).
37. *Id.* at —, 108 S. Ct. at 2803.

as to allow the selective use of alternative procedures to protect the child witness from the trauma of courtroom testimony.[38]

Justice O'Connor emphasized that the Court has consistently indicated that the confrontation clause reflects merely a preference for face-to-face confrontation at trial, which may be overcome by careful analysis of competing interests.[39] She rejected Justice Scalia's suggestion that this principle might be less true where an exception implicates the core right of confrontation, noting that use of hearsay evidence often compromises this core right, but is nonetheless excepted from the purview of the confrontation clause.[40]

Justice O'Connor agreed with Justice Scalia that an exception to the right of confrontation must be necessary to further an important public policy.[41] She went further, however, and explicitly identified the protection of child witnesses as an important public policy warranting an exception to the right of confrontation. She stated that the Court's inquiry should therefore center on the requirement of necessity.[42] While she agreed that the Iowa scheme did not satisfy the necessity requirement, she indicated that a statutory scheme requiring specific findings of necessity might cause the "compelling state interest" of protecting child witnesses to outweigh the defendant's interest in confronting his accuser.[43]

Justice Blackmun, joined by Chief Justice Rehnquist, dissented, believing that the Iowa procedure did not offend the confrontation clause.[44] The dissent agreed with the concurrence that the confrontation clause reflects only a preference for face-to-face confrontation, best exemplified by the frequent admission of certain hearsay statements, such as co-conspirator statements, made outside the presence of the defendant. The dissent, unpersuaded by Justice Scalia's conception of face-to-face confrontation at trial as the "irreducible literal meaning of the clause," argued that the extent of infringement was minimal where the right of cross-examination was not compromised.[45]

The two dissenting Justices, like the two concurring Justices, explicitly identified the protection of child witnesses as an important

38. *Id.* (O'Connor, J., concurring).

39. *Id.* at —, 108 S. Ct. at 2804 (O'Connor, J., concurring) (citing Ohio v. Roberts, 448 U.S. 56, 63-64 (1980)).

40. *Id.* at —, 108 S. Ct. at 2804-05 (O'Connor, J., concurring). As Justice O'Connor stated, "[t]hat a particular procedure impacts the 'irreducible literal meaning of the clause,' . . . does not alter this conclusion." *Id.* at —, 108 S. Ct. at 2804 (O'Connor, J., concurring) (quoting *id.* at —, 108 S. Ct. at 2803 (Scalia, J.)).

41. *Id.* at —, 108 S. Ct. at 2805 (O'Connor, J., concurring).

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at —, 108 S. Ct. at 2806-07 (Blackmun, J., dissenting).

public policy to which the defendant's interest in face-to-face confrontation might bow.[46] The dissent identified two major adverse consequences of face-to-face confrontation between defendant and child witness: the encounter may cause psychological and emotional injury to the child; and the encounter may so frighten the child as to render the child witness unable to testify, causing the loss of truthful testimony and seriously compromising the truth-determining process.[47]

Unlike the other six Justices who participated in the decision, however, the dissenters argued that a legislative exception to the right of confrontation, as found under the Iowa statute, was similar to other rules allowing general admissibility of out-of-court statements, and therefore did not offend the confrontation clause.[48] The dissent argued that because the girls had testified under oath, in view of the trier of fact, and subject to cross-examination, their statements possessed particularized guarantees of trustworthiness warranting their admission without more.[49]

The Court therefore requires that an exception to the defendant's right to face-to-face confrontation be at a minimum "necessary to further an important public policy." The four Justices adhering to the opinion of Justice Scalia would require that this showing be made before they could even consider whether there exists an exception to the core right of confrontation. The two concurring Justices would require nothing more, explicitly stating that the protection of child witnesses is an important public policy and suggesting that the necessity requirement could be satisfied by case-specific findings. The two dissenting Justices would require an even lesser showing, which by implication would be satisfied by an individualized showing of necessity. The dissent, like the concurrence, explicitly identified the protection of child witnesses as an important public policy, bringing the number of Justices to do so to four.

IV. THE CONSTITUTIONALITY OF THE ALASKA STATUTE

A majority of the Court in *Coy* did not specifically address the constitutionality of child witness protection statutes which provide for case-specific findings of necessity. While not directly at issue in *Coy,* the two concurring Justices embraced such a procedure. The two dissenting Justices would by implication also endorse this statutory scheme. The fact that the four remaining Justices who participated in *Coy* strongly criticized the dissent but not the concurrence suggests a

46. *Id.* at —, 108 S. Ct. at 2809 (Blackmun, J., dissenting).
47. *Id.*
48. *Id.*
49. *Id.*

lack of substantial disagreement with the concurrence as to the permissibility of a procedure providing for individualized findings of necessity. These four Justices, while they might require a greater showing of necessity than that required by the concurring Justices, will therefore likely allow protective procedures when narrowly tailored to a specific case.

A. Interests Advanced by Protective Statutes

Child witness protection statutes advance at least two important public policies which under certain circumstances should suffice to override the defendant's right of face-to-face confrontation: reducing the trauma child witnesses may suffer as they testify in the presence of the defendant; and providing an atmosphere in which child witnesses may communicate effectively to the jury.

The first policy, the primary impetus for these procedural innovations, involves protection of child witnesses from the psychological harm they may experience if required to testify in court. As the dissent noted in *Coy,* "[a]lthough research in this area is still in its early stages, studies of children who have testified in court indicate that such testimony is 'associated with increased behavioral disturbance in children.' "[50] A number of commentators have questioned the system's role in subjecting child witnesses to the potential trauma associated with courtroom testimony.[51]

The second policy implicates a frequent consequence of this trauma: the loss of the child's testimony. Confrontation between the defendant and the child witness may so frighten the child as to render the witness unable to testify. As the dissent noted in *Coy,* " 'to a child who does not understand the reason for confrontation, the anticipation and experience of being in close proximity to the defendant can be

50. *Coy,* — U.S. at —, 108 S. Ct. at 2808 (Blackmun, J., dissenting) (quoting G. Goodman, D. Jones, E. Pyle, L. Prado-Estrada, L. Port, P. England, R. Mason & L. Rudy, *The Emotional Effects of Criminal Court Testimony on Child Sexual Assault Victims,* in THE BRITISH PSYCHOLOGICAL SOCIETY FOR THE DIVISION OF CRIMINOLOGICAL AND LEGAL PSYCHOLOGY, THE CHILD WITNESS: DO THE COURTS ABUSE CHILDREN? 52 (1988)).

51. *See generally* Avery, *The Child Abuse Witness: Potential for Secondary Victimization,* 7 CRIM. JUST. J. 1, 3-4 (1983); Mahady-Smith, *The Young Victim as Witness for the Prosecution: Another Form of Abuse?,* 89 DICK. L. REV. 721 (1985); Melton, *The Child Witness and the First Amendment: A Psychological Dilemma,* 40 J. SOC. ISSUES 109 (1984); Myers, *The Legal Response to Child Abuse: In the Best Interests of Children?,* 24 J. FAM. L. 149 (1985-86); Parker, *The Rights of Child Witnesses: Is the Court a Protector or Perpetrator?,* 17 NEW ENG. L. REV. 643 (1981-82).

overwhelming.' "[52] Providing a procedure by which the child may testify effectively may "ensur[e] the integrity of the fact-finding process,"[53] a central theme of Justice Scalia's opinion, by making possible truthful testimony that might otherwise be lost through intentional or inadvertent intimidation of the child witness.

The adverse impact of the loss of such testimony may be especially severe in the prosecution of child abuse cases, the offense for which the protective statutes were primarily designed. One difficulty in the prosecution of these cases is that the child is often the only witness to the abuse, and yet it is often very difficult for the child to relate the relevant events. This difficulty may stem from either the child's low cognitive development or the child's lack of understanding of the judicial process. The ability of the defendant, frequently a relative of the child, to "stare down" the child may have a debilitating impact on the child's ability to communicate effectively. This problem is accentuated by the fact that the child is called to testify in a foreign and often confusing environment.[54] The child's testimony, often crucial to the prosecution, may therefore be lost.

Society has a substantial interest in effective prosecution of these cases. Statistics reveal that reports of the mistreatment of children are steadily increasing. Annual reports of mistreatment increased from 669,000 cases in 1976 to over 2.4 million cases in 1989.[55] The number of child abuse fatalities continues to rise, increasing more than thirty-eight percent since 1985, with a minimum of three child deaths per day attributed to child abuse.[56]

The figures for Alaska are equally grim. The State of Alaska, Department of Health and Social Services, Division of Family and

52. — U.S. at —, 108 S. Ct. at 2808 (Blackmun, J., dissenting) (quoting D. WHITCOMB, E. SHAPIRO & L. STELLWAGEN, WHEN THE VICTIM IS A CHILD: ISSUES FOR JUDGES AND PROSECUTORS 17-18 (1985)).

53. — U.S. —, 108 S. Ct. at 2802 (quoting Kentucky v. Stincer, 482 U.S. at 736).

54. Note, however, that the intimidation or fear created by the courtroom itself may be cured by remedies which do not compromise the defendant's right of confrontation, such as reducing the degree of courtroom formality or allowing the child to sit in an appropriately sized chair. The Alaska statute confers significant discretion on the trial court to adjust courtroom procedures in a number of ways which do not affect the defendant's right of confrontation. *See supra* note 16.

55. THE AMERICAN ASSOCIATION FOR PROTECTING CHILDREN, HIGHLIGHTS OF OFFICIAL CHILD NEGLECT AND ABUSE REPORTING, 1985 at 3 (1987); NATIONAL COMMITTEE FOR PREVENTION OF CHILD ABUSE, CURRENT TRENDS IN CHILD ABUSE AND REPORTING AND FATALITIES: THE RESULTS OF THE 1989 ANNUAL FIFTY STATE SURVEY 2 (1990).

56. Based on data collected from forty-one states and the District of Columbia. NATIONAL COMMITTEE FOR PREVENTION OF CHILD ABUSE, *supra* note 55, at 15.

Youth Services (DFYS), provided protective services for 2,866 children in fiscal year 1978.[57] It provided protective services for 9,744 children just ten years later. In fiscal year 1978, DFYS reported that 506 of these children had been physically abused. It reported that 2,423 children had been physically abused in fiscal year 1988.[58] This increase in the reported incidence of physical abuse and neglect of children in Alaska has not seen a corresponding increase in social workers to combat this societal tragedy.[59]

Prosecution of these cases has not kept pace with their increasing incidence. The National Institute of Justice, for instance, has suggested that over ninety percent of all child abuse cases are not brought forward.[60] Child witness protection statutes seek to increase the likelihood of effective prosecution of child abuse and other criminal prosecutions by providing alternatives to traditional courtroom procedures where the court has determined that the child witness is unable to communicate. By making facts known that would otherwise be lost, these procedures enhance the truth-determining process. The concern for ensuring accurate fact finding led Justice Scalia to place great importance on the right to face-to-face confrontation.[61] That concern may in many instances be better served by denying the defendant the right to such confrontation where the witness is a child.

The benefit of face-to-face confrontation is the ability of a defendant to stare down the lying witness. The cost associated with this benefit, in addition to the trauma inflicted upon the child, is the possibility that truthful testimony will be lost through intimidation by the defendant. Any cost-benefit comparison must consider that the balance is struck heavily in favor of the defendant in a criminal trial. Constitutional safeguards do in fact, as Justice Scalia notes,[62] have their costs. As a practical matter, however, there comes a point at which the cost of the constitutional protection so outweighs its marginal benefit that the right may be compromised. Such a situation exists where a court has made a showing that the infringement, the denial of face-to-face confrontation, is necessary to protect the child and to allow the child

57. *See* STATE OF ALASKA, DEPARTMENT OF HEALTH AND SOCIAL SERVICES, DIVISION OF FAMILY AND YOUTH SERVICES, CHILDREN RECEIVING PROTECTIVE SERVICES (1989).

58. *Id.*

59. *See* Harper, *Abuse Case Handling Censured,* Anchorage Times, Apr. 20, 1989, at A-1, A-8, col. 6.

60. NATIONAL INSTITUTE OF JUSTICE, RESEARCH IN BRIEF 1 (Nov. 1985).

61. *See* State v. Bonello, 210 Conn. 51, 60, 554 A.2d 277, 282 (1989) ("[T]he priority accorded the right to face-to-face confrontation in *Coy* turned not on its intrinsic inviolability but rather on its functional value in enhancing the factfinding process of criminal trials . . . .").

62. *Coy,* — U.S. at —, 108 S. Ct. at 2802.

to testify effectively, and does not substantially disadvantage the defendant, who is protected by other constitutional safeguards emanating from the confrontation clause. These safeguards include the requirement that the witness testify under oath, subject to cross-examination, and in the presence of the trier of fact, who may judge the demeanor of the witness as he or she testifies.[63] A court engages in this balancing process, and reaches a similar result, when it admits hearsay statements against the defendant, compromising the defendant's right to face-to-face confrontation in favor of society's interest in effective prosecution. Though Justice Scalia's opinion does not explicitly suggest it, all members of the Court in *Coy* engaged in some form of balancing.

The need for the child to testify effectively is often substantial. It may be particularly important in the case of child abuse, where the child witness is often the only source of direct evidence of that abuse. At the same time, however, the importance of this testimony also requires that the defendant's right to face-to-face confrontation not be compromised where protective procedures are not essential. The balance is a delicate one, but certainly one that may favor the child under appropriate circumstances. The balance should be struck in favor of the child where a court has made an individualized showing that protective procedures are necessary to safeguard the child from psychological injury and to enable the child witness to communicate effectively, and that the danger of false child testimony is addressed by other constitutional safeguards emanating from the confrontation clause, such as the right of cross-examination.

B. The States' Response to *Coy*

Despite the Court's invalidation of the Iowa statute in *Coy,* the importance of the public policies served by these statutes makes it almost certain that the Court will strike a balance in favor of protective procedures where statutes mandate individualized showings of necessity. This conclusion is borne out by the legislative and judical response to *Coy,* which has been overwhelmingly supportive of such procedures, even where the defendant's right of confrontation is compromised.[64]

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63. *See* California v. Green, 399 U.S. 149, 158 (1970).

64. Note that a few state statutes, by their language or by judicial construction, do not implicate confrontation issues because they allow the defendant to be present with the child when the protective procedures are employed. These statutes do, however, shield the child from the courtroom, the jury or both. *See, e.g.,* ALA. CODE § 15-25-3 (Supp. 1989) (allowing the use of closed circuit television but providing that the defendant be present in the same room as the child witness); ILL. ANN. STAT. ch. 38,

A majority of states have enacted, or have retained, child witness protection statutes which, like Alaska's, shield the child from confrontation with the defendant. At least one-half of the states, in addition to Alaska, permit by statute the use of closed circuit television or one-way obstructions to the line of sight of the child witness.[65] A majority of states also permit the use of videotaped testimony utilizing procedural safeguards similar to those found with the use of closed circuit television.[66] These states have thus clearly evinced their belief that

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para. 106-A2 (Smith-Hurd Supp. 1989); N.Y. CRIM. PROC. LAW §§ 65.00-.30 (McKinney Supp. 1990) (providing for two-way closed circuit television). *See also* Commonwealth v. Bergstrom, 402 Mass. 534, 524 N.E.2d 366 (1988) (holding that the confrontation clause of the Massachusetts Constitution requires that the defendant be present when videotaped testimony of the child is taken, despite no such requirement under the statute itself, MASS. ANN. LAWS ch. 278, § 16D (Law. Co-op. Supp. 1989)).

65. As of February 1990, at least 26 states provide for the use of closed circuit television, one-way screens or one-way mirrors. ALA. CODE § 15-25-3 (Supp. 1989); ALASKA STAT. § 12.45.046 (Supp. 1989); ARIZ. REV. STAT. ANN. § 13-4253 (1989); CAL. PENAL CODE § 1347 (West Supp. 1990); CONN. GEN. STAT. ANN. § 54-86g (West Supp. 1989); FLA. STAT. ANN. § 92.54 (West Supp. 1990); GA. CODE ANN. § 17-8-55 (Supp. 1989); HAW. R. EVID. 616 (1988); IND. CODE ANN. § 35-37-4-8 (Burns Supp. 1989); IOWA CODE ANN. § 910A.14 (West Supp. 1989); KAN. STAT. ANN. § 22-3434 (1988); KY. REV. STAT. ANN. § 421.350 (Baldwin Supp. 1989); LA. REV. STAT. ANN. § 15:283 (West Supp. 1990); MD. CTS. & JUD. PROC. CODE ANN. § 9-102 (1989); MASS. ANN. LAWS ch. 278, § 16D (Law. Co-op. Supp. 1989); MINN. STAT. ANN. § 595.02 subd. 4 (West 1988); MISS. CODE ANN. § 13-1-405 (Supp. 1989); N.J. STAT. ANN. § 2A:84A-32.4 (West Supp. 1989); N.Y. CRIM. PROC. LAW §§ 65.00-.30 (McKinney Supp. 1990); OHIO REV. CODE ANN. § 2907.41 (Anderson 1987); OKLA. STAT. ANN. tit. 22, § 753 (West Supp. 1990); PA. CONS. STAT. ANN. tit. 42 § 5985 (Purdon Supp. 1989); R.I. GEN. LAWS § 11-37-13.1 (Supp. 1988); TEX. CRIM. PROC. CODE ANN. art. 38.071 (Vernon Supp. 1990); UTAH CODE ANN. § 77-35-15.5 (Supp. 1989); VT. R. EVID. 807(e), (f) (Supp. 1989).

66. As of February 1990, 34 states provide for the use of videotaped testimony. ALA. CODE § 15-25-2 (Supp. 1989); ARIZ. REV. STAT. ANN. § 13-4253 (1989); ARK. CODE ANN. § 16-44-203 (1987); CAL. PENAL CODE § 1346 (West Supp. 1990); COLO. REV. STAT. § 18-3-413 (1986); CONN. GEN. STAT. ANN. § 54-86g (West Supp. 1989); DEL. CODE ANN. tit. 11, § 3511 (1987); FLA. STAT. § 92.53 (West Supp. 1990); HAW. R. EVID. 616 (1988); ILL. ANN. STAT. ch. 38, para. 106A-2 (Smith-Hurd Supp. 1989); IND. CODE ANN. § 35-37-4-8 (Burns Supp. 1989); IOWA CODE ANN. § 910A.14 (West Supp. 1989); KAN. STAT. ANN. § 22-3434 (1988); KY. REV. STAT. ANN. § 421.350 (Baldwin Supp. 1990); MASS. GEN. LAWS ANN. ch. 278 § 16D (West Supp. 1989); MINN. STAT. ANN. § 595.02 (West Supp. 1988); MISS. CODE ANN. § 13-1-407 (Supp. 1989); MO. ANN. STAT. §§ 491.680-687 (Vernon Supp. 1989); MONT. CODE ANN. §§ 46-15-401 to -403 (1987); NEV. REV. STAT. ANN. §§ 174.227, 174.229 (1986); N.H. REV. STAT. ANN. § 517.13-a (Supp. 1989); N.M. STAT. ANN. § 30-9-17 (1984); OHIO REV. CODE ANN. § 2907.41 (Baldwin 1987); OKLA. STAT. ANN. tit. 22 § 753 (West Supp. 1990); PA. CONS. STAT. ANN. tit. 42 § 5984 (Purdon Supp. 1989); R.I. GEN. LAWS § 11-37-13.1 (Supp. 1988); S.C. CODE ANN. § 16-3-1530(G) (1985); S.D. CODE ANN. § 23A-12-9 (1988); TENN. CODE ANN. § 24-7-116 (Supp. 1989); TEX. CRIM. PROC. CODE ANN. art. 38.071 (Vernon Supp. 1990); UTAH CODE ANN. § 77-35-15.5 (Supp. 1989); VT. R. EVID. 807; WIS. STAT. § 967.04(7) (Supp. 1989); WYO. STAT. § 7-11-408 (1987).

these procedures are necessary and that they further important public policies.

Since the Court's decision in *Coy,* state courts have almost unanimously upheld the constitutionality of their statutes, despite interference with the defendant's right to face-to-face confrontation, where individualized showings of necessity are required either by statute or judicial decision.[67] One court has invalidated its state statute, and declined to reform that statute, where case-specific findings of necessity were not mandated.[68] The Louisiana Supreme Court likened the requirements of its state statute to the general legislative findings made by the Iowa statute considered in *Coy,* but refused to speculate as to the constitutionality of the Louisiana statute if specific, individualized findings were made.[69] The courts in only two states which have addressed the issue have declined to permit exceptions in this context to the defendant's right of face-to-face confrontation.[70]

The facial constitutionality of the Alaska statute, which provides for case-specific findings of necessity, thus appears free from doubt, despite the fact that the United States Supreme Court has not yet upheld such a statute.

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67. *E.g.,* State v. Vincent, 159 Ariz. 418, 768 P.2d 150 (1989) (en banc); People v. Thomas, 770 P.2d 1324 (Colo. Ct. App. 1988), *cert. granted* (Colo. Mar. 13, 1989); State v. Bonello, 210 Conn. 51, 554 A.2d 277, *cert. denied,* — U.S. —, 109 S. Ct. 2103 (1989); Glendening v. State, 536 So. 2d 212 (Fla. 1988), *cert. denied,* — U.S. —, 109 S. Ct. 3219 (1989); Brady v. State, 540 N.E.2d 59 (Ind. Ct. App. 1989); State v. Hoversten, 437 N.W.2d 240 (Iowa 1989), *cert. denied,* — U.S. — 110 S. Ct. 212 (1989); State v. Eaton, 244 Kan. 370, 769 P.2d 1157 (1989); Wildermuth v. State, 310 Md. 496, 530 A.2d 275 (1987); State v. Conklin, 444 N.W.2d 268 (Minn. 1989); State v. Crandall, 231 N.J. Super. 124, 555 A.2d 35 (Super. Ct. App. Div. 1989), *cert. granted,* 117 N.J. 143, 564 A.2d 866 (1989); State v. Tafoya, 108 N.M. 1, 765 P.2d 1183 (Ct. App. 1988), *cert. denied,* — U.S. —, 109 S. Ct. 1572 (1989); People v. Rivera, 141 Misc. 2d 1031, 535 N.Y.S.2d 909 (Sup. Ct. 1988); Ohio v. Eastham, 39 Ohio St. 3d 307, 530 N.E.2d 409 (1988); Commonwealth v. Groff, 548 A.2d 1237 (Pa. Super. Ct. 1988); State v. Taylor, 562 A.2d 445 (R.I. 1989); State v. Thomas, 150 Wis. 2d 374, 442 N.W.2d 10, *cert. denied,* — U.S. —, 110 S. Ct. 188 (1989).

68. State v. Murphy, 542 So. 2d 1373, 1376 (La. 1989).

69. *Id.*

70. Commonwealth v. Bergstrom, 402 Mass. 534, 550-51, 524 N.E.2d 366, 374-75 (1988) (basing its holding solely on the right of confrontation contained within the Massachusetts Constitution); State v. Murray, 375 S.E.2d 405, 412 (W. Va. 1988) (declining to engage in extensive analysis). In People v. Bastien, the Illinois Supreme Court held that its child shield statute violated the defendant's right of confrontation, but only insofar as it denied his right to contemporaneous cross-examination during videotaping. 129 Ill. 2d 64, —, 541 N.E.2d 670, 676 (1989). The court explicitly declined to address the right of face-to-face confrontation. *Id.* at —, 541 N.E.2d at 674.

V. CONTOURS OF THE ALASKA STATUTE

The battleground in the state courts has moved from the general constitutionality of protective statutes, which is now presumed, to the constitutionally permissible contours of these statutes. The statutes vary significantly in the reach of their provisions, and courts, as Justice O'Connor predicted in *Coy,*[71] have varied in their interpretation of the degree of necessity that is required before the defendant's right of confrontation may be compromised.

A. Coverage of the Statute

Alaska's statute may be used to protect child witnesses who were not themselves the victims of a crime.[72] While many statutes protect only child victims, a number of statutes extend as far as the Alaska statute to reach non-victim child witnesses.[73] The broad scope of statutes like Alaska's may be subject to constitutional challenge under the Court's requirement of necessity, which has yet to be defined.

The Court may find that a child witness who was not a victim could never meet the requirement of necessity. The more appropriate resolution of this issue, however, would be to adopt a flexible standard of necessity, one that considers whether the child witness was a victim as a factor in determining whether the procedures are necessary in a given case. It seems likely that the statutory threshold, whether a showing of trauma sufficient to inflict lasting psychological injury or a showing sufficient to render the child unable to communicate, will often be more difficult to meet where the child was merely a witness to a criminal offense. It would be inappropriate, however, to categorically deny such a child the protection of the statute. A court could conceivably find that under certain circumstances the requirement of necessity is met notwithstanding the fact that the child was not a victim.

In *State v. Blume,*[74] Judge White of the Superior Court of Alaska, Third Judicial District, shielded a child witness from the gaze of her parents, the defendants, despite the fact that the child was not a victim to the alleged abuse. The judge permitted the child, the sister of the victim, to testify while her parents watched from behind a one-way

71. *Coy,* — U.S. at —, 108 S. Ct. at 2805 (O'Connor, J., concurring).

72. ALASKA STAT. § 12.45.046 (Supp. 1989).

73. *E.g.,* ARIZ. REV. STAT. ANN. § 13-4251 (1989); DEL. CODE ANN. tit. 11 § 3511 (1987); IND. CODE ANN. § 35-37-4-8(d) (Burns Supp. 1989); IOWA CODE ANN. § 910 A.14 (West Supp. 1989); MASS. ANN. LAWS ch. 278 § 16D (Law. Co-op. 1989).

74. State v. Blume (Alaska Super.) (Nos. 3ANS-86-2547 Cr., 3ANS-86-1847 Cr.), *appeal docketed,* Nos. A-1799, A-1902 (Alaska Ct. App. Sept. 19, 1989).

mirror.[75] The judge ordered that the child witness be subject to full cross-examination, that the defendants be in full communication with their counsel and that the defendants be entitled to a limiting instruction concerning the child's testimony.[76] There is some question as to the sufficiency of the trial court showing that protective procedures were warranted in *Blume,* which was made without benefit of the Alaska statute or the Supreme Court's decision in *Coy.* Nonetheless, the fact pattern in *Blume,* in which the child was to testify against her parents, and there had been evidence that her parents had instructed her not to testify,[77] presents a compelling case for the appropriateness of protecting certain non-victim witnesses.

B. Substantive Standard

The substantive standard for invoking child witness protection varies substantially by state. At least six state statutes require a finding of some degree of "serious" or "severe" psychological or emotional distress.[78] Other statutes require a lesser showing.[79] Courts generally require that the child experience "much more than mere nervousness or excitement or some reluctance to testify."[80]

The Alaska statute and others like it analyze the trauma that testifying is likely to inflict by examining the ability of the child to communicate in the proceeding.[81] The Alaska statute, which treats the likelihood of psychological harm to the child as a factor[82] but ultimately focuses on the child's inability to communicate effectively

75. *Id.,* transcript at 271-78.

76. *Id.,* at 277-78.

77. *Id.,* at 277.

78. *See* GA. CODE ANN. § 17-8-55 (Supp. 1989); MD. CTS. & JUD. PROC. CODE ANN. § 9-102(a) (1989); N.J. STAT. ANN. § 2A:84A-32.4 (West Supp. 1989); N.Y. CRIM. PROC. LAW § 65.10 (McKinney Supp. 1990); OHIO REV. CODE ANN. § 2907.41 (Anderson 1987); UTAH CODE ANN. § 77-35-15.5 (Supp. 1989).

79. *E.g.,* FLA. STAT. ANN. § 92.53 (West Supp. 1989) ("substantial likelihood . . . [of] moderate emotional or mental harm if required to testify in open court"); IND. CODE ANN. § 35-37-4-8(d) (Burns Supp. 1989); MO. ANN. STAT. § 491.680(2) (Vernon Supp. 1989); N.H. REV. STAT. ANN. § 517:13-a (Supp. 1989); WIS. STAT. ANN. § 967.04(7)(a) (West Supp. 1988).

80. *E.g.,* Wildermuth v. State, 310 Md. 496, 524, 530 A.2d 275, 289 (1987); *accord* State v. Vincent, 159 Ariz. 418, 431, 768 P.2d 150, 163 (1989); State v. Eaton, 244 Kan. 370, —, 769 P.2d 1157, 1165 (1989); State v. Conklin, 444 N.W.2d 268, 274 (Minn. 1989).

81. ALASKA STAT. § 12.45.046(a) (Supp. 1989); MD. CTS. & JUD. PROC. CODE ANN. § 9-102(a)(1)(ii) (1989) ("testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate"); OHIO REV. CODE ANN. § 2907.41(B)(1)(a) (Anderson 1987). *See also* VT. R. EVID. 807(c) (Supp. 1989).

82. ALASKA STAT. § 12.45.046(b) (Supp. 1989).

under normal courtroom procedures,[83] most directly addresses the requirement of necessity imposed by the Court in *Coy*. It is therefore the type of statute most likely to survive constitutional challenge.

Some courts have further required that the trauma inflicted upon the child, or the child's inability to testify, be the result of the presence of the defendant and not the fear created simply by the size or unfamiliarity of the courtroom.[84] Where the trauma is the product of exposure to the courtroom and not to the defendant, a trial court should utilize remedies less invasive of the defendant's right of confrontation, such as adjustments to the courtroom setting or to courtroom procedure. This approach embodies the Supreme Court's requirement of necessity and provides the greatest assurance to a trial court as it attempts the difficult task of balancing the state's interest in the protection of child witnesses and the defendant's right of confrontation.

The Alaska statute does not explicitly require that the child's inability to testify effectively be attributable solely to the presence of the defendant. In fact, the statute's reference to the child's inability to effectively communicate "under normal court procedures"[85] might suggest that the court should consider trauma created by exposure to the courtroom setting. The phrase "under normal court procedures," however, also suggests consideration of the trauma created by the presence of the defendant, for it is "normal" for the defendant to be present. The interpretation least likely to run afoul of the confrontation clause is one which considers the child's inability to communicate solely on the basis of the trauma created by the presence of the defendant.

The trial court in *State v. Blume* relied in large part on the disruptive effect of the presence of the defendants on the child witness.[86] While the record in *Blume* is not entirely clear, the trial court appears, however, to have also based its findings in part on consideration of anxiety created by the circumstances.[87] Furthermore, while the court recognized that trauma would likely be inflicted on the child,[88] the

83. *Id.* § 12.45.046(a)(2).

84. State v. Vincent, 159 Ariz. 418, 432, 768 P.2d 150, 164 (1989); State v. Bonnello, 210 Conn. 51, 58, 59, 554 A.2d 277, 281, *cert. denied,* — U.S. —, 109 S. Ct 2103 (1989); State v. Jarzbek, 210 Conn. 396, 397, 554 A.2d 1094, 1095 (1989); Craig v. State, 316 Md. 551, 564, 560 A.2d 1120, 1126 (1989), *cert. granted sub nom.* Maryland v. Craig, — U.S. —, 110 S. Ct. 834 (1990); State v. Conklin, 444 N.W.2d 268, 274 (Minn. 1989); State v. Davidson, 764 S.W.2d 731, 733-34 (Mo. Ct. App. 1989); State v. Crandall, 231 N.J. Super. 124, 131, 555 A.2d 35, 39 (Super. Ct. App. Div. 1989).

85. ALASKA STAT. § 12.45.046(a) (Supp. 1989).

86. *Blume,* transcript at 237-38, 277.

87. *Id.* at 236.

88. *Id.* at 277.

expert testified only that the child "might tend to defer to [the defendants] in some way."[89] To the extent that the court relied on trauma generated by sources other than the defendants, and to the extent that trauma may not have resulted in the child's inability to communicate effectively, the court's placement of the defendants behind a one-way mirror in *Blume* may have offended the confrontation clause.

Where the child is intimidated by the courtroom itself, a cautious court should seek to employ procedural alternatives which do not compromise the defendant's right of confrontation. The Alaska statute allows the trial court to accommodate the child witness by making the courtroom less intimidating to the child in situations in which the court does not find that the child witness will be unable to testify effectively.[90] A court should rely on these less intrusive remedies where the threshold determination is not based solely on the trauma created by the presence of the defendant.

C. Evidentiary Standard

The standard by which a trial court is to make its determination that a case warrants protective procedures varies by jurisdiction. While a number of states have not yet established an evidentiary standard, most state courts that have considered the question have ruled that the finding of trauma must be established by "clear and convincing evidence."[91] In contrast, one state by statute requires only that the finding of trauma be made by a "preponderance of the evidence."[92] One state by judicial decision has suggested that the state may need to show "beyond a reasonable doubt" that protective procedures are necessary to prevent severe, long-term emotional trauma to the child.[93]

Alaska has not yet considered the appropriate standard to be used. The intermediate standard of "clear and convincing evidence" accommodates both the Court's emphasis on necessity in this context and the recognition that psychological determinations of prospective trauma may often be incapable of estimation "beyond a reasonable doubt." Alaska should therefore adopt the clear and convincing evidence standard.

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89. *Id.* at 236.

90. For a description of potential accommodations, see *supra* note 16.

91. State v. Bonello, 210 Conn. 51, 67,554 A.2d 277, 285, *cert. denied,* — U.S. —, 109 S. Ct. 2103 (1989); State v. Eaton, 244 Kan. 370, —, 769 P.2d 1157, 1167-68 (1989); State v. Crandall, 231 N.J. Super. 124, 130-31, 555 A.2d 35, 39 (Super. Ct. App. Div. 1989); State v. Taylor, 562 A.2d 445, 453 (R.I. 1989).

92. N.H. REV. STAT. ANN. § 517:13-a (Supp. 1989).

93. Commonwealth v. Bergstrom, 402 Mass. 534, 550-51, 524 N.E.2d 366, 376 (1988) (basing its holding solely on its construction of the confrontation clause of the Massachusetts Constitution).

D. Basis for Determination

A final issue in construction of child witness protection statutes is the evidence on which a court may permissibly base its constitutionally required finding that protective procedures are necessary to further the state's important public policies. The Minnesota Supreme Court has recommended that the finding be based on consideration of several sources of information:

> The trial judge is permitted, if not encouraged, to question the child witness in camera if necessary. Additional testimony should be taken from witnesses having personal knowledge of the child. Their testimony must be about the consequences of having the child testify in the presence of the defendant, must be specific, and must be based on their experience with that particular child. This pertains to expert testimony as well. While expert testimony is not required in every case, it may be necessary in cases where the cause of the child's testimonial difficulties and trauma is not clear.[94]

Minnesota therefore advises the judge to consider his own questioning of the child witness and lay and expert testimony about the likely effects of the presence of the defendant on the child. The Minnesota procedure does not require that the child initially confront the defendant before the judge may make this determination.[95]

The trial court in *State v. Blume* considered both the circumstances of the case and expert testimony as to the likely effect of confrontation on the child witness.[96] The court did not require that the child initially confront the defendant in making its determination.[97]

In contrast, the highest court of Maryland has recently held that the Maryland statute may not ordinarily be invoked unless the child witness is initially questioned in the presence of the defendant, whether in or outside of the courtroom.[98] The trial judge may support his finding with expert testimony, but expert testimony may not normally take the place of examination of the child in the presence of the defendant.[99]

The Maryland procedure is undesirable because it drastically undercuts the policy sought to be advanced by the state: the protection of child witnesses resulting from confrontation with the defendant. In essence, the Maryland court construes too restrictively the Supreme Court's requirement of necessity before protective procedures may be invoked.

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94. State v. Conklin, 444 N.W.2d 268, 274 (Minn. 1989).

95. *See id.*

96. *Blume,* transcript at 275-77.

97. *See id.*

98. Craig v. State, 316 Md. 551, 566-67, 560 A.2d 1120, 1127-28 (1989), *cert. granted sub nom.* Maryland v. Craig, — U.S. —, 110 S. Ct. 834 (1990).

99. *Id.*

VI. THE ISSUES PRESENTED BY *MARYLAND V. CRAIG*

On January 16, 1990, the United States Supreme Court granted certiorari to hear the case of *Maryland v. Craig.*[100] The Court will consider for the first time the constitutionality of a child witness protection statute similar to the Alaska statute, which requires individualized showings of necessity.

Under the Maryland statute[101] protective procedures may be invoked when "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."[102] Applying this standard, the trial judge in *Craig* found the use of closed circuit television necessary for four children whose ages ranged from four to seven. He based his finding on expert testimony concerning the ability of the children to communicate effectively.[103] The defendant was convicted under this procedure.[104]

The Maryland Court of Appeals reversed the conviction of the defendant and remanded for a new trial. The court rejected the trial court's findings because the trial judge did not question the child himself, he did not observe the child in the presence of the defendant, he did not consider alternatives less intrusive to the defendant's right of confrontation, and he relied on expert testimony which did not discriminate between trauma created by the courtroom experience and trauma created by the presence of the defendant.[105] The court held that only trauma created by the defendant was sufficient to warrant the use of closed circuit television outside the presence of the defendant.[106]

The Maryland high court mandated an exceptionally strong showing of necessity, most notably in its requirement of an initial confrontation between the defendant and the child, a requirement the majority of courts have not imposed.[107] The Maryland position may

100. — U.S. —, 110 S. Ct. 834 (1990).

101. MD. CTS. & JUD. PROC. CODE ANN. § 9-102 (1989).

102. *Id.* § 9-102(a)(1)(ii).

103. *Craig,* 316 Md. at 568, 560 A.2d at 1128.

104. *Id.* at 556, 560 A.2d at 1122.

105. *Id.* at 568, 560 A.2d at 1128. The expert testified, for instance, that as to one child, "coming into the courtroom where she would be faced with the alleged perpetrator *and a courtroom of strangers* [she] would be unable to talk about what happened to her." As to another, the expert concluded that "he would have great difficulty *in talking in front of people,* particularly in front of Mrs. Craig [the defendant] . . . ." *Id.* at 569, 560 A.2d at 1129 (emphasis in original).

106. *Id.* at 570, 560 A.2d at 1129.

107. *See* State v. Vincent, 159 Ariz. 418, 768 P.2d 150 (1989) (en banc); People v. Thomas, 770 P.2d 1324 (Colo. Ct. App. 1988), *cert. granted* (Colo. Mar. 13, 1989); State v. Bonello, 210 Conn. 51, 554 A.2d 277, *cert. denied,* — U.S. —, 109 S. Ct. 2103 (1989); Glendening v. State, 536 So. 2d 212 (Fla. 1988), *cert. denied,* — U.S. —, 109 S.

approximate the position of Justice Scalia, given the importance he attributed to the core right of confrontation in *Coy,* his refusal to identify exceptions to this core right and the value he perceived in the capacity of face-to-face confrontation to ensure "the integrity of the factfinding process."[108] The Maryland position may create a more demanding standard of necessity than would Justice O'Connor, in light of her expressed concern for the protection of child witnesses, her unwillingness to embrace Justice Scalia's conception of the core nature of the face-to-face confrontation right at issue and her general willingness to admit that exceptions to the right of confrontation exist in this context.[109] The Maryland position is certainly more onerous than that of the two dissenting Justices, who would not even require that an individualized showing of necessity be made.[110]

The degree of necessity required in *Craig,* while it might arguably approximate the one drawn by Justice Scalia in *Coy,* is overly demanding because it too heavily favors the defendant at the expense of the child. Justice Scalia's opinion in *Coy* implicitly requires a strong showing of necessity before protective procedures may be used, assuming that Justice Scalia would in fact find that such procedures may be invoked in certain circumstances. The balance he strikes is in part a function of the degree to which he believes face-to-face confrontation benefits the criminal defendant. Because this confrontation is not cost-free, exacting a price both in terms of its psychological harm to the child and its potential to so traumatize the child witness as to result in the loss of truthful testimony, a court must weigh these competing objectives. This balance will depend in part on the court's belief in the accuracy and truthfulness of child witnesses, and the court's belief in the ability of the trier of fact to detect lying by child witnesses absent confrontation.

Ct. 3219 (1989); Brady v. State, 540 N.E.2d 59 (Ind. Ct. App. 1989); State v. Hoversten, 437 N.W.2d 240 (Iowa), *cert. denied,* — U.S. —, 110 S. Ct. 212 (1989); State v. Eaton, 244 Kan. 370, 769 P.2d 1157 (1989); Wildermuth v. State, 310 Md. 496, 530 A.2d 275 (1987); State v. Conklin, 444 N.W.2d 268 (Minn. 1989); State v. Crandall, 231 N.J. Super. 124, 555 A.2d 35 (Super. Ct. App. Div.), *cert. granted,* 117 N.J. 143, 564 A.2d 866 (1989); State v. Tafoya, 108 N.M. 1, 765 P.2d 1183 (Ct. App. 1988), *cert. denied,* — U.S. —, 109 S. Ct. 1572 (1989); People v. Rivera, 141 Misc. 2d 1031, 535 N.Y.S.2d 909 (Sup. Ct. 1988); Ohio v. Eastham, 39 Ohio St. 3d 307, 530 N.E.2d 409 (1988); Commonwealth v. Groff, 548 A.2d 1237 (Pa. Super. Ct. 1988); State v. Thomas, 150 Wis. 2d 374, 442 N.W.2d 10, *cert. denied,* — U.S. —, 110 S. Ct. 188 (1989). *But see* State v. Taylor, 562 A.2d 445, 453 (R.I. 1989) (interpreting the confrontation clause of the Rhode Island Constitution).

108. *See Coy,* — U.S. at —, 108 S. Ct. at 2800-03.

109. *See id.* at —, 108 S. Ct. at 2803-05 (O'Connor, J., concurring).

110. *See id.* at —, 108 S. Ct. at 2809 (Blackmun, J., dissenting).

Empirical evidence suggests that young children rarely fabricate accounts of child abuse or child sexual abuse.[111] One commentator has expressed concern over the suggestiveness of pretrial investigative techniques in sexual abuse cases, such as the use of anatomically correct dolls, which may "stimulate fantasy and not recall."[112] In these cases, however, courts have recognized that the frequent ability of victims of sexual abuse to testify accurately as to matters of sexuality not ordinarily understood by children of their age and experience is one guarantee of reliability.[113]

From a premise that young children will generally testify truthfully, it follows that the integrity of the factfinding process will be enhanced by abridging the defendant's right of face-to-face confrontation where that confrontation will result in the child's inability to communicate. Statutes requiring a showing of inability to communicate will thus contribute to more accurate truthfinding. This fact is not dispositive, because our system of justice decisively favors the defendant in criminal proceedings. To the extent, however, that Justice Scalia may overvalue the need for physical confrontation to expose the untruthful witness, the concerns for the welfare of the truthful witness and for the state's interest in eliciting this testimony should be accorded more weight than apparently given them by Justice Scalia in his opinion in *Coy.* Similarly, the balance struck by Maryland in *Craig,* requiring an initial face-to-face confrontation between the defendant and the child before protective measures may be used, is inappropriate because it overvalues the utility of that confrontation in determining the truth and undervalues society's interest in protecting the welfare of the child witness.

Justice Scalia also predicated his rigorous requirement of necessity in *Coy* on his conception of the right of face-to-face confrontation at trial as the core right of the confrontation clause.[114] His elevation of this right above those rights implicit in the clause, such as the right to cross-examine an accuser and the right to exclude certain out-of-

111. *See* Note, *Expert Testimony in Child Sexual Abuse Prosecutions: A Spectrum of Uses,* 68 B.U.L. REV. 155, 175-76 (1988); Comment, *Child Witnesses in Sexual Abuse Proceedings: Their Capabilities, Special Problems, and Proposals for Reform,* 13 PEPPERDINE L. REV. 157, 158-60 (1985) (suggesting that child witnesses are generally as reliable as adults). *See generally* Myers, *supra* note 51, at 186-92 (considering both the veracity and suggestibility of children).

112. *See* Christiansen, *The Testimony of Child Witnesses: Fact, Fantasy, and the Influence of Pretrial Interviews,* 62 WASH. L. REV. 705, 711 (1987).

113. *E.g.,* United States v. Dorian, 803 F.2d 1439, 1445 (8th Cir. 1986) (considering the reliability of hearsay statements by a child); State v. McCafferty, 356 N.W.2d 159, 164 (S.D. 1984), *cert. denied,* 476 U.S. 1172 (1986).

114. Coy v. Iowa, — U.S. at —, 108 S. Ct. at 2802-03.

court statements, was not embraced by four members of the Court.[115] Justice Scalia's conception of the right to face-to-face confrontation at trial as the "irreducible literal meaning of the clause"[116] is conceptually unsatisfying because it is an overly formalistic reading of the clause.

Justice Scalia rejected the contention that the Court had ever identified exceptions to the core right of face-to-face confrontation at trial.[117] The exceptions the Court has recognized to the rights implicit in the clause, however, such as exceptions to the right to exclude out-of-court statements, necessarily implicate the core right identified by Justice Scalia.[118] When, for example, hearsay evidence is admitted, the defendant is denied his "core" right to face-to-face confrontation, and yet the Court has not hesitated to allow such evidence in a variety of situations.

The Court articulated the standard by which out-of-court statements may be admitted in *Ohio v. Roberts.*[119] Despite Justice Scalia's conception of the core right of confrontation as qualitatively different from the implicit right to exclude certain out-of-court statements, courts have often applied the functional equivalent of the *Roberts* test of unavailability in determining whether procedural protection is necessary for the protection of the child and for the production of child witness testimony.[120]

The Court in *Roberts* required that for an out-of-court statement to be admitted which is not itself a "firmly rooted" hearsay exception, the proponent must demonstrate that the witness is unavailable and that the statement has independent guarantees of trustworthiness.[121] As applied in the context of child witnesses, "unavailability" is measured by the inability of the child witness to testify effectively in the presence of the defendant.[122] The requirement of reliability is generally held to be satisfied by the circumstances under which the child's

115. *Id.* at —, 108 S. Ct. at 2804-05 (O'Connor, J., concurring); *id.* at —, 108 S. Ct. at 2806 (Blackmun, J., dissenting).

116. *Id.* at —, 108 S. Ct. at 2803.

117. *Id.* at —, 108 S. Ct. at 2802.

118. *See, e.g.,* State v. Eaton, 244 Kan. 370, —, 769 P.2d 1157, 1166 (1989).

119. 448 U.S. 56, 66 (1980).

120. *See, e.g.,* State v. Vincent, 159 Ariz. 418, 432, 768 P.2d 150, 164 (1989) (a finding that a child would be so traumatized as to be unable to communicate reasonably held "tantamount to a finding of unavailability in the *Roberts* sense") (quoting Wildermuth v. State, 310 Md. 496, 519, 530 A.2d 275, 286 (1987)); State v. Eaton, 244 Kan. 370, —, 769 P.2d 1157, 1166 (1989).

121. 448 U.S. at 66.

122. *E.g.,* Wildermuth v. State, 310 Md. 496, 514-16, 530 A.2d 275, 284-85 (1987).

testimony is taken under the protective procedures: under oath, subject to cross-examination and in the view of the trier of fact who may judge the demeanor of the witness as he or she testifies.[123]

By adopting the conceptual framework of *Roberts,* courts have implicitly rejected any substantive distinction between the core right of face-to-face confrontation at trial and those rights which are implicit in the clause. Because Justice Scalia attributed preeminent significance to the "irreducible literal meaning of the clause,"[124] he required too great a showing by the state before an exception to this literal meaning could be identified. Justice Scalia's opinion in *Coy* should therefore not be read to impose a burden as onerous as the Maryland high court has imposed, requiring an initial confrontation between the defendant and the child before protective procedures may be invoked. The more desirable approach, that taken by the vast majority of states and the trial court in *Blume,* is to allow an individual showing of necessity to be made absent an initial confrontation between the defendant and the child.

The *Craig* case will present the Court with its first opportunity to address the constitutionality of a child witness protection statute which, like Alaska's, requires individualized showings of necessity. While it seems clear that the Court will uphold the statute as constitutional on its face, clarification is strongly needed as to the permissible contours of the protective statute. Courts have been given little guidance in construing their state's statute in harmony with the requirements of the right of confrontation as identified in *Coy.* Uncertainty may prompt courts to require more than is necessary at the expense of the interests of the state. As a practical matter, uncertainty may also have a chilling effect on efforts to invoke protective procedures by deterring prosecutors and guardians ad litem, fearful of appellate court reversal, from making use of protective statutes where arguably they should. This chilling effect may be particularly strong in the case of child witnesses because of the severe consequences that may flow from appellate court reversal. Several years may pass between the alleged incidents and the time of trial, and even more years may pass as the defendant appeals his conviction. Where an appellate court rules that the defendant is entitled to a new trial because of an infringement of his right of confrontation, the child may be subjected to the trauma of a second trial. The state may be unable to successfully prosecute the defendant because the child may be unable to recall events which occurred years before. The parties or the judge may therefore be reluctant to protect the child at the initial trial, to the detriment of the

123. *Id.*
124. *Coy,* — U.S. at —, 108 S. Ct. at 2803.

child. An explicit pronouncement by the Court would reduce uncertainty and eliminate the potential for uncertainty to produce a chilling effect.

The Court's decision in *Craig* will almost certainly provide greater guidance to the states as to what the confrontation clause requires. Because of the demanding requirement of necessity mandated by the *Craig* court, it appears likely that the Court will uphold the constitutionality of the Maryland scheme, but the decision is difficult to predict with precision. To the extent that the Maryland court was improperly construing the sixth amendment, the Court may overturn the decision. To the extent that the Maryland court was construing Maryland law, the Court may defer to its interpretation. The decision could have a profound impact on the manner in which courts in every state interpret their child witness protection statutes. The decision in *Craig* will be particularly instructive as Alaska courts undertake to construe the Alaska statute.

VII. CONCLUSION

Alaska's child witness protection statute attempts to protect children who testify from the trauma associated with confronting the defendant in court. The statute as drafted does not impermissibly compromise the defendant's right of confrontation as secured by the sixth amendment. Careful construction of the statute by the Alaska courts will shield the statute from constitutional challenge. The United States Supreme Court, in its upcoming decision in *Maryland v. Craig,* will likely assist Alaska courts in determining the appropriate scope of the Alaska statute.

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