St. Mary's Law Journal

Volume 22 | Number 2 Article 8

1-1-1990

Allowing a Child Abuse Victim to Testify Via One-Way Closed-Circuit Television Does Not Violate a Criminal Defendant's Sixth Amendment Confrontation Clause Right If the Trial Court Specifically Finds Such a Procedure Necessary to Protect the Child's Welfare.

Lisa R. Miller

CONSTITUTIONAL LAW—Confrontation Clause—Allowing a Child Abuse Victim to Testify Via One-Way Closed-Circuit Television Does Not Violate a Criminal Defendant's Sixth Amendment Confrontation Clause Right if the Trial Court Specifically Finds Such a Procedure Necessary to Protect the Child's Welfare.

Maryland v. Craig,
__ U.S. __, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990).

Sandra Ann Craig was charged with child abuse and sexual abuse of Brooke Etze, a six-year-old who attended a pre-school center owned and operated by Craig.[1] Prior to trial, the state moved to invoke a Maryland statute which allows the victims of alleged child abuse to testify via one-way closed-circuit television.[2] In considering the state's motion, the trial court admitted expert testimony that Brooke and the other children involved in

---

1. Maryland v. Craig, __ U.S. __, __, 110 S. Ct. 3157, 3160, 111 L. Ed. 2d 666, 675 (1990).

2. *Id.* at __, 110 S. Ct. at 3160-61, 111 L. Ed. 2d at 675. The procedure is found in § 9-102 of the Courts and Judicial Proceedings Article of the Annotated Code of Maryland (1989). Section 9-102 provides that:

> (a)(1) In a case of abuse of a child as defined in § 5-701 of the Family Law Article or Article 27, § 35A of the Code, a court may order that the testimony of a child victim be taken outside the courtroom and shown in the courtroom by means of a closed circuit television if:
>
> (i) The testimony is taken during the proceeding; and
>
> (ii) The judge determines that testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate.
>
> (2) Only the prosecuting attorney, the attorney for the defendant, and the judge may question the child.
>
> (3) The operators of the closed circuit television shall make every effort to be unobtrusive.
>
> (b)(1) Only the following persons may be in the room with the child when the child testifies by closed circuit television:
>
> (i) The prosecuting attorney;
>
> (ii) The attorney for the defendant;
>
> (iii) The operators of the closed circuit television equipment; and
>
> (iv) Unless the defendant objects, any person whose presence, in the opinion of the court, contributes to the well-being of the child, including a person who has dealt with the child in a therapeutic setting concerning the abuse.
>
> (2) During the child's testimony by closed circuit television, the judge and the defendant shall be in the courtroom.

the case would suffer serious emotional distress should they be required to testify in the courtroom in the presence of Craig.[3] Despite the defendant's objection to the state's motion,[4] the trial court permitted Brooke and the other children to testify via one-way closed-circuit television.[5] The jury subsequently convicted Craig on all counts.[6]

---

(3) The judge and the defendant shall be allowed to communicate with the persons in the room where the child is testifying by any appropriate electronic method.

(c) The provisions of this section do not apply if the defendant is an attorney pro se.

(d) This section may not be interpreted to preclude, for purposes of identification of a defendant, the presence of both the victim and the defendant in the courtroom at the same time.

MD. CTS. & JUD. PROC. CODE ANN. § 9-102 (1989). The statute was enacted to facilitate the testimony of children in child and sexual abuse cases. Craig v. State, 560 A.2d 1120, 1121 (Md. 1989), *vacated and remanded sub nom.* Maryland v. Craig, __ U.S. __, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990). When the closed-circuit television procedure is used, the child witness, prosecutor, and defense counsel are in one room, while the jury, judge, and defendant are in the courtroom. *Id.* The child witness is questioned by counsel, and a video monitor displays the testimony of the witness to the people in the courtroom. *Id.* Although the defendant can see the child witness and communicate with defense counsel through electronic devices, the child witness is unable to see the defendant. Maryland v. Craig, __ U.S. __, __, 110 S. Ct. 3157, 3161, 111 L. Ed. 2d 666, 676 (1990).

3. *Id.* at __, 110 S. Ct. at 3161, 111 L. Ed. 2d at 676. Although Craig was on trial for offenses against Brooke only, other children, also allegedly abused by Craig, were called to testify at trial and provide evidence of other crimes. *See* Craig v. State, 544 A.2d 784, 787, 806 (Md. Ct. Spec. App. 1988), *rev'd and remanded*, 560 A.2d 1120 (Md. 1989), *vacated and remanded sub nom.* Maryland v. Craig, __ U.S. __, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990). Brooke's child therapist said that Brooke feared Craig would harm her or her family, and that Craig's presence in the room would make it difficult for Brooke to testify. *See* Brief for Petitioner at 9, Maryland v. Craig, __ U.S. __, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990) (No. 89-478). Additionally, the therapist said that during preparation for trial, Brooke's fear had caused disruption in her breathing. *Id.* The therapist believed that if Brooke were required to testify in Craig's presence, Brooke most likely would curl up into a ball and refuse to speak. *Id.* at 9-10. Experts testified that the three other children would be unable to communicate effectively because of fear, depression, and anxiety which would result if they were forced to testify in front of Craig. *Id.* at 10. The trial judge relied solely on expert testimony and, although he examined the children to determine their competency as witnesses, he did not place them on the witness stand in the presence of the defendant and personally observe their behavior. *See* Craig v. State, 560 A.2d 1120, 1122, 1128 n.11 (Md. 1989), *vacated and remanded sub nom.* Maryland v. Craig, __ U.S. __, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990).

4. *Craig*, __ U.S. at __, 110 S. Ct. at 3161, 111 L. Ed. 2d at 676. Craig objected on confrontation clause grounds. *Id.*

5. Maryland v. Craig, __ U.S. __, 110 S. Ct. 3157, 3162, 111 L. Ed. 2d 666, 676 (1990). Brooke's testimony was taken in the judge's chambers in accordance with the established procedures and the defendant, judge, and jury viewed the child witness' testimony on television monitors from the courtroom. Craig v. State, 544 A.2d 784, 799 (Md. Ct. Spec. App. 1988), *rev'd and remanded*, 560 A.2d 1120 (Md. 1989), *vacated and remanded sub nom.* Maryland v. Craig, __ U.S. __, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990). Craig communicated to her defense counsel through a private telephone line. *Id.*

6. *Craig*, __ U.S. at __, 110 S. Ct. at 3162, 111 L. Ed. 2d at 676. The counts included

The Court of Special Appeals of Maryland affirmed the conviction and held that permitting the children to testify via one-way closed-circuit television did not violate Craig's confrontation clause rights.[7] The appellate court agreed with the trial court's reasoning that forcing the children to testify in court, and in Craig's presence, would have traumatized them and prevented effective communication.[8] The Court of Appeals of Maryland, the state's highest court, reversed and remanded because the state's evidence did not sufficiently justify either the use of Maryland's closed-circuit television procedure or the consequent denial of the defendant's right to a face-to-face encounter with her accusers.[9] However, the court rejected Craig's broad claim that the confrontation clause requires a face-to-face encounter between the defendant and his accusers in every case.[10] The United States Supreme Court granted certiorari to determine whether, in a child abuse case, the admission of a child's testimony via closed-circuit television violated the defendant's sixth amendment confrontation rights.[11] Held—*vacated and remanded*. Allowing a child abuse victim to testify via one-way closed-circuit television does not violate a criminal defendant's sixth amendment confrontation clause right if the trial court specifically finds such a procedure necessary to protect the child's welfare.[12]

The portion of the sixth amendment commonly referred to as the "confrontation clause" provides that "[i]n all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against

---

child abuse, first and second-degree sexual offenses, perverted sexual practice, assault, and battery. *Id.* at __, 110 S. Ct. at 3160, 111 L. Ed. 2d at 675.

7. *See* Craig v. State, 544 A.2d 784, 798-800 (Md. Ct. Spec. App. 1988), *rev'd and remanded*, 560 A.2d 1120 (Md. 1989), *vacated and remanded sub nom.* Maryland v. Craig, __ U.S. __, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990) (where face-to-face testimony would cause child emotional distress and interfere with communication, confrontation right not violated by one-way television procedure). Craig raised a total of seven issues on appeal and charged that her trial counsel was constitutionally incompetent. *Id.* at 787. The court rejected each of the claims. *Id.*

8. *Id.*

9. *See* Maryland v. Craig, __ U.S. __, __, 110 S. Ct. 3157, 3162, 111 L. Ed. 2d 666, 676-77 (1990) (appellate court held state's showing did not meet threshold requirement to invoke statute). The Court of Appeals of Maryland stated that the trial judge must determine that testifying in the presence of the defendant would cause the child witness emotional distress severe enough to prevent communication. Craig v. State, 560 A.2d 1120, 1127 (Md. 1989), *vacated and remanded sub nom.* Maryland v. Craig, __ U.S. __, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990). The court reasoned that the expert testimony had not focused sufficiently on the effect the defendant's presence would have on the children, and the expert testimony could not be supplemented by judicial observation because the trial judge did not personally observe the child witnesses while each was questioned in the defendant's presence. *Id.* at 1129.

10. *Craig*, __ U.S. at __, 110 S. Ct. at 3162, 111 L. Ed. 2d at 676-77.

11. Maryland v. Craig, __ U.S. __, 110 S. Ct. 834, 107 L. Ed. 2d 830 (1990).

12. *Craig*, __ U.S. at __, 110 S. Ct. at 3171, 111 L. Ed. 2d at 688.

him. . . ."[13] The right to confront one's accusers in a criminal proceeding is rooted in early Roman law, and subsequently developed a substantial foundation in English common law.[14] The original purpose of the confrontation right was to prevent the accusers in a criminal proceeding from using ex parte affidavits or depositions against a defendant, in lieu of personal testimony.[15] Several early American state constitutions incorporated provisions protecting the common law rights of criminal defendants, including the right to confront one's accusers, and some of the drafters of the federal Constitution demanded that it also include those same rights.[16] However, the Con-

---

13. U.S. CONST. amend. VI.

14. *See* Coy v. Iowa, 487 U.S. 1012, 1015-16 (1988) (Romans granted accused face-to-face meeting with accusers; English recognized confrontation right); Greene v. McElroy, 360 U.S. 474, 496 n.25 (1959) (confrontation right existed in Biblical times under Roman law); Salinger v. United States, 272 U.S. 542, 548 (1926) (confrontation right was common law right); *see also* Pollitt, *The Right of Confrontation: Its History and Modern Dress*, 8 J. PUB. L. 381, 384-88 (1959) (citing instances of confrontation right in Biblical and Roman times and describing modified form of confrontation brought to England by Normans). *See generally* F. HELLER, THE SIXTH AMENDMENT TO THE CONSTITUTION 3-12 (1968) (discussing background of sixth amendment in English law). The common law right of confrontation had recognized exceptions and limitations. *See Salinger*, 272 U.S. at 548 (exceptions existed in common law confrontation right); Dowdell v. United States, 221 U.S. 325, 330 (1911) (confrontation clause is general rule of law with well-recognized exceptions); *see also* Robertson v. Baldwin, 165 U.S. 275, 281-82 (1897) (Bill of Rights was intended to embody guarantees of English law without disregarding exceptions resulting from necessities of case); 5 J. WIGMORE, EVIDENCE § 1397, at 158 (J. Chadbourn rev. 1974) (common law recognized confrontation right and intended exceptions).

15. *See, e.g.*, California v. Green, 399 U.S. 149, 156 (1970) (practice of trying defendant based on ex parte affidavits gave rise to confrontation clause); *Dowdell*, 221 U.S. at 330 (sixth amendment confrontation right intended to prevent use of ex parte affidavits or depositions to convict accused); Mattox v. United States, 156 U.S. 237, 242 (1895) (confrontation provision made in order to exclude evidence by ex parte affidavits or depositions); *see also* Jonakait, *Restoring the Confrontation Clause to the Sixth Amendment*, 35 UCLA L. REV. 557, 578 (1988) (clause aims to prevent ex parte affidavits); Note, *The Revision of Article 38.071 After* Long v. State: *The Troubles of a Child Shield Law in Texas*, 40 BAYLOR L. REV. 267, 270-71 (1988) (clause's objective is to prevent use of ex parte affidavits and depositions in place of witness' direct testimony). The confrontation clause is believed to have originated as a reaction to the trial of Sir Walter Raleigh. *See* F. HELLER, THE SIXTH AMENDMENT TO THE CONSTITUTION 104 (1968). Raleigh was accused of conspiring with Lord Cobham to commit treason. *See* Pollitt, *The Right of Confrontation: Its History and Modern Dress*, 8 J. PUB. L. 381, 388 (1959). While being tortured, Cobham confessed to conspiring with Raleigh. Cobham later repudiated the confession in a letter written to Raleigh, but Cobham's original confession was used as evidence against Raleigh. Raleigh's demands at trial that Cobham be brought before him for questioning were denied, and Raleigh was convicted and subsequently executed. *Id.* at 388-89.

16. *See Green*, 399 U.S. at 175 (Harlan, J., concurring) (sixth amendment guarantees found in colonial constitutions); *Ex parte* Milligan, 71 U.S. 2, 120 (1866) (original Constitution faced severe opposition because it failed to protect personal liberties later embodied in sixth amendment); *see also* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 590 (1980)(Bren-

stitution contained no such provision[17] until the sixth amendment was adopted.[18] Although the sixth amendment originally only affected federal criminal trials, the Supreme Court eventually applied the sixth amendment's confrontation right to state criminal proceedings through the fourteenth amendment.[19]

The United States Supreme Court has observed that the confrontation clause ensures the reliability of evidence presented at trial.[20] Accordingly,

---

nan, J., concurring) (colonial charters and constitutions provided accused certain rights, including open trial proceedings). *See generally* F. HELLER, THE SIXTH AMENDMENT TO THE CONSTITUTION 22-25 (1968) (discussing particular provision of each state's constitution and opposition to federal Constitution); Pollitt, *The Right of Confrontation: Its History and Modern Dress*, 8 J. PUB. L. 381, 398 (1959) (on recommendation of Second Continental Congress, states adopted constitutions with common law rights).

17. *See Green*, 399 U.S. at 175 (Harlan, J., concurring) (sixth amendment added after ratification of Constitution); *Milligan*, 71 U.S. at 120 (Constitution failed to protect personal liberties). The drafters at the Constitutional Convention of 1787 provided for a trial by jury in federal criminal cases but made no attempt to include any details of criminal procedure. *See* Pollitt, *The Right of Confrontation: Its History and Modern Dress*, 8 J. PUB. L. 381, 399 (1959) (original Constitution silent on procedure other then requiring trial by jury and two witnesses to convict for treason). *See generally* F. HELLER, THE SIXTH AMENDMENT TO THE CONSTITUTION 24 (1968) (proposed Constitution included no criminal procedure details).

18. U.S. CONST. amend. VI. *See* United States v. Barracota, 45 F. Supp. 38, 38 (S.D.N.Y. 1942) (sixth amendment added common law confrontation right to Constitution); State v. Gaetano, 114 A. 82, 84 (Conn. 1921) (sixth amendment designed to incorporate common law principles regarding evidence). *See generally* F. HELLER, THE SIXTH AMENDMENT TO THE CONSTITUTION 28-30 (1968) (Bill of Rights added to Constitution to appease opposition; sixth amendment provided procedural safeguards to accused); Note, *Placing a Child Victim of Sexual Abuse Behind a Screen During Courtroom Testimony As Violation of Sixth Amendment Confrontation Clause*, 57 U. CIN. L. REV. 1537, 1542 (1989) (sixth amendment provides procedural safeguards, such as cross-examination). James Madison drafted the proposal for the sixth amendment based upon the Virginia Bill of Rights written by George Mason and submitted by the Virginia ratifying committee. *See* F. HELLER, THE SIXTH AMENDMENT TO THE CONSTITUTION 28, 34 (1968). The proposed amendment was adopted without recorded debate. *See* California v. Green, 399 U.S. 149, 176 (1970)(Harlan, J., concurring) (drafters primarily concerned with political consequences of proposals; confrontation right, along with other sixth amendment rights, approved without debate); *see also* Massaro, *The Dignity Value of Face-to-Face Confrontations*, 40 U. FLA. L. REV. 863, 867 (1988) (no debate on sixth amendment).

19. *See* Dutton v. Evans, 400 U.S. 74, 79 (1970) (recognizing sixth amendment as obligatory on states); Harrington v. California, 395 U.S. 250, 252 (1969) (confrontation right applies to state trials by incorporation in due process clause of fourteenth amendment); Pointer v. Texas, 380 U.S. 400, 403 (1965) (confrontation is fundamental right obligatory on states). *See generally* Annotation, *Federal Constitutional Right to Confront Witnesses—Supreme Court Cases*, 98 L. Ed. 2d 1115, 1134 (1990) (fourteenth amendment's due process clause makes sixth amendment's confrontation clause applicable to state criminal prosecutions); Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 494 (1977) (sixth amendment rights extended to states).

20. *See* Lee v. Illinois, 476 U.S. 530, 540 (1986) (confrontation right is functional right promoting reliability); Ohio v. Roberts, 448 U.S. 56, 65 (1979) (underlying purpose of clause is

the Court has ordinarily required that a witness testify under oath before the accused[21] within the jury's view,[22] and be subject to cross-examination.[23] Although "confront" has generally been interpreted to mean "face-to-

---

to ensure accuracy in fact-finding process); *Dutton*, 400 U.S. at 89 (practical concern of confrontation clause is to provide accuracy in truth-determining process); *see also* Jonakait, *Restoring the Confrontation Clause to the Sixth Amendment*, 35 UCLA L. REV. 557, 578 (1988) (clause's mission is accuracy in truth-finding process); Myers, *Hearsay Statements by the Child Abuse Victim*, 38 BAYLOR L. REV. 775, 820 (1986) (confrontation right's purpose is to ensure accuracy). Accuracy is promoted by allowing the defendant to test evidence which is adverse to him. *See Roberts*, 448 U.S. at 65 (clause allows defendant to test evidence and thus ensures accuracy of facts).

21. *See* California v. Green, 399 U.S. 149, 158 (1970) (confrontation ensures witness will testify in person under oath); Bridges v. Wixon, 326 U.S. 135, 153 (1945) (rules requiring statements be made under oath provide important safeguards); State v. Kaufman, 304 So. 2d 300, 303 (La. 1974) (underlying purpose of confrontation right ensures that witness will testify under oath); *see also* Note, *The Use of Prior Recorded Testimony and the Right of Confrontation*, 54 IOWA L. REV. 360, 365 (1968) (accused is entitled to face witness against him). *See generally* Myers, *Hearsay Statements by the Child Abuse Victim*, 38 BAYLOR L. REV. 775, 826-28 (1986) (witness' presence in open court is element of effective confrontation). Testifying under oath impresses the witness with the seriousness of the matter and protects against perjury. *Green*, 399 U.S. at 158. Requiring the witness to testify in person also protects against perjury by making it more difficult to lie. *See* Coy v. Iowa, 487 U.S. 1012, 1019 (1988) (more difficult to lie to person to his face); *see also* Note, *The Use of Prior Recorded Testimony and the Right of Confrontation*, 54 IOWA L. REV. 360, 365 (1968) (witness less inclined to lie in face-to-face confrontation). Scholars have not accepted the theory that the confrontation right is for the purpose of allowing the accused to disturb the witness by glaring at him. *See generally* 5 J. WIGMORE, EVIDENCE § 1395, at 153 n.2 (J. Chadbourn rev. 1974) (confrontation no longer designed for emotional effect); Note, *Placing a Child Victim of Sexual Abuse Behind a Screen During Courtroom Testimony as Violation of Sixth Amendment Confrontation Clause*, 57 U. CIN. L. REV. 1537, 1539 (1989) (confrontation not for "idle purpose of gazing upon the witness, or being gazed upon by him").

22. *See, e.g.*, *Green*, 399 U.S. at 158 (confrontation permits jury to view behavior of witnesses as they testify); Douglas v. Alabama, 380 U.S. 415, 418-19 (1965) (confrontation between witness and accused allows jury to take into account manner in which witness testifies); Mattox v. United States, 156 U.S. 237, 242-43 (1895) (clause's objective to require witness to testify face-to-face with jury, so they can view his demeanor and determine truthfulness). *See generally* 5 J. WIGMORE, EVIDENCE § 1395, at 153 (J. Chadbourn rev. 1974) (testifying witness' personal appearance allows jurors to obtain otherwise incommunicable evidence regarding witness' deportment); Myers, *Hearsay Statements by the Child Abuse Victim*, 38 BAYLOR L. REV. 775, 825-26 (1986) (opportunity for jury to view witness is element of confrontation).

23. *See, e.g.*, Davis v. Alaska, 415 U.S. 308, 316 (1974) (cross-examination essential for confrontation and is means by which witness' testimony tested for truth); *Green*, 399 U.S. at 158 (confrontation necessitates that witness submit to cross-examination); *Douglas*, 380 U.S. at 418 (primary interest of confrontation clause secured by cross-examination). *See generally* Myers, *Hearsay Statements by the Child Abuse Victim*, 38 BAYLOR L. REV. 775, 824 (1986) (cross-examination an element of confrontation); Note, *Closed-Circuit Television and Videotape Transmission of Child Sexual Assault Victims' Testimony*, 10 U. BRIDGEPORT L. REV 165, 178-79 (1989) (discussing how cross-examination satisfies purposes of sixth amendment).

face,"[24] the Court has held that actual face-to-face confrontation may, on occasion, yield to public policy considerations and the compelling necessities of particular cases.[25] As a result, the Court has not interpreted the sixth amendment to guarantee a face-to-face encounter in every instance, but instead has allowed some exceptions.[26] The most commonly allowed excep-

---

24. *See* Coy v. Iowa, 487 U.S. 1012, 1016 (1988) (fact that "confront" derived from Latin words "opposed" and "forehead" supports idea that confrontation clause guarantees face-to-face meeting); Pennsylvania v. Ritchie, 480 U.S. 39, 51 (1987) (confrontation clause provides criminal defendant right to face his accusers physically); Snyder v. Massachusetts, 291 U.S. 97, 106 (1934) (privilege to confront one's accusers face to face is assured); Kirby v. United States, 174 U.S. 47, 55 (1899) (accused has right to confront witnesses against him and look at them while being tried); *Mattox*, 156 U.S. at 242 (confrontation clause assures defendant opportunity to examine witness personally, as he stands face-to-face with jury and judge); *see also* Cerkovnik, *The Sexual Abuse of Children: Myths, Research, and Policy Implications*, 89 DICK. L. REV. 691, 740-41 (1985) (confrontation right includes right to physical, face-to-face confrontation); Note, *Sixth Amendment—Defendant's Right to Confront Witnesses: Constitutionality of Protective Measures in Child Sexual Assault Cases*, 79 J. CRIM. L. & CRIMINOLOGY 759, 764 (1988) ("confrontation" is defined as a face-to-face encounter).

25. *See Coy*, 487 U.S. at 1021 (any exceptions to right to meet accusers face to face would only be allowed to further important public policy); Ohio v. Roberts, 448 U.S. 56, 64-65 (1980) (Court has recognized competing interest may permit dispensing with confrontation and has sought to accommodate competing interests by allowing exceptions); *Mattox*, 156 U.S. at 243 (on occasion, rules of law must give way to public policy and necessities of case). *See generally* Note, Coy v. Iowa: *Should Children Be Heard and Not Seen?* 50 U. PITT. L. REV. 1187, 1199-200 (1989) (defendant's right to confrontation may yield to public policy concerns); Note, *The New Illinois Videotape Statute in Child Sexual Abuse Cases: Reconciling the Defendant's Constitutional Rights With the State's Interest in Prosecuting Defenders*, 22 J. MARSHALL L. REV. 331, 341-42 (1988) (discussing instances where Court has allowed confrontation right to bow to public policy). Some sixth amendment rights have been interpreted in light of trial necessities. *See, e.g.*, Perry v. Leeke, 488 U.S. 272, 280-85 (1989) (right to counsel not violated when judge prevented testifying defendant from conferring with counsel during brief break); Taylor v. United States, 484 U.S. 400, 410-16 (1988) (no violation of compulsory process where judge precluded surprise witness' testimony); *Ritchie*, 480 U.S. at 51-54 (no violation of right to cross-examination where defendant was denied access to investigative files).

26. *See* Ohio v. Roberts, 448 U.S. 56, 64-65 (1980) (Court has recognized competing interests may permit dispensing with confrontation and has sought to accommodate competing interests by allowing exceptions); *Snyder*, 291 U.S. at 107 (1934) (confrontation right had common law exceptions which may be enlarged); Motes v. United States, 178 U.S. 458, 471-74 (1900) (allowing prior testimony of unavailable witnesses is exception to confrontation right); Kirby v. United States, 174 U.S. 47, 61 (1899) (allowing dying declarations is exception to confrontation right). *See generally* Goldman, *Not So "Firmly Rooted": Exceptions to the Confrontation Clause*, 66 N.C.L. REV. 1, 8-17 (1987) (expanding list of traditional exceptions); Note, *The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations*, 98 HARV. L. REV. 806, 810 (1985) (Court has noted exceptions based on the notion that certain types of evidence are likely to be reliable). The Court has allowed public policy concerns to justify dispensing with rights under the confrontation clause by reasoning that the rights are not absolute. *See* Chambers v. Mississippi, 410 U.S. 284, 295 (1973) (confrontation right not absolute, but denial requires close examination of competing interests); *see also* Note, *The Constitutionality of the Use of Two-Way Closed Circuit Television to Take Testimony of*

tion involves out-of-court, or hearsay, statements.[27]

Increasing incidents of child abuse[28] and the special problems encountered in accepting the testimony of children[29] have prompted some courts to

---

Child Victims of Sex Crimes, 53 FORDHAM L. REV. 995, 999 (sixth amendment confrontation right not absolute). *But see* H. BLACK, THE GREAT RIGHTS 45 (E. Cahn ed. 1963) (discussing reasons underlying view that prohibitions in Bill of Rights were intended to be absolute). Additionally, the Court has warned against a literal reading of the sixth amendment in some instances. *See* Mattox v. United States, 156 U.S. 237, 243 (1895) (common law exceptions intended to be respected, and literal interpretation of constitutional provision could protect accused more than necessary). *But see Ex parte* Milligan, 71 U.S. 2, 120-21 (1866) (sixth amendment rights established by irrepealable law and expressed clearly so that ingenuity of man could not evade them as problems arose).

27. *See, e.g.*, Bourjaily v. United States, 483 U.S. 171, 174 (1987) (co-conspirator's statements made while committing conspiracy admitted into evidence); United States v. Inadi, 475 U.S. 387, 390-91 (1986) (co-conspirator's statements allowed despite failure to show declarant's unavailability); Dutton v. Evans, 400 U.S. 74, 78 (1970) (co-conspirator's statements allowed under established state law exception); California v. Green, 399 U.S. 149, 151-52 (1970) (allowed evidence of minor's preliminary-hearing testimony). *See generally* Graham, *The Confrontation Clause, the Hearsay Rule, and Child Sexual Abuse Prosecutions: The State of the Relationship*, 72 MINN. L. REV. 523 *passim* (1988) (discussing the category of confrontation cases involving admission of out-of-court statements); Note, *Placing a Child Victim of Sexual Abuse Behind a Screen During Courtroom Testimony as Violation of Sixth Amendment Confrontation Clause*, 57 U. CIN. L. REV. 1537, 1539-50 (1989) (discussing theory and examples of hearsay cases).

28. *See* Morgan v. Foretich, 846 F.2d 941, 943 (4th Cir. 1988) (dramatic increase in child abuse and sexual abuse); Ellison v. Sachs, 769 F.2d 955, 957 n.5 (4th Cir. 1985) (increase in sexual abuse resulted in increased numbers of child victims as witnesses); State v. Myatt, 697 P.2d 836, 841 (Kan. 1985) (increase in incidence of sexual abuse of young children); *see also* Galtney, *Mothers on the Run*, U.S. NEWS & WORLD REPORT, June 13, 1988, at 22, 23 (estimated one in five female children have been sexually molested); Watson, *Special Report: A Hidden Epidemic*, NEWSWEEK, May 14, 1984, at 30 (between 100,000 and 500,000 children will be sexually molested this year).

29. *See, e.g.*, Commonwealth v. Willis, 716 S.W.2d 224, 226 (Ky. 1986) (five-year-old witness said she was unable to answer because she did not want defendant, who was in room, to hurt her); State v. Tafoya, 729 P.2d 1371, 1375 (N.M. Ct. App. 1986) (expert testified child victims would become incoherent if they saw defendant), *vacated and remanded sub nom.* Tafoya v. New Mexico, 487 U.S. 1229 (1988); Commonwealth v. Lufwig, 531 A.2d 459, 464 (Pa. 1987) (expert testified child would be traumatized by testifying). *See generally* Ginkowski, *The Abused Child: The Prosecutor's Terrifying Nightmare*, 1 CRIM. JUST. 31 *passim* (1986) (discussing problems prosecutor faces in compelling children to testify in child abuse cases); Libai, *The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System*, 15 WAYNE L. REV. 977, 979-86 (1969) (describing possibility of emotional harm to child from treatment in courtroom). The problems include difficulty in questioning and cross-examining a child witness, along with the child's fear, confusion, and sense of intimidation. *See* Ginkowski, *The Abused Child: The Prosecutor's Terrifying Nightmare*, 1 CRIM. JUST. 31, 33 (1986) (examining difficulty of questioning child); Skoler, *New Hearsay Exceptions for a Child's Statement of Sexual Abuse*, 18 J. MARSHALL L. REV. 1, 37-38 (1984) (fear and trauma may undermine child's ability to testify effectively). An additional difficulty, and the one of most concern, is that the courtroom experience may result in psychological trauma for the child.

apply the confrontation clause's hearsay exception to child abuse cases.[30] Under this hearsay exception, a court may admit a child's statements regarding abuse by allowing an adult, to whom the child made the statements, to testify as to the information the child revealed.[31] In the case of *Idaho v. Wright*,[32] decided the same day as *Maryland v. Craig*, the Supreme Court held that the confrontation clause permits the admission of some hearsay statements of children.[33] However, the Court restricted the admission of

---

See Frumkin, *The First Amendment and Mandatory Courtroom Closure in* Globe Newspaper Co. v. Superior Court: *The Press' Right, the Child Rape Victim's Plight*, 11 HASTINGS CONST. L. Q. 637, 639-40 (1984) (discussing long-term emotional effects on children who are required to testify); *see also* Note, *Protecting Child Rape Victims from the Public and Press After* Globe Newspaper *and* Cox Broadcasting, 51 GEO. WASH. L. REV. 269, 269 (1983) (testimony exposes victim to embarrassment and degradation).

30. *See* State v. Boodry, 394 P.2d 196, 199 (Ariz. 1964) (hearsay statements used to avoid necessity of child testifying against her father); Albritten v. State, 317 N.E.2d 854, 855 (Ind. 1974) (hearsay statements of four-year-old used to convict her rapist); State v. Myatt, 697 P.2d 836, 840 (Kan. 1985) (hearsay statements of child who was disqualified from testifying were admitted). *See generally* Graham, *The Confrontation Clause, the Hearsay Rule, and Child Sexual Abuse Prosecutions: The State of the Relationship*, 72 MINN. L. REV. 523 *passim* (applying hearsay analysis to hypothetical case involving sexually abused child); Note, *The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations*, 98 HARV. L. REV. 806 *passim* (1985) (examining courts' analyses and applications of hearsay exception in child sexual abuse cases). The Court has established standards for the admissibility of hearsay statements. *See* Ohio v. Roberts, 448 U.S. 56, 65 (1980) (showing of necessity and indicia of reliability required for proper admission of hearsay statements).

31. *See* State v. Boodry, 394 P.2d 196, 199 (Ariz. 1964) (statements made by child to baby-sitter were admitted as hearsay evidence); State v. Myatt, 697 P.2d 836, 839-40 (Kan. 1985) (statements made by child to caseworker and police investigator admitted as evidence); State v. Ryan, 691 P.2d 197, 200, 202 (Wash. 1984) (statements made to mother of child could have been admitted under the hearsay exception, if requirements for admission had been met). *See generally* Mosteller, *Child Sexual Abuse and Statements for the Purpose of Medical Diagnosis or Treatment*, 67 N.C.L. REV. 257, 257-64 (1989) (analyzing use of hearsay statutes which enable child's doctor to testify about child's description of incidents); Note, *To Keep the Balance True: The Case of* Coy v. Iowa, 40 HASTINGS L.J. 437, 442-43 (1989) (discussing use of hearsay exception statutes for child testimony). Statements made to physicians are commonly used under the hearsay exception for the admission of the child abuse victim's declarations into evidence. *See* Mosteller, *Child Sexual Abuse and Statements for the Purpose of Medical Diagnosis or Treatment*, 67 N.C.L. REV. 257, 257 (1989) (physician's statements admitted under hearsay exception).

32. __ U.S. __, 110 S. Ct. 3139, 111 L. Ed. 2d 638 (1990).

33. Idaho v. Wright, __ U. S. __, __, 110 S. Ct. 3139, 3145-46, 111 L. Ed. 2d 638, 651 (1990). In *Wright*, a pediatrician was allowed to testify as to statements made to her by a two- and one-half-year-old girl regarding sexual abuse the child had suffered. *Id.* at __, 110 S. Ct. at 3143, 111 L. Ed. 2d at 648. The child did not testify, and the defendant was convicted of lewd conduct with a minor. *Id.* at __, __, 110 S. Ct. at 3143, 3145, 111 L. Ed. 2d at 648, 650. The Supreme Court held that the hearsay statements should have been barred under the facts and reversed the conviction. *Id.* at __, 110 S. Ct. at 3152-53, 111 L. Ed. 2d at 659-60 (incriminating statements not shown to be trustworthy); *see also* State v. Lanam, 459 N.W.2d 656, 659 (Minn. 1990) (Court is willing to allow hearsay statements). *See generally* Peck & Williams,

such statements to situations where the prosecution either produces the declarant or demonstrates the unavailability of the declarant, and then proves that the statements contain adequate indicia of reliability.[34]

In responding to public concerns regarding sexual and child abuse,[35] state legislatures have promulgated statutes which permit alternative methods of testimony by the victims of alleged child abuse, thereby protecting the child from the emotional trauma associated with testifying.[36] In most instances,

---

Supreme Court Preview, 76 A.B.A. J. 48, 52-55 (October 1990) (discussing circumstances of case); Note, *The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations*, 98 HARV. L. REV. 806, 809-11 (1985) (discussing confrontation clause's limitations on admission of hearsay).

34. *Wright*, __ U.S. at __, __, 110 S. Ct. at 3146, 3149, 111 L. Ed. 2d at 651-52, 655-56. The majority opinion, written by Justice O'Connor, focused mainly on the element of trustworthiness. *See id.* at __, 110 S. Ct. at 3147, 111 L. Ed. 2d at 652-53 (unavailability of witness assumed). The Court rejected the state's contention that evidence corroborating the truth of the hearsay statements was sufficient to provide trustworthiness. *Id.* at __, 110 S. Ct. at 3150, 111 L. Ed. 2d at 547. Instead, the Court required that the hearsay evidence "possess indicia of reliability by virtue of its inherent trustworthiness." *Id.*; *cf.* Delaware v. Van Arsdall, 475 U.S. 673, 680 (1986) (when determining violations of confrontation clause, court must focus on particular witness and not on outcome of trial). The Court based the requirements for the admission of children's hearsay statements on the general hearsay exception requirements under common law. *Wright*, __ U.S. at __, 110 S. Ct. at 3146, 111 L. Ed. 2d at 651-52; *see also* Ohio v. Roberts, 448 U.S. 56, 65 (1980) (requirements for hearsay exceptions include necessity, as shown by unavailability; and trustworthiness, as shown by indicia of reliability). *See generally* Mosteller, *Child Sexual Abuse and Statements for the Purpose of Medical Diagnosis or Treatment*, 67 N.C.L. REV. 257, 258 (1989) (basis of common law exception for hearsay statements made to doctor is trustworthiness and necessity); Comment, *Admission of Grand Jury Testimony Under the Residual Hearsay Exception*, 59 TUL. L. REV. 1033, 1047-48 (1985) (case law requires showings of unavailability and indicia of reliability in order to allow hearsay statements).

35. *See* State v. Jarzbek, 529 A.2d 1245, 1251 (Conn. 1987) (growing public concern regarding sexual abuse of children); People v. Groff, 518 N.E.2d 908, 912 (N.Y. 1987) (sexual abuse has become major concern); State v. Gilbert, 326 N.W. 2d 744, 750-51 (Wis. 1982) (much societal, legislative, and judicial concern for well-being of child-victim witness). *See generally* Note, *The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations*, 98 HARV. L. REV. 806, 806 (1985) (attention focused on statistical increase in child abuse); Note, *Defendants' Rights in Child Witness Competency Hearings: Establishing Constitutional Procedures for Sexual Abuse Cases*, 69 MINN. L. REV. 1377, 1377 (1985) (increased media attention on child sexual abuse).

36. *See, e.g.*, CAL. PENAL CODE § 868.7(a)(1) (Deering 1983) (permits children's videotaped depositions and closed-circuit testimony); IOWA CODE ANN. § 910A.14 (West. Supp. 1990) (authorizing use of closed-circuit testimony of children); TEX. CODE CRIM. PROC. ANN. art. 38.071, §§ 1, 3 (Vernon Supp. 1990) (victims under thirteen years old allowed to testify by closed-circuit television). *See generally* Bulkley, *Evidentiary and Procedural Trends in State Legislation and Other Emerging Legal Issues in Child Sexual Abuse Cases*, 89 DICK. L. REV. 645, 645 (statutory reform efforts undertaken to improve handling of child abuse cases); Note, *Protecting the Child Sexual Abuse Victim From Courtroom Trauma After* Coy v. Iowa, 67 N.C.L. REV. 711, 711 (1989) (common statutory approach to protecting child victim was to excuse him from viewing alleged attacker). For a survey of states' child witness protection

the statutes provide for the use of either the child's pre-trial videotaped testimony or live closed-circuit video testimony.[37] One state statute authorized the use of a screen separating a testifying child from the defendant,[38] but the Supreme Court held the statute unconstitutional in *Coy v. Iowa*.[39] In *Coy*, the state argued that its interest in protecting child abuse victims outweighed the defendant's confrontation right, and thus warranted an exception to the confrontation clause.[40] The Court, however, expressed great reluctance to allow such an exception since the right was explicitly enumerated in the sixth amendment.[41] Instead, the majority reasoned that the confrontation

---

statutes, see Brief for the American Bar Association (amicus curiae) app. A, Coy v. Iowa, 487 U.S. 1012 (1988) (No. 86-6757).

37. *See, e.g.*, CAL. PENAL CODE § 868.7(a)(1) (Deering 1983) (permits videotaped depositions and closed-circuit testimony); FLA. STAT. ANN. § 92.53(1) (West Supp. 1990) (permits videotaped testimony of victim under sixteen years of age); TEX. CODE CRIM. PROC. ANN. art. 38.071, § 3 (Vernon Supp. 1990) (permits closed-circuit television). *See generally* Note, *The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations*, 98 HARV. L. REV. 806 *passim* (1985) (discussing use of videotaping statutes to enable jury to view child's testimony); Note, *To Keep the Balance True: The Case of* Coy v. Iowa, 40 HASTINGS L.J. 437, 440-42 (1989) (discussing use of videotaping statutes and closed-circuit television statutes).

38. IOWA CODE ANN. § 910A.14 (West. Supp. 1988); *see also* Iowa v. Coy, 487 U.S. 1012, 1023 (1988) (O'Connor, J., concurring) (Iowa only state authorizing use of screen). *See generally* Note, *To Keep the Balance True: The Case of* Coy v. Iowa, 40 HASTINGS L.J. 437, 441 (1989) (discussing Iowa court's use of screen); Note, *Sixth Amendment—Defendant's Right to Confront Witnesses: Constitutionality of Protective Measures in Child Sexual Assault Cases*, 79 J. CRIM. L. & CRIMINOLOGY 759, 762 (1988) (explaining procedure for use of screen).

39. 487 U.S. 1012 (1988). In *Coy*, two thirteen-year-old girls, spending the night in one girl's backyard, were assaulted by a masked man. *Id.* at 1014. At trial, the prosecution requested that the Iowa law be invoked, and that the testimony of the two child witnesses be taken either by closed-circuit television or while the defendant was confined behind a screen. The trial court chose to use the screen, and the jury found Coy guilty of two counts of lascivious acts with a child. *Id. See generally The Supreme Court—Leading Cases*, 102 HARV. L. REV. 143, 151-52 (1988) (describing facts in *Coy*); Note, Coy v. Iowa: *Should Children Be Heard and Not Seen?* 50 U. PITT. L. REV. 1187, 1192 (1989) (discussing background of *Coy*).

40. Coy v. Iowa, 487 U.S. 1012, 1020 (1988); *see also* Note, Coy v. Iowa: *Should Children Be Heard and Not Seen?* 50 U. PITT. L. REV. 1187, 1191 (1989) (state has dual objective of protecting child victim-witnesses and increasing convictions). *See generally* Note, *Placing a Child Victim of Sexual Abuse Behind a Screen During Courtroom Testimony as Violation of Sixth Amendment Confrontation Clause*, 57 U. CIN. L. REV. 1537, 1552-55 (1989) (discussing cases where states argued compelling state interest).

41. *See Coy*, 487 U.S. at 1020 (right to confrontation is "narrowly and explicitly set forth in the Clause"); U.S. CONST. amend. VI. ("right . . . to be confronted with witnesses against him"); *see also* Kirby v. United States, 174 U.S. 47, 55 (1899) (under the confrontation clause, only witnesses the accused can look at are allowed); Note, *Sixth Amendment—Defendant's Right to Confront Witnesses: Constitutionality of Protective Measures in Child Sexual Assault Cases*, 79 J. CRIM. L. & CRIMINOLOGY 759, 765 (1988) (face-to-face confrontation is explicit and essential element of confrontation). *See generally* Note, *Placing a Child Victim of Sexual Abuse Behind a Screen During Courtroom Testimony as Violation of Sixth Amendment Con-*

clause guarantees a face-to-face confrontation[42] and held that permitting the child to testify from behind a semi-opaque screen violated the defendant's constitutional right to face his accusers.[43]

The Court's conservative construction of the confrontation clause in *Coy* left unanswered the question as to when a state's interest in protecting child witnesses might allow some type of exception to confrontation rights via alternative testimonial procedures.[44] However, the majority clearly stated in *Coy* that any such exception, if allowed, would require a specific finding of necessity based upon the furthering of an important public policy.[45] In her concurring opinion in *Coy*, Justice O'Connor noted that many states had statutorily provided for closed-circuit video procedures,[46] and that the hold-

---

frontation Clause, 57 U. CIN. L. REV. 1537, 1558 (1989) (physical face-to-face encounter literally guaranteed by confrontation clause).

42. *See Coy*, 487 U.S. at 1016-19 (supporting face-to-face interpretation with Latin, Shakespeare, case law, and President Eisenhower's hometown code from Abilene, Kansas); *see also* Pennsylvania v. Ritchie, 480 U.S. 39, 51 (1987) (confrontation clause provides defendant right to face his accusers physically); Snyder v. Massachusetts, 291 U.S. 97, 106 (1934) (face-to-face confrontation privilege assured); Note, *The Supreme Court—Leading Cases*, 102 HARV. L. REV. 143, 153 (1988) (face-to-face meeting with witnesses is "core" confrontation right); Note, *To Keep the Balance True: The Case of* Coy v. Iowa, 40 HASTINGS L.J. 437, 448 (1989) (at least, confrontation clause gives right to face-to-face meeting).

43. *Coy*, 487 U.S. at 1020-22; *see also* Massaro, *The Dignity Value of Face-to-Face Confrontations*, 40 U. FLA. L. REV. 863, 895 (1988) (screen prevents face-to-face encounter which sixth amendment guarantees); Comment, *Defendant's Right to Confront the Witnesses Against Him—Is There an Exception Behind the Screen?* Coy v. Iowa, 63 ST. JOHN'S L. REV. 124, 125 (1988) (Court held use of screen violated defendant's confrontation right).

44. *See* Coy v. Iowa, 487 U.S. 1012, 1021 (1988) (declining determination of whether exceptions exist); *see also* Note, Coy v. Iowa: *Should Children Be Heard and Not Seen?* 50 U. PITT. L. REV. 1187, 1187 (1989) (possibility that exception might exist not denied by majority). *See generally* Comment, *Defendant's Right to Confront the Witnesses Against Him—Is There an Exception Behind the Screen?* Coy v. Iowa, 63 ST. JOHN'S L. REV. 124, 130 (1988) (Court established framework for exception by declining to decide whether face-to-face confrontation right was absolute).

45. *See Coy*, 487 U.S. at 1021 (exception, if any, would only be allowed for furtherance of important policy and would require more than generalized finding); Chambers v. Mississippi, 410 U.S. 284, 295 (1973) (confrontation right not absolute and may bow to legitimate interests); *cf.* Globe Newspaper Co. v. Superior Ct., 457 U.S. 596, 607-09 (1982) (compelling interest does not automatically justify mandatory rules). *See generally* Note, *Sixth Amendment—Defendant's Right to Confront Witnesses: Constitutionality of Protective Measures in Child Sexual Assault Cases*, 79 J. CRIM. L. & CRIMINOLOGY 759, 766 (1988) (confrontation right exception justifiable only to further important public policy); Note, Coy v. Iowa: *Should Children Be Heard and Not Seen?* 50 U. PITT. L. REV. 1187, 1194 (1989) (Scalia hinted that exception might be acceptable if finding of necessity to further important public interest was shown).

46. *See Coy*, 487 U.S. at 1023 (O'Connor, J., concurring) (one-half of states have authorized use of video procedures); *see also* CAL. PENAL CODE § 868.7 (a)(1) (Deering 1983) (permits videotaped depositions); TEX. CODE CRIM. PROC. ANN. art. 38.071, § 3(a) (Vernon Supp. 1990) (permitting closed-circuit television). *See generally* Bulkley, *Evidentiary and Procedural Trends in State Legislation and Other Emerging Legal Issues in Child Sexual Abuse Cases*, 89

ing in *Coy* did not invalidate those states' attempts to protect testifying children through such procedures.[47] Furthermore, Justice O'Connor stated that the confrontation clause's protections might give way to a state's interest in protecting child witnesses under other, more compelling circumstances.[48]

The Court addressed Justice O'Connor's "more compelling circumstances" in *Maryland v. Craig*.[49] The Supreme Court held in *Craig* that allowing a child abuse victim to testify via one-way closed-circuit television does not violate a criminal defendant's sixth amendment confrontation clause right if the trial court specifically finds the use of such a procedure necessary to protect the child's welfare.[50] Justice O'Connor, writing for the majority, rejected a literal interpretation of the confrontation clause[51] and recognized that the clause does not grant a criminal defendant an absolute right to encounter his accusing witnesses face to face.[52] Instead, it indicates

---

DICK. L. REV. 645, 657-58 (1985) (discussing states with videotaping statutes); Note, *Sixth Amendment—Defendant's Right to Confront Witnesses: Constitutionality of Protective Measures in Child Sexual Assault Cases*, 79 J. CRIM. L. & CRIMINOLOGY 759, 767-68 (1988) (discussing Justice O'Connor's concurring opinion).

47. *Coy*, 487 U.S. at 1023; *see also* State v. Conley, 416 N.W.2d 69, 71 (Wis. Ct. App. 1987), *vacated and remanded sub nom.* Conley v. Wisconsin, 487 U.S. 1230 (1988) (Court vacated and remanded conviction where lower court allowed use of blackboard to block defendant's view of child witness); Note, *Sixth Amendment— Defendant's Right to Confront Witnesses: Constitutionality of Protective Measures in Child Sexual Assault Cases*, 79 J. CRIM. L. & CRIMINOLOGY 759, 767 (1988) (Justice O'Connor would permit use of protective devices in "appropriate circumstances"); Note, *Placing a Child Victim of Sexual Abuse Behind a Screen During Courtroom Testimony as Violation of Sixth Amendment Confrontation Clause*, 57 U. CIN. L. REV. 1537, 1559 (1989) (Justice O'Connor emphasized holding limited to shielding methods and not to doom other legislative measures). *But see* Tafoya v. New Mexico, 487 U.S. 1229 (1988) (Court vacated and remanded conviction of defendant where evidence included videotaped testimony of child victims).

48. *See Coy*, 487 U.S. at 1025 (upon specific finding of necessity, confrontation clause may give way to state interest); *see also* Note, *Placing a Child Victim of Sexual Abuse Behind a Screen During Courtroom Testimony As Violation of Sixth Amendment Confrontation Clause*, 57 U. CIN. L. REV. 1537, 1560 (1989) (procedures denying defendant face-to-face confrontation may be overcome by showing compelling state interest). *See generally* Comment, *Defendant's Right to Confront the Witnesses Against Him—Is There an Exception Behind the Screen?* Coy v. Iowa, 63 ST. JOHN'S L. REV. 124, 130-32 (1988) (Court developing framework for exception).

49. ___ U.S. ___, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990).

50. Maryland v. Craig, ___ U.S. ___, ___, 110 S. Ct. 3157, 3171, 111 L. Ed. 2d 666, 688 (1990).

51. *See id.* at ___, 110 S. Ct. at 3165, 111 L. Ed. 2d at 679 (literal reading of confrontation clause rejected). The Court stated that a literal interpretation of the confrontation clause was not plausible because such an interpretation would abrogate all hearsay exceptions. The Court reasoned that because the hearsay exception allows statements of a declarant who is not in the presence of the defendant, "confront" could not be limited to mean actual face-to-face confrontation. *Id.*

52. *Id.* at ___, 110 S. Ct. at 3163, 111 L. Ed. 2d at 677. The Court stated that face-to-face

only a "preference" for face-to-face confrontation.[53] The Court further explained that trial courts could set aside this "preference" where the necessities of a case and public policy demanded the denial of a face-to-face encounter.[54]

The majority reached its more liberal construction of the confrontation clause by balancing the state's interest in protecting the welfare of child witnesses against a defendant's right to confront his accusers.[55] The Court justified its interpretation by noting that it had previously "harmonized" society's interest in accurate fact-finding with the goal of the confrontation clause[56] when it allowed exceptions to other sixth amendment rights based on the necessities of trial.[57] The majority recognized the difficulties associated with denying a face-to-face encounter,[58] but found that the compelling state interest in protecting child victims of sexual abuse served a substantial state policy,[59] and thus provided a sufficient basis to deny a defendant a face-to-face encounter with his accuser.[60] The Court ruled that a trial court would have to make a case-specific finding of necessity before allowing child abuse victims to testify via one-way closed-circuit television,[61] but refused to

---

confrontation is not the *sine qua non* of the confrontation clause. Furthermore, the Court noted that generally the confrontation clause is satisfied when the defense is allowed a fair opportunity to cross-examine the witness. *Id.* at __, 110 S. Ct. at 3164, 111 L. Ed. 2d at 679.

53. *Id.* at __, 110 S. Ct. at 3165, 111 L. Ed. 2d at 681.

54. *See id.* at __, 110 S. Ct. at 3165, 111 L. Ed. 2d at 680 (preference may succumb to public policy and case necessities).

55. *See id.* at __, 110 S. Ct. at 3167, 111 L. Ed. 2d at 683 (state's interest in well-being of child abuse victims may outweigh defendant's right to face accusers).

56. *Id.* at __, 110 S. Ct. at 3165, 111 L. Ed. 2d at 680. The Court observed that the purpose of the confrontation clause was to ensure the reliability of evidence by subjecting it to the tests of an adversarial proceeding, as well as to place limits on the kind of evidence that may be received. *Id.* at __, __, 110 S. Ct. at 3163, 3165, 111 L. Ed. 2d at 678, 680. On the other hand, the Court asserted that society has an interest in assuring that the fact-finding proceeding is accurate, and such an interest might require that out-of-court statements be admitted. *Id.* at __, 110 U.S. at 3165, 111 L. Ed. 2d at 680.

57. *Id.* at __, 110 S. Ct. at 3166, 111 L. Ed. 2d at 681. The Court cited examples of the defendant's right to presence at trial, cross-examination, compulsory process, and effective counsel; all of which have been constitutionally curtailed where the necessities of trial dictated. *Id.*

58. *Id.* at __, 110 S. Ct. at 3166, 111 L. Ed. 2d at 682. The Court noted that in *Coy v. Iowa* it had suggested that any exception to the right of confrontation would be allowed only when necessary to further an important public policy. *Id*; *see also* Coy v. Iowa, 487 U.S. 1012, 1021 (1988).

59. *See Craig*, __ U.S. at __, 110 S. Ct. at 3168-69, 111 L. Ed. 2d at 685 (protecting against child abuse is important state interest). The Court stated that compelling evidence exists showing children suffer emotional trauma when testifying, and that a large number of states had taken measures to protect children under those circumstances. *Id.*

60. *Id.* at __, 110 S. Ct. at 3169, 111 L. Ed. 2d at 685.

61. *See id.* at __, 110 S. Ct. at 3169, 111 L. Ed. 2d at 685 (if state shows necessity, state's interest in protecting children outweighs defendant's confrontation rights).

establish any particular procedures which must be followed to reach such a finding.[62] However, Justice O'Connor did outline three elements of the finding of necessity.[63] Initially, the trial court must determine that protecting the welfare of the particular child demands the use of the procedure.[64] The second element requires a finding that traumatization of the child would result from his or her testifying in the presence of the defendant, and not simply from testifying in the courtroom.[65] Finally, the trial court must find that the emotional distress the child would suffer would be more than de minimis.[66] The Court upheld the particular Maryland statutory procedure at issue because it furthered a significant state interest[67] and ensured reliability of the evidence by preserving both cross-examination and the jury's opportunity to observe the testifying witness.[68]

Justice Scalia, writing for the dissent, literally construed the text of the confrontation clause to guarantee criminal defendants a face-to-face encounter with their accusers.[69] In addition, he argued that where the Constitution

---

62. *Id.* at __, 110 S. Ct. at 3171, 111 L. Ed. 2d at 688. The Court refused to adopt the specific categorical evidentiary prerequisites which the Maryland Court of Appeals had stated would be required before allowing the procedure. The Maryland court would have required that the trial court question the child in the defendant's presence and consider the alternative of two-way closed-circuit television. If the trial court found that the two-way procedure would prevent the child from suffering emotional distress, use of the one-way procedure would not be allowed under the Maryland court's analysis. *Id.* at __, 110 S.Ct. at 3170-71, 111 L. Ed. 2d at 686-88.

63. *Id.* at __, 110 S. Ct. at 3169, 111 L. Ed. 2d at 685.

64. *Id.*

65. *Id.* If the child would only be traumatized from testifying in the courtroom, the child should simply testify in more comfortable surroundings, but with the defendant present. *Id.*

66. *Id.* The trauma would have to be consequential. The court observed that trauma great enough to impair a child's ability to communicate would be more than de minimis. *Id.*

67. *Id.* at __, 110 S. Ct. at 3168-69, 111 L. Ed. 2d at 684-85. The Court accepted the state's reasoning that Maryland's statute was intended to safeguard the well-being of child victims by avoiding or minimizing the trauma produced by testifying. *Id.*

68. *See id.* at __, 110 S. Ct. at 3166, 111 L. Ed. 2d at 682 (Maryland statute subjects evidence to adversarial testing by preserving elements of confrontation). The Court enunciated the elements of the confrontation clause to include, in addition to physical face-to-face confrontation, a witness testifying under oath, a witness who submits to cross-examination, and a jury which is able to observe the demeanor of the witness as he testifies. *Id.* at __, 110 S. Ct. at 3163, 111 L. Ed. 2d at 678. The Court noted that the elements preserved by the Maryland procedure would permit a defendant to undo a false accuser, or to reveal a coached child. *Id.* at __, 110 S. Ct. at 3166-67, 111 L. Ed. 2d at 682. Furthermore, the Court reasoned that because the confrontation clause elements were preserved, the Maryland statutory procedure may provide for greater reliability of the evidence than would allowing such evidence to be admitted under the hearsay exception. *Id.*

69. *See* Maryland v. Craig, __, U.S. __, __, 110 S. Ct. 3157, 3171, 111 L. Ed. 2d 666, 688 (1990)(Scalia, J., dissenting) (confrontation provision unmistakably clear). The dissent stated that the confrontation right "always and everywhere" means what it explicitly says. *Id.* at __, 110 S. Ct. at 3172, 111 L. Ed. 2d at 689 (Scalia, J., dissenting). The dissent distinguished the

provides an explicit guarantee, the Court should not engage in a "cost-benefit analysis" and thereby adjust the Constitution to satisfy public policy interests.[70] The dissent attacked the majority's interpretation of the purpose of the clause by stating that the clause does not automatically guarantee reliable evidence, but rather provides procedures that, in turn, ensure reliable evidence.[71] Justice Scalia rejected the majority's analogy between the hearsay exception and the use of closed-circuit television testimony.[72] The dissenting justices also questioned the state's asserted interest in protecting child witnesses by suggesting that the state's actual interest was in increasing the conviction rate of alleged child abusers.[73] Finally, the dissent rejected, as speculative, the majority's argument that the emotional distress caused by confrontation with the defendant would itself negate the clause's goal of ensuring reliable evidence.[74]

In *Craig*, the Court created a constitutionally valid exception to the con-

---

cases the majority relied on to claim that the Constitution provides only a preference for face-to-face confrontation by claiming that those cases dealt only with the implications of the clause, and not with its meaning. *Id.* at __, 110 S. Ct. at 3172-73, 111 L. Ed. 2d at 689-90 (Scalia, J., dissenting).

70. *Id.* at __, 110 S. Ct. at 3176, 111 L. Ed. 2d at 694 (Scalia, J., dissenting). The dissent stressed that the Constitution is meant to protect against popular beliefs, not conform to them. *Id.* at __, 110 S. Ct. at 3172, 111 L. Ed. 2d at 689 (Scalia, J., dissenting). The dissent rejected the majority's argument that balancing tests applied to other sixth amendment rights have considered the necessities of trial and explained that, in those situations, the Court was denying expansive scope to a provision whose purpose was unclear. By contrast, the dissent urged, the purpose of the confrontation clause is clear, and no further interpretation by balancing the necessities of trial is needed. *Id.* at __, 110 S. Ct. at 3173, 111 L. Ed. 2d at 690 (Scalia, J., dissenting).

71. *Id.* at __, 110 S. Ct. at 3172, 111 L. Ed. 2d at 689 (Scalia, J., dissenting).

72. *See id.* at __, 110 S. Ct. at 3173-74, 111 L. Ed. 2d at 690-92 (Scalia, J., dissenting) (test applied under hearsay exception cannot be applied to permit denial of right guaranteed by literal meaning of confrontation clause). Justice Scalia rejected the majority's suggestion that testimony via one-way closed-circuit television might itself be a type of hearsay evidence. He reasoned that in child abuse cases, hearsay evidence is only allowed upon a finding of the witness' unavailability, and there was no such finding in Craig's case. *Id.* at __, 110 S. Ct. at 3174, 111 L. Ed. 2d at 689-92 (Scalia, J., dissenting). Furthermore, the dissent stated that the majority's requirement that the child be unable to testify was not a finding of unavailability, but merely of unwillingness. *Id.* The dissent explained that the child's unwillingness to testify in the defendant's presence was not a valid excuse, and that placing the witness under the "hostile glare of the defendant" was precisely what the confrontation clause intended. *Id.* at __, 110 S. Ct. at 3174, 111 L. Ed. 2d at 692 (Scalia, J., dissenting).

73. *Id.* at __, 110 S. Ct. at 3175, 111. L. Ed. 2d at 692-93 (Scalia, J., dissenting). The dissent stated that a state's interest in obtaining more convictions was not unworthy, but should not be presented as a humanitarian interest. *Id.* at __, 110 S. Ct. at 3175, 111 L. Ed. 2d at 693 (Scalia, J., dissenting).

74. *Id.* at __, 110 S. Ct. at 3176, 111 L. Ed. 2d at 694 (Scalia, J., dissenting). The dissent reasoned that if confrontation were a disservice, that would be a Constitutional defect which should be corrected by the amendment process. *Id.*

frontation clause by fashioning a balancing test which protects both the testifying child abuse victim and the individual defendant's sixth amendment rights.[75] In developing this new test, the Court relied on strong precedent suggesting that public policy and necessity can outweigh the right of confrontation.[76] Although the balancing test acknowledges the important public policy of permitting child abuse victims to testify out of the presence of their alleged abusers,[77] it does not tolerate interference with the defendant's sixth amendment rights unless the state can prove the compelling nature of its interest, and the trial court makes a specific finding of necessity.[78] Adherence to this stringent standard anticipates the dissent's concern that the defendant's constitutional rights not be displaced merely by the state's

---

75. *See id.* at __, 110 S. Ct. at 3170, 111 L. Ed. 2d at 686 (denial of face-to-face confrontation allowed to protect child witness from trauma where procedure used ensures reliable evidence).

76. *See id.* at __, 110 S. Ct. 3157, 3165, 111 L. Ed. 2d 666, 680 (confrontation right must occasionally give way); *see also* Ohio v. Roberts, 448 U.S. 56, 64 (1980) (public policy may permit dispensing with confrontation right); Mattox v. United States, 156 U.S. 237, 243 (1895) (rule of law may give way to public policy). *See generally* Note, *The New Illinois Videotape Statute in Child Sexual Abuses Cases: Reconciling the Defendant's Constitutional Rights With the State's Interest in Prosecuting Defenders*, 22 J. MARSHALL L. REV. 331, 341-42 (1988) (discussing instances where Court has allowed confrontation right to bow to public policy); Note, Coy v. Iowa: *Should Children Be Heard and Not Seen?* 50 U. PITT. L. REV. 1187, 1199-200 (1989) (confrontation right may yield to public policy). Justice O'Connor referred to the balancing test as an attempt to "harmonize" the purpose of the clause with compelling state interest. *See Craig*, __ U.S. at __, 110 S. Ct. at 3165, 111 L. Ed. 2d at 681.

77. *See* Maryland v.Craig __ U.S. __, __, 110 S. Ct. 3157, 3167, 111 L. Ed. 2d 666, 683 (1990) (state's compelling interest in safeguarding minor's well-being sometimes outweighs defendant's right to confront accusers); *see also* Morgan v. Foretich, 846 F.2d 941, 943 (4th Cir. 1988) (child may be unable to testify because of fear); Commonwealth v. Willis, 716 S.W.2d 224, 226 (Ky. 1986) (five-year-old unable to answer questions because she feared defendant, who was present). *See generally* Frumkin, *The First Amendment and Mandatory Courtroom Closure in* Globe Newspaper Co. v. Superior Court: *The Press' Right, the Child Rape Victim's Plight*, 11 HASTINGS CONST. L.Q. 637, 639-40 (1984) (discussing long-term emotional effects of children testifying); Libai, *The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System*, 15 WAYNE L. REV. 977, 979-86 (1969) (describing possibility of emotional harm to child from treatment in courtroom).

78. *Craig*, __ U.S. at __, 110 S. Ct. at 3166, 111 L. Ed. 2d at 682; *see* Coy v. Iowa, 487 U.S. 1012, 1025 (1988) (O'Connor, J., concurring) (confrontation clause may give way to state interest if necessity specifically found); *see also* Globe Newspaper Co. v. Superior Ct., 457 U.S. 596, 607-09 (1982) (compelling interest does not automatically justify mandatory rules). *See generally* Comment, *Defendant's Right to Confront the Witnesses Against Him —Is There An Exception Behind the Screen?* Coy v. Iowa, 63 ST. JOHN'S L. REV. 124, 128 (1988) (right of face-to-face confrontation may be overcome by specific showing of necessity to further state's interest); Note, Coy v. Iowa: *Should Children Be Heard and Not Seen?* 50 U. PITT. L. REV. 1187, 1194 (1989) (in *Coy v. Iowa* Scalia hinted that exception would require finding of necessity).

assertion of public policy.[79]

The Court's view that the confrontation right is not absolute is supported by the fact that the confrontation clause has not always been literally interpreted and has a history of exceptions.[80] Furthermore, strong precedent supports the Court's assertion that actual face-to-face confrontation is only a preference, not a requirement.[81] Even so, in *Craig*, the Court tempered any apparent harshness in denying a defendant the right to a face-to-face confrontation by emphasizing that the overriding purpose of the confrontation clause is to ensure the reliability of evidence.[82] From this perspective, the Court was able to undercut the dissent's strict face-to-face argument and interpret the confrontation right to guarantee the defendant an opportunity to challenge the evidence against him.[83]

---

79. *See Craig*, __ U.S. at __, 110 S. Ct. at 3171, 111 L. Ed. 2d at 688 (Scalia, J., dissenting) (Constitution intended to prevent public policy from overcoming defendant's rights).

80. *See id.* at __, 110 S. Ct. at 3165, 111 L. Ed. 2d at 680 (hearsay exception could not exist under literal interpretation of confrontation clause); Salinger v. United States, 272 U.S. 542, 548 (1926) (common law confrontation right had exceptions); Dowdell v. United States, 221 U.S. 325, 330 (1911) (confrontation clause has well-recognized exceptions); *see also* 5 J. WIGMORE, EVIDENCE § 1397, at 158 (J. Chadbourn rev. 1974) (confrontation clause had exceptions at common law). *See generally*, Graham, *The Confrontation Clause, the Hearsay Rule, and Child Sexual Abuse Prosecutions: The State of the Relationship*, 72 MINN L. REV. 523 *passim* (1988) (discussing cases involving hearsay exception to confrontation clause).

81. Maryland v. Craig, __ U.S. __, __, 110 S. Ct. 3157, 3165, 111 L. Ed. 2d 666, 681 (1990); *see also* Ohio v. Roberts, 448 U.S. 56, 63-64 (1980) (prefer face-to-face confrontation); Mattox v. United States, 156 U.S. 237, 243 (1895) (confrontation may give way to public policy). *See generally* Note, *The Constitutionality of the Use of Two-Way Closed Circuit Television to Take Testimony of Child Victims of Sex Crimes*, 53 FORDHAM L. REV. 995, 999 (sixth amendment confrontation right not absolute); Note, *Sixth Amendment—Defendant's Right to Confront Witnesses: Constitutionality of Protective Measures in Child Sexual Assault Cases*, 79 J. CRIM. L. & CRIMINOLOGY 759, 775-77 (1988) (face-to-face confrontation right is not absolute).

82. *Craig*, __ U.S. at __, 110 S. Ct. at 3163, 111 L. Ed. 2d at 678; *see also* Lee v. Illinois, 476 U.S. 530, 540 (1986) (confrontation promotes reliability); Dutton v. Evans, 400 U.S. 74, 89 (1970) (confrontation clause's purpose is to provide for accuracy). *See generally* Jonakait, *Restoring the Confrontation Clause to the Sixth Amendment*, 35 UCLA L. REV. 557, 578 (1988) (clause's mission is accuracy in truth-finding process); Myers, *Hearsay Statements by the Child Abuse Victim*, 38 BAYLOR L. REV. 775, 820 (1986) (confrontation right's purpose is accuracy of evidence).

83. *See Craig*, __ U.S. at __, 110 S. Ct. at 3166, 111 L. Ed. 2d at 682 (use of oath, cross-examination, and observance of witness' demeanor subject evidence to adversarial test); *see also* Ohio v. Roberts, 448 U.S. 56, 65 (1979) (clause allows testing of evidence's accuracy); Davis v. Alaska, 415 U.S. 308, 316 (1974) (cross-examination is element of confrontation which allows witness' testimony to be tested for truth). *See generally* Jonakait, *Restoring the Confrontation Clause to the Sixth Amendment*, 35 UCLA L. REV. 557, 578 (1988) (purpose of confrontation clause is accuracy in truth-finding process); Myers, *Hearsay Statements by the Child Abuse Victim*, 38 BAYLOR L. REV. 775, 820 (1986) (confrontation right provides accuracy of evidence).

Because allowing testimony via one-way closed-circuit television preserves both cross-examination and the ability of the jury to observe the witness' demeanor, the defendant retains the ability to challenge the evidence presented.[84] The procedure followed under the Maryland statute places the child witness, the prosecuting attorney, and the defense attorney in one room with a camera and cameraman.[85] The attorneys follow traditional courtroom procedures in eliciting the child's testimony.[86] As the child testifies, the defendant, jury, and judge view the proceedings on monitors in the courtroom.[87] Through the use of electronic communication to the room where the child is testifying, the judge controls the proceedings, and the defendant retains the ability to communicate with his attorney during the entire examination period.[88] The defense attorney conducts cross-examination, just as he would under normal court procedures.[89] Additionally, although the defendant and the jury are able to view the demeanor of the child as he testifies,[90] the witness cannot see the defendant and is spared the trauma of having to testify in his intimidating presence.[91] Thus, the one-way closed-circuit television procedure provides great protection for the child while depriving the defendant only whatever advantage he might have

84. *Craig*, __ U.S. at __, 110 S. Ct. at 3166, 111 L. Ed. 2d at 682; *see also Davis*, 415 U.S. at 316 (cross-examination is essential element of confrontation and means by which testimony is tested for truth); Douglas v. Alabama, 380 U.S. 415, 418 (1965) (primary interest of confrontation clause secured by cross-examination); Mattox v. United States, 156 U.S. 237, 242-43 (1895) (clause's objective was to allow jury to view demeanor of witness so as to determine truthfulness of testimony). *See generally* Myers, *Hearsay Statements by the Child Abuse Victim*, 38 BAYLOR L. REV. 775, 825-826 (1986) (discussing opportunity for jury to view witness); Note, *Closed-Circuit Television and Videotape Transmission of Child Assault Victims' Testimony*, 10 U. BRIDGEPORT L. REV. 165, 178-79 (1989) (discussing cross-examination's satisfaction of sixth amendment purposes).

85. Maryland v. Craig, __ U.S. __, __, 110 S. Ct. 3157, 3161, 111 L. Ed. 2d 666, 676 (1990); MD. CTS. & JUD. PROC. CODE ANN. § 9-102 (1989).

86. *Craig*, __ U.S. at __, 110 S. Ct. at 3161, 111 L. Ed. 2d at 676; *see also* MD. CTS. & JUD. PROC. CODE ANN. § 9-102 (1989) (prosecuting attorney and defense attorney question child).

87. *Craig*, __ U.S. at __, 110 S. Ct. at 3161, 111 L. Ed. 2d at 676; MD. CTS. & JUD. PROC. CODE ANN. § 9-102 (1989).

88. *Craig*, __ U.S. at __, 110 S. Ct. at 3161, 111 L. Ed. 2d at 676; MD. CTS. & JUD. PROC. CODE ANN. § 9-102 (1989); *see also* D.A.D. v. State, 566 So. 2d 257, 258 (Fla. Dist. Ct. App. 1990) (unconstitutional use of procedure where there was failure to ensure that defendant could communicate with attorney in room with child).

89. Maryland v. Craig, __ U.S. __, __, 110 S. Ct. 3157, 3161, 111 L. Ed. 2d 666, 676 (1990).

90. *Id.*; *see* MD. CTS. & JUD. PROC. CODE ANN. § 9-102 (1989) (statute provides for child's testimony to be televised in courtroom).

91. *Craig*, __ U.S. at __, 110 S. Ct. at 3166, 111 L. Ed. 2d at 682. *But see id.* at __, 110 S. Ct. at 3174, 111 L. Ed. 2d at 692 (Scalia, J., dissenting) (object of confrontation clause is to place witness under defendant's "hostile glare").

gained through intimidation of the testifying child.[92] Such an advantage, however, is neither within the intended purpose of the confrontation clause, nor does it justify risking the emotional health of the child.[93]

The Court's holding in *Craig* will be inapplicable outside the child abuse context because the balancing test requires case-specific findings of necessity in protecting the welfare of *children*.[94] Before permitting testimony via one-way closed-circuit television, the trial judge will have to establish each of the three elements articulated by the Court.[95] First, the trial judge will need to determine that the procedure is necessary to protect the particular child who will be testifying.[96] The judge could do so by examining evidence regarding that specific child's welfare and the effect testifying would have on him.[97] The second element requires the trial judge to determine that the child's trauma would result from testifying in the presence of the defendant.[98] This

---

92. *See id.* at __, 110 S. Ct. at 3166, 111 L. Ed. 2d at 682 (procedure prevents child from seeing defendant, but other elements of confrontation are preserved); *see also* Mattox v. United States, 156 U.S. 237, 243 (1894) (interpreting constitutional provisions literally might protect the accused more than necessary).

93. *See* State v. Tafoya, 729 P.2d 1371, 1374-75 (N.M. Ct. App. 1986) (child would become incoherent if required to testify), *vacated and remanded sub nom.* Tafoya v. New Mexico, 487 U.S. 1229 (1988); Commonwealth v. Ludwig, 531 A.2d 459, 464 (Pa. Super. Ct. 1987) (child would be traumatized if required to testify); *see also* 5 J. WIGMORE, EVIDENCE § 1397, at 153 n.2 (J. Chadbourn rev. 1974) (confrontation no longer intended for emotional effect); Libai, *The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System*, 15 WAYNE L. REV. 977, 979-86 (1969) (possibility of emotional harm to child from treatment in courtroom); Note, *Placing a Child Victim of Sexual Abuse Behind a Screen During Courtroom Testimony as Violation of Sixth Amendment Confrontation Clause*, 57 U. CIN. L. REV. 1537, 1539 (1989) (confrontation not for "idle purpose of gazing upon the witness, or being gazed upon by him").

94. *See Craig*, __ U.S. at __, 110 S. Ct. at 3169, 111 L. Ed. 2d at 685 (state must show necessity); *see also* Leggett v. State, 565 So. 2d 315, 317, n.* (Fla. 1990) (use of television procedure requires case-specific finding of necessity); D.A.D. v. State, 566 So. 2d 257, 258 n.1 (Fla. Dist. Ct. App. 1990) (finding of necessity must be case specific). The Court's decision allows balancing, but the defendant's rights must be weighed against the compelling state interest of protecting the welfare of children. *See Craig*, __ U.S. at __, 110 S. Ct. at 3169, 111 L. Ed. 2d at 685.

95. *See Craig*, __ U.S. at __, 110 S. Ct. at 3169, 111 L. Ed. 2d at 685 (listing three requirements of necessity finding); *see also* State v. Crandall, 577 A.2d 483, 486 (N.J. 1990) (enumerating three findings trial court must make prior to use of closed-circuit television procedure).

96. *Craig*, __ U.S. at __, 110 S. Ct. at 3169, 111 L. Ed. 2d at 685; *see also Crandall*, 577 A.2d at 486 (trial court must find procedure needed to protect particular testifying child).

97. *See Craig*, __ U.S. at __, 110 S. Ct. at 3161, 111 L. Ed. 2d at 676 (judge received evidence on each child and what his or her specific trauma would be); *see also Crandall*, 577 A.2d at 486 (as trial approached, child slept poorly, refused to stay alone, and stated she feared defendant, not courtroom).

98. Maryland v. Craig, __ U.S. __ , __, 110 S. Ct. 3157, 3169, 111 L. Ed. 2d 666, 685 (1990).

could be accomplished by inquiring whether the child's trauma would result from an actual encounter with the defendant or from the general experience of testifying in a courtroom.[99] Finally, the judge will have to consider whether the potential trauma the child would undergo would be substantial rather than minimal.[100] In making this assessment, the court could rely on the testimony of expert witnesses familiar with the child's emotional health.[101] Because the Court avoided prescribing any exact procedures for establishing each of these three elements, the trial courts are free to use their discretion.[102] However, the *Craig* decision should prompt state legislatures to amend their statutes to predicate use of the television procedure upon a trial court's finding of necessity.[103]

The *Craig* decision, taken in light of the Court's previous rejection of the use of screens and restrictions on the hearsay testimony of children, reveals a clear preference for the use of the television procedure.[104] This preference is well founded inasmuch as the one-way closed-circuit television procedure

---

99. *See id.* at __, 110 S. Ct. at 3161, 111 L. Ed. 2d at 676 (judge received testimony that each child would have difficulty communicating in Craig's presence).

100. *Id.* at __, 110 S. Ct. at 3169, 111 L. Ed. 2d at 685; *see also* D.A.D. v. State, 566 So. 2d 257, 258 (Fla. Dist. Ct. App. 1990) (improper use of television procedure where no finding that child would suffer at least some emotional or mental harm).

101. *See Craig*, __ U. S. at __, 110 S. Ct. at 3161, 111 L. Ed. 2d at 676 (trial court relied on expert testimony in evaluating extent of trauma).

102. *See id.* at __, 110 S. Ct. at 3171, 111 L. Ed. 2d at 688 (Court declined to establish categorical evidentiary prerequisites).

103. *See* Maryland v. Craig, __ U.S. __, __, 110 S. Ct. 3157, 3169, 111 L. Ed. 2d 666, 685 (1990) (if specific necessity is shown, state interest may justify use of one-way closed-circuit procedure). Existing legislation may be revised to meet the Court's requirement and may state that the closed-circuit television procedure should only be implemented after a case-specific showing of necessity. *See, e.g.*, CAL. PENAL CODE § 868.7(a)(1) (Deering 1983) (requires finding that testifying is likely to cause psychological harm); IOWA CODE ANN. § 910A.14 (West Supp. 1990) (no requirement for finding of necessity); TEX. CODE CRIM. PROC. ANN. art. 38.071, § 3 (Vernon Supp. 1990) (no necessity finding required); *see also* Coy v. Iowa, 487 U.S. 1012, 1021 (1988) (exceptions to confrontation right require more than generalized findings of necessity). *See generally* Note, *The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations*, 98 HARV. L. REV. 806, 816 (1985) (suggests legislatures draft statutes requiring finding that face-to-face confrontation would substantially traumatize child); Note, *Sixth Amendment—Defendant's Right to Confront Witnesses: Constitutionality of Protective Measures in Child Sexual Assault Cases*, 79 J. CRIM. L. & CRIMINOLOGY 759, 772 (1988) (showing of necessity should be prerequisite for implementing protective devices).

104. *Compare Craig*, __ U.S. at __, 110 S. Ct. at 3171, 111 L. Ed. 2d at 688 (allowed child victim to testify via one-way closed-circuit television) *with* Idaho v. Wright, __ U.S. __, __, 110 S. Ct. 3139, 3152, 111 L. Ed. 2d 638, 650 (1990) (disallowed child's hearsay statements which had no "particularized guarantees of trustworthiness") *and* Coy v. Iowa, 487 U.S. 1012, 1022 (1988) (use of screen violated constitutional right to face-to-face confrontation). *See generally* Peck & Williams, *Supreme Court Preview*, 76 A.B.A. J. 48, 52-56 (October 1990) (*Wright* decision barred hearsay description of statements made by child out of court; *Craig* approved child's testimony via one-way closed-circuit television).

ensures greater evidentiary reliability than does the hearsay exception.[105] Where testimony is allowed under the hearsay exception, for instance, the defendant has no opportunity to cross-examine the child or to view the child's reactions to questioning.[106] By contrast, because allowing a child to testify via one-way closed-circuit television still preserves both cross-examination and the ability of the jury to observe the witness' demeanor, the defendant is not forced to sacrifice these critical methods of challenging the evidence against him.[107]

Although the Court was not prepared to create a confrontation right exception in its 1988 *Coy* decision, the 1990 Court finally recognized the compelling need to protect child abuse victims and properly addressed the issue. The one-way closed-circuit video procedure, upheld by the Court, protects testifying victims of child abuse without completely denying the defendant's confrontation right. Moreover, because the system retains the defendant's opportunities for cross-examination and observance of the witness' demeanor, it does more to preserve the adversarial nature of the proceedings and enhance the reliability of evidence than does the hearsay exception approach. The confrontation clause's history of exceptions supports the

---

105. *See Craig*, __ U. S. at __, __, 110 S. Ct. at 3164, 3167, 111 L. Ed. 2d at 679, 682 (cross-examination gives defendant opportunity to test evidence; its presence in closed-circuit procedure makes such procedure favorable); *see also* Davis v. Alaska, 415 U.S. 308, 316 (1974) (cross-examination tests truth); Douglas v. Alabama, 380 U.S. 417, 418 (1965) (primary interest of confrontation secured by cross-examination). *See generally* Myers, *Hearsay Statements by the Child Abuse Victim*, 38 BAYLOR L. REV. 775, 822 (1986) (where hearsay admitted, impossible to evaluate observational capacity of declarant; memory and truthfulness go unchecked); Note, *The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations*, 98 HARV. L. REV. 806, 823 (1985) (videotaping statutes preserve confrontation elements of cross-examination and opportunity to observe witness' demeanor).

106. *See* Idaho v. Wright, __ U.S. __, __, 110 S. Ct. 3139, 3143, 111 L. Ed. 2d 638, 648 (1990) (hearsay testimony admitted although child was not present and did not testify). *See generally* Myers, *Hearsay Statements by the Child Abuse Victim*, 38 BAYLOR L. REV. 775, 822-23 (1986) (where hearsay admitted, impossible to evaluate declarant's observational capacity; cannot check memory and truthfulness); Graham, *The Confrontation Clause, the Hearsay Rule, and Child Sexual Abuse Prosecutions: The State of the Relationship*, 72 MINN. L. REV. 523 *passim* (1988) (discussing use of hearsay exception in child abuse cases); Comment, *Balancing the Right to Confrontation and the Need to Protect Child Sexual Abuse Victims: Are Statutes Authorizing Televised Testimony Serving Their Purpose?* 12 U. PUGET SOUND L. REV. 109, 113 (1988) (televised testimony better method than allowing hearsay statements of children).

107. Maryland v. Craig, __ U.S. __, __, 110 S. Ct. 3157, 3166, 111 L. Ed. 2d 666, 682 (1990). *See generally* Note, *The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations*, 98 HARV. L. REV. 806, 814-15 (1985) (most videotaping statutes preserve confrontation elements of cross-examination and opportunity to observe witness' demeanor); Note, *Closed-Circuit Television and Videotape Transmission of Child Sexual Assault Victims' Testimony*, 10 U. BRIDGEPORT L. REV. 165, 198 (1989) (videotape procedures should provide opportunity for observation of witness).

Court's view that the right to confrontation is not absolute, and permits the Court to balance competing interests. By protecting both the child's emotional health and the defendant's capacity to test the evidence, the Court has struck a fair balance. The constitutional validity of statutes authorizing one-way closed-circuit testimony will most likely promote increases in the number of children testifying in child abuse and sexual abuse cases, and society will benefit from corresponding increases in convictions of the perpetrators of these heinous crimes.

Lisa R. Miller