Televised Justice: Toward a New Definition of Confrontation Under Maryland v. Craig

Theresa Cusick
TELEVISED JUSTICE: TOWARD A NEW DEFINITION OF CONFRONTATION UNDER MARYLAND V. CRAIG

Increased public awareness of child abuse, indicated by the dramatic rise in reported cases, has brought more children to court. As witnesses in child sex abuse cases, however, children present special problems. Children may be psychologically traumatized by testifying in court in the presence of the defendant. It is common for the child to know the abuser, frequently as a relative or a friend. Further, children may be more susceptible to suggestion than adults and tend to have shorter memories than adults. These factors make "it . . . questionable whether children can be effective and competent witnesses."

Yet despite these problems, the existence of credible child witness testimony remains crucial to the successful prosecution of most child sex abuse cases: child sex abuse victims are usually the only direct witnesses to their abuse and most states do not require the testimony of the child to be corroborated. Often there is no medical or physical evidence that sexual abuse occurred. Thus, in a very real sense it is often the victim's word against the accused.

4. Hill & Hill, supra note 2, at 809 n.1 (citing MacFarlane, Sexual Abuse of Children, The Victimization of Women 81, 86 (1978)).
7. Feher, supra note 5.
8. Berliner, supra note 6, at 171.
9. Feher, supra note 5, at 243. Feher notes that "traditional, aggressive methods of cross-examination will not work" to test the child's testimony "because such tactics will promote sympathy for the child and ire at the defense." Id. at 244.

967
In response to this dilemma, many states have adopted statutory measures to ease the trauma experienced by child victims in court. In addition, some courts make special provisions for child witnesses, such as allowing leading questions in direct testimony and barring spectators and the press from the courtroom during the child's testimony.

A majority of states have enacted statutes that are aimed primarily at protecting child sex abuse victims from testifying in open court in the presence of the accused. These statutes fall into two broad categories. Some facilitate the admission of a child's out-of-court statements as substantive evidence. Others allow child sex abuse victims to testify via an alternative means, either by closed circuit television during trial or by a prior video-


11. Id. at 172.


13. These hearsay statutes are beyond the scope of this note.


Eight states authorize the use of two-way closed circuit television (in which the child can see the defendant on a television monitor). See CAL. PENAL CODE. § 1347 (West Supp. 1990); HAW. REV. STAT. ch. 626, Rule Evid. 616 (1988); IDAHO CODE § 19-3024A (Supp. 1989); MICH. STAT. § 595.02(4)(c)(2) (1988); N.Y. CRIM. PROC. LAWS §§ 65.00-30 (McKinney Supp. 1990); OHIO REV. CODE ANN. §§ 2907.41(C), (E) (Baldwin 1986); UT. CODE ANN. § 18.2-67.9 (Michie 1988); VT. RULE EVID. 807(e) (Supp. 1990).

Thirty-seven states allow child sex abuse victims to testify via videotape. See ALA. CODE § 15-25-2 (Supp. 1989); ARIZ. REV. STAT. ANN. §§ 13-4251, -4253(B), (C) (1989); ARK. CODE ANN. § 16-44-203 (Michie 1987); CAL. PENAL CODE § 1346 (West Supp. 1990); COLO. REV. STAT. §§ 18-3-413, 18-6-401.3 (1986); CONN. GEN. STAT. § 54-86g (1989); DEL. CODE ANN. tit. 11, § 3511 (1987); FLA. STAT. ANN. § 92.53 (West Supp. 1991); HAW. REV. STAT. ch. 626, Rule Evid. 616 (1988); ILL. REV. STAT. ch. 38, para 106A-2 (1989); IND. CODE §§ 35-37-4-8(c), (d), (f), (g) (1988); IOWA CODE § 910A.14 (1987); KAN. STAT. ANN. § 38-1558 (1986); KY. REV. STAT. ANN. § 421.350(4) (Baldwin Supp. 1989); MASS. GEN. LAWS ANN. ch 278, § 16D (West Supp. 1990); MICH. COMP. LAWS ANN. § 600.2163a(5) (West
taped deposition which is presented to the jury at the time of trial.\textsuperscript{16} Although the defendant's attorney must be present to cross-examine the witness and must be in communication with the defendant during cross-examination, the defendant is not physically present during the testimony.\textsuperscript{17} The goal of these statutes is to foster more accurate and truthful testimony by shielding the testifying child from the trauma of facing the defendant in an open courtroom.\textsuperscript{18} These new statutes, designed literally to hide the defendants from their alleged victims, are in conflict with the defendants' right to confront their accusers in open court, as guaranteed by the Sixth Amendment's Confrontation Clause.\textsuperscript{19}

\textsuperscript{16} The Supreme Court has ruled that broadcasting testimony over closed circuit television is not "out-of-court," hence, not hearsay. \textsuperscript{17} While presenting videotaped testimony rather than a live broadcast over closed circuit television might more logically be classified as hearsay, most state courts consider a videotaped deposition that mirrors trial proceedings to be the functional equivalent of live testimony. See, \textit{e.g.}, State v. Thomas, 150 Wis. 2d 374, 391-92, 442 N.W.2d 10, 12-19 (stating videotaped testimony is the "functional equivalent to live in-court testimony"), \textit{cert. denied}, 110 S. Ct. 188 (1989); State v. Jarzbek, 204 Conn. 683, 697, 529 A.2d 1245, 1252 (1987) (same), \textit{cert. denied}, 484 U.S. 1061 (1988). \textit{But see} State v. Johnson, 240 Kan. 326, 329, 729 P.2d 1169, 1173 (1986) ("[V]ideotaped testimony is hearsay."), \textit{cert. denied}, 481 U.S. 1071 (1987). For purposes of this Note, statutes that create provisions for closed circuit television broadcasts will not be distinguished from those which allow videotaped depositions, unless there is a substantial reason to do so.


\textsuperscript{18} \textit{See} Ellen Forman, \textit{Note, To Keep the Balance True: The Case of Coy v. Iowa}, 40 \textit{HASTINGS L.J.} 437, 437-38 (1989). The group of statutes in the second category will be referred to as "child shield" laws and the testimony given under such statutes as "televised testimony." There is a third group of statutes which allows the use of an \textit{ex parte} videotape statement on the condition that the child is later available in court and subject to cross-examination. These videotape statements, however, are more logically viewed as a form of hearsay and are beyond the scope of this Note.

\textsuperscript{19} U.S. CONST. amend. VI states: "In all criminal prosecutions, the accused shall enjoy the right \ldots to be confronted with the witnesses against him. \ldots"
The United States Supreme Court decision in *Globe Newspaper Co. v. Superior Court* 20 is a leading case legitimizing the concept that children involved in sex abuse prosecutions may be entitled to special protection. *Globe* permitted trial courts to close criminal trials to the press and the public if the court makes a particularized finding that closing the courtroom is “necessary to protect the welfare” of the child. 21 The *Globe* Court found that the state’s interest in protecting “‘minor victims of certain sex crimes from public degradation, humiliation, demoralization, and psychological damage’” 22 is a compelling one. While *Globe* remedies one source of trauma—the prospect of speaking about such intimate matters in open court—it does not assuage the trauma of face-to-face confrontation with the accused. 23 But neither does the *Globe* ruling infringe upon the right to face-to-face confrontation. 24

The use by states of the now popular child shield laws represents an infringement of a defendant’s right to confront his accusers at trial. In implementing these statutes, courts must balance this long-standing right against the avowed need to protect children and bring wrongdoers to justice. 25 While there is purportedly unanimous concern for the child, at issue is the extent to which the court may deprive criminal defendants of the right to face their accusers at trial. 26

In *Maryland v. Craig,* 27 the Supreme Court endorsed a procedure that struck the balance in favor of protecting the child in child sex abuse cases. *Craig* creates an exception to the Sixth Amendment’s Confrontation Clause. This exception establishes a class of witnesses—child sex abuse victims—

21. *Id.* at 608.
22. *Id.* at 607 n.18 (quoting *Globe Newspaper Co. v. Superior Court*, 383 Mass. 838, 848, 423 N.E.2d 773, 779 (1981)).
23. See Note, supra note 3, at 813, 826.
24. Arguably, *Globe* may impinge on another Sixth Amendment right, the right to a public trial. U.S. Const. amend. VI. The amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial...” *Id.*
25. See, e.g., *State v. Andrews*, 447 N.W.2d 118, 122-23 (Iowa 1989) (holding a child’s unresponsive testimony at trial, absent showing that unresponsiveness was caused by fear of defendant, did not in itself justify use of prior videotaped testimony); *Commonwealth v. Bergstrom*, 402 Mass. 534, 544-46, 524 N.E.2d 366, 373 (1988) (ruling that unless a child victim is unavailable, use of televised testimony is an unjustified infringement on the defendant’s right to physical confrontation); *State v. Sheppard*, 197 N.J. Super. 411, 431, 484 A.2d 1330, 1342 (1984) (stating considerations of trauma to child “must be weighed and balanced against the right of confrontation in child abuse cases”). *But see State v. Hoversten*, 437 N.W.2d 240, 242 (Iowa) (finding evidence that child had been the victim of “horrendous and painful abuse by someone” justified dispensing with defendant’s right to face-to-face confrontation), *cert. denied*, 110 S. Ct. 212 (1989).
26. See generally Mlyniec & Dally, supra note 17.
who may testify at trial while avoiding face-to-face confrontation with their alleged abusers.\textsuperscript{28} The \textit{Craig} exception allows the child victim to give televised testimony outside the presence of the defendant if the trial court determines that confronting the defendant would so traumatize the child that he could not "reasonably communicate."\textsuperscript{29}

Sandra Ann Craig, a day care provider, was convicted by a Maryland court of sexually abusing children enrolled in her pre-school.\textsuperscript{30} Prior to trial, the prosecution requested a statutory procedure allowing the use of one-way closed circuit television for the presentation of the testimony of child sex abuse victims.\textsuperscript{31} In a pre-trial hearing, expert witnesses testified that the children would have difficulty testifying in the presence of the accused.\textsuperscript{32} Based on the testimony of the experts, the trial court determined, as required by statute, that testifying in the presence of the defendant would cause the child witnesses such emotional distress that the children could not reasonably communicate.\textsuperscript{33} A jury convicted Craig, and the Maryland Court of Special Appeals affirmed.\textsuperscript{34} The Maryland Court of Appeals reversed, concluding that the state's evidence of need was insufficient to warrant denial of the defendant's confrontation right.\textsuperscript{35} The United States Supreme Court granted certiorari and ultimately vacated the decision of the Maryland Court of Appeals.\textsuperscript{36}

In the majority's opinion, a state may use a special procedure designed to shield children from viewing their alleged abusers at trial if necessary to prevent trauma to the child and to ensure the accuracy of the child's testimony.\textsuperscript{37} Thus, Maryland's statutory provisions, which allowed the use of the special procedure only when the court found that testifying in the pres-

\begin{itemize}
\item 28. \textit{Id.} at 3169.
\item 29. \textit{Id.}
\item 30. \textit{Id.} at 3160.
(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 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.
\item 32. \textit{Craig}, 110 S. Ct. at 3161.
\item 33. \textit{Id.} at 3162.
\item 34. \textit{Id.}
\item 35. \textit{Id.}
\item 36. \textit{Id.} at 3162, 3171.
\item 37. \textit{Id.} at 3169.
\end{itemize}
ence of the defendant would render a child unable to communicate reasonably, passed constitutional muster.  

The dissent, led by Justice Scalia, protested vigorously. Justice Scalia argued that such an infringement of the confrontation right is "explicitly forbidden" by the Constitution. Justice Scalia further argued that, generally, exceptions to the hearsay rule hinge on a finding that the witness is unavailable at trial. The majority's ruling, he asserted, would allow a child to be excused from testifying in the presence of the defendant simply because the child was "unwilling" to testify in this manner, an unprecedented result.

This Note surveys state laws and judicial decisions permitting victims of child abuse to testify via closed circuit television or videotaped depositions in lieu of live testimony and analyzes the impact of Maryland v. Craig on these laws. This Note then discusses the United States Supreme Court's rationale in Craig for creating this new exception to the Confrontation Clause and the effect it may have on the rights of criminal defendants. This Note will conclude that this exception to the Confrontation Clause is a creature of public policy which may overreach its limited purpose of protecting children from trauma. Finally, this Note argues that Craig leaves unanswered many important questions about the level of evidence needed to invoke this exception and the characteristics of the class entitled to its protection.

I. CHILD SHIELD LAWS IN THE STATES AND THE CONFRONTATION CLAUSE: BEFORE COY V. IOWA

A. Confrontation Clause

The central purpose of the Confrontation Clause is to require an adverse witness physically to confront the accused in a criminal trial with the evidence against him. The Confrontation Clause also provides parties with

38. Id. at 3170.
39. Id. at 3174 (Scalia, J., dissenting).
40. Id.
41. Id.
42. Mattox v. United States, 156 U.S. 237 (1895), described the importance of physical confrontation, as well as cross-examination, to the confrontation right:

The primary object of the constitutional provision in question was to prevent depositions or ex parte affidavits . . . being used against the prisoner in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

Id. at 242-43 (emphasis added).

Later, the Supreme Court underscored the dual purpose of the Confrontation Clause. See, e.g., Pennsylvania v. Ritchie, 480 U.S. 39, 51 (1987) (finding "[t]he Confrontation Clause pro-
the opportunity to elicit testimony under oath, to cross-examine adverse witnesses, and enables the jury to observe and test the credibility of the witness.\textsuperscript{43} The Supreme Court has held that the Confrontation Clause requires that adverse witnesses appear at trial to be examined by the prosecution in the presence of the accused and to face the defendant for cross-examination.\textsuperscript{44} This right is not "absolute,"\textsuperscript{45} but there is a "preference for face-to-face confrontation at trial,"\textsuperscript{46} which "must occasionally give way to considerations of public policy and the necessities of the case."\textsuperscript{47} Thus, the courts have created a number of exceptions to the right to confrontation.\textsuperscript{48} The exceptions mainly allow into evidence out-of-court statements or hearsay, in which there is no possibility of in-court confrontation.\textsuperscript{49}

In \textit{Ohio v. Roberts},\textsuperscript{50} the Court established a two-prong test for determining exceptions to the confrontation right. In \textit{Roberts}, a witness testified at a preliminary hearing against a defendant accused of check forgery and possession of stolen credit cards; the witness subsequently disappeared and could not be located at the time of trial.\textsuperscript{51} Following the prosecution's good faith effort to locate the witness,\textsuperscript{52} the trial court allowed the use of the preliminary hearing transcripts and the defendant was convicted.\textsuperscript{53} The Ohio

\begin{itemize}
  \item California v. Green, 399 U.S. 149, 158-60 (1970); see Owen, supra note 10, at 1516-17.
  \item See United States v. Benfield, 593 F.2d 815, 821 (8th Cir. 1979). The court did not permit the use of videotaped testimony of an adult woman, stating that "[n]ormally the right of confrontation includes a face-to-face meeting at trial at which time cross-examination takes place." See also Graham, supra note 1, at 66.
  \item See, e.g., Maryland v. Craig, 110 S. Ct. 3157, 3163 (1990).
  \item Ohio v. Roberts, 448 U.S. 56, 63 (1980).
  \item Mattox v. United States, 156 U.S. 237, 243 (1895).
  \item See, e.g., FED. R. EVID. 803(1) (present sense impression); FED. R. EVID. 803(2) (excited utterance); FED. R. EVID. 803(3) (then existing mental, emotional, or physical condition). These traditional hearsay exceptions do not require that the declarant be unavailable to testify. Michael H. Graham, \textit{The Confrontation Clause, the Hearsay Rule, and Child Sexual Abuse Prosecutions: The State of the Relationship}, 72 MINN. L. REV. 523, 527-28 (1988). Other hearsay exceptions, such as FED. R. EVID. 804(b)(1) (former testimony), require that the declarant be unavailable to testify at trial. See also Graham, supra, at 549.
  \item See, e.g., FED. R. EVID. 804(b)(1) (former testimony); FED. R. EVID. 804(b)(2) (statement under belief of impending death); FED. R. EVID. 804(b)(3) (statements against interest); FED. R. EVID. 804(b)(4) (statement of personal or family history). The scope of the Confrontation Clause, however, is broader than hearsay. See California v. Green, 399 U.S. 149, 155 (1970); see also Graham, supra note 48, at 524 (noting the Supreme Court "has . . . stated that the confrontation clause is not a codification of the hearsay rule").
\end{itemize}
Court of Appeals reversed and the Supreme Court of Ohio affirmed. Following a grant of certiorari, the United States Supreme Court concluded that the trial court correctly allowed the use of the hearing transcript. The Court stated that two elements are necessary to satisfy the exceptions to the Confrontation Clause. First, the proponent of the evidence must establish the unavailability of the declarant. Second, the evidence must have "adequate indicia of reliability." If the evidence fits a "firmly rooted" exception, the court can infer reliability. "Particularized guarantees of trustworthiness" must be established for all other exceptions. In this case, the Court found that the prosecution had earnestly tried and failed to locate the witness, and had demonstrated that she was unavailable to testify. Further, the Court stated that the testimony was reliable because the defense attorney had cross-examined the absent witness at the hearing.

The Roberts standard has been adopted by a few states as an appropriate framework for balancing the need to protect children against the confrontation rights of criminal defendants. Unfortunately, many states have adopted a lesser standard and a few have presumed that the harm to the child in confronting the accused automatically outweighs any damage to the confrontation rights of the accused.

54. *Id.* The Ohio Court of Appeals reversed on the grounds that the State failed to meet its burden of demonstrating that it attempted to locate the witness. The Supreme Court of Ohio affirmed, however, because "the mere opportunity to cross-examine at a preliminary hearing did not afford constitutional confrontation for purposes of trial." *Id.* at 61.

55. *Id.* at 77.

56. "In the usual case . . . the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant." *Id.* at 65. In child abuse prosecutions, "unavailability" may include "incompetence, . . . the danger of severe psychological injury to a child victim from testifying, and an unwillingness or inability to testify." Graham, *supra* note 48, at 554.


58. *Id.* An example of a "firmly rooted exception" is a "dying declaration." Dying declarations "are considered trustworthy" against the accused in a homicide case. Glen Weis- senberger, *FEDERAL RULES OF EVIDENCE, RULES, LEGISLATIVE HISTORY, COMMENTARY AND AUTHORITY* § 804.17 (1987).


60. *Id.* For example, in Bourjaily v. United States, 483 U.S. 171 (1987), the Supreme Court found that the exception for co-conspirator's statements was firmly rooted "enough" so that the Court did not have to make an independent evaluation of the statement's reliability. *Id.* at 183.

61. *Roberts*, 448 U.S. at 75. "The law does not require the doing of a futile act." *Id.* at 74.

62. *Id.* at 70-71.

63. See, e.g., Wildermuth v. State, 310 Md. 496, 530 A.2d 275 (1987); *infra* notes 115-24 and accompanying text.

64. See, e.g., State v. Hoversten, 437 N.W.2d 240, 241-42 (Iowa) (upholding use of one-way mirror because protecting delicate emotional condition of child witness is an important
Globe Newspaper Co. v. Superior Court\textsuperscript{65} offered support for the idea that child sex abuse victims deserve special treatment at trial and that the needs of children can sometimes justify the infringement of a constitutional right. In Globe, the United States Supreme Court ruled that trial courts may close trials to the press and the public if the court makes a particularized finding that this is necessary to protect the child—an act which necessarily limits the news media's exercise of their First Amendment rights.\textsuperscript{66}

\textbf{B. The Presumption of Harm to the Child}

The test created in Ohio v. Roberts provided some guidance for determining the validity of Confrontation Clause exceptions. Nonetheless, some states attempting to shield children from their alleged abusers have cast aside the Roberts framework, creating standards that allow the use of televised testimony. These standards presume that the needs of child sex abuse victims always outweigh the rights of the defendant.

The states adopting this "presumptive" view allow the blanket admission of televised testimony taken outside the presence of the defendant if the witness testifying is a child sex abuse victim below a statutory minimum age.\textsuperscript{67} State supreme courts have upheld such laws based upon the presumption that all young children, regardless of their individual circumstances and characteristics, need protection from the trauma of testifying in court.\textsuperscript{68} For example, in State v. Cooper,\textsuperscript{69} the South Carolina Supreme Court accepted the legislative presumption in the state's shield statute that all young children needed such protection and concluded that the face-to-face requirement of the Confrontation Clause would be satisfied by cross-examination outside the defendant's presence.\textsuperscript{70}

\textsuperscript{65} 457 U.S. 596 (1982).
\textsuperscript{66} Id. at 607-09.
\textsuperscript{68} See, e.g., State v. Sheppard, 197 N.J. Super. 411, 484 A.2d 1330 (1984). In Sheppard, the court allowed the use of video equipment in the prosecution of a man for sexually abusing his ten-year-old stepdaughter. The court was concerned with the possibility of further harm inflicted on child witnesses by the judicial process and reasoned that "[c]hildren who are prevailed upon to testify may be more damaged by their traumatic role in the court proceedings than they were by their abuse." Id. at 431, 484 A.2d at 1342.
\textsuperscript{70} Id. at 356, 353 S.E.2d at 454.
Other courts base their tests on the presumption that the trauma induced by facing the defendant in the courtroom undermines a child's truthfulness, a result which justifies dispensing with face-to-face encounters. Courts have also presumed that the very nature of sexual abuse indicates truthfulness in child testimony, for it is inconceivable that small children could fabricate the particulars of an assault. The Kansas Supreme Court expressed the presumption in favor of a child's veracity in *State v. Myatt.* *Myatt* involved the interpretation of a statute creating a hearsay exception for child sex abuse victims. In *Myatt,* a six-year-old girl was diagnosed with gonorrhea. She told a social worker and a police officer that her mother's boyfriend had touched her in the genital area. The trial court allowed the social worker and the police officer to testify about the child's statements. Partially on the basis of this testimony, the defendant was convicted of child molestation. Because children are not likely to lie to their parents or other authority figures about sexual abuse, the court found a child's testimony concerning sexual abuse to be inherently reliable. Moreover, the court held that children lack the requisite knowledge to fabricate about such matters.

While the *Myatt* court addressed the validity of a hearsay exception for child sex abuse victims, the presumption in favor of a child's truthfulness applies equally to televised testimony. Under the presumptive view, if the prosecution wishes to invoke the child shield statute, a criminal defendant in
a child sex abuse case can never demand the right to confront his accusers. The criminal defendant’s rights are thus automatically subservient to his alleged victim’s.

C. The Requirement that Some Harm be Proved

While some courts embraced the presumption that all children need protection from the trauma of testifying against the accused in open court, others determined that the mere presumption of harm is not sufficient to justify dispensing with the confrontation right. Instead, some require that a court determine that testifying in the presence of the defendant will either harm the child in some way or impede the judicial process. Absent such a finding, the use of a child shield procedure will not pass constitutional muster. For example, the Kentucky Supreme Court, in interpreting its law giving trial judges total discretion to invoke the child shield statute, inserted a minimal requirement that the use of a child shield law be “reasonably necessary” to protect child victims from trauma. In Commonwealth v. Willis, the court upheld the use of television cameras to present the testi-

82. Graham, supra note 48, at 559-60.
83. See, e.g., State v. Davis, 229 N.J. Super. 66, 74, 550 A.2d 1241, 1245 (1988) (requiring finding that the “witness would suffer severe emotional or mental distress”); Glendenning v. State, 536 So. 2d 212, 218 (Fla. 1988) (requiring finding that the child would suffer “emotional or mental harm”), cert. denied, 492 U.S. 907 (1989); People v. Cintron, 75 N.Y.2d 249, 254, 551 N.E.2d 561, 564, 552 N.Y.S.2d 68, 71 (1990) (requiring the court to find that “child witness will suffer severe mental or emotional harm” (emphasis in original)).
84. KY. REV. STAT. ANN. § 421.350 (Michie/Bobbs-Merrill Supp. 1991) (declared unconstitutional on other grounds by Gaines v. Commonwealth, 728 S.W.2d 525 (Ky. 1987)). The statute at the time of trial read as follows:

The court may, on the motion of the attorney for any party, order that the testimony of the child be taken in a room other than the courtroom and be televised by closed circuit equipment in the courtroom to be viewed by the court and the finder of fact in the proceeding.

Id. at § 421.350(3).
85. Commonwealth v. Willis, 716 S.W.2d 224, 230-31 (Ky. 1986). Unlike the United States Constitution, the Kentucky State Constitution contains an explicit “face-to-face” requirement. Id. The trial court reasoned, however, that “[t]he choice of the words ‘face to face’ may have resulted from an inability to foresee technological developments permitting cross-examination and confrontation without physical presence,” i.e., television. Id. at 230. The dissent protested angrily that “[t]he majority has put the imprimatur of this Court on a new revision of the rule which says that the right of confrontation is no longer ‘face to face,’ but is rather, ‘face—to television screen—to face.’” Id. at 234.
86. 716 S.W.2d 224 (Ky. 1986).
mony of a five-year-old child abuse victim. The court determined that the child’s reluctance to testify in the presence of the accused and her failure to give specifics about the crime while in the defendant’s presence justified use of the protective procedure and met the “reasonably necessary” standard. The Kentucky Supreme Court reasoned that the legislature did not intend the traditional requirement of unavailability to be imposed on child sex abuse victims, otherwise it would not have provided this special statutory protection.

Courts adopting the Willis view recognize the need to balance the desire to protect children from harm against the possible harm to the defendant's right to confrontation. But the competing interests are not equally weighted. For example, in the Willis court’s view, the needs of the child are real and compelling, while the violation of the defendant’s right is a mere technicality.

D. The Requirement of Particularized Need

Other courts have required a stronger showing of particularized need before dispensing with the confrontation right. These courts have upheld child shield statutes only if the statute required a case by case evaluation of the needs of a particular child.

For example, in State v. Vess, because there was no requirement of an individualized showing that the child needed to be protected, the Arizona Supreme Court held as unconstitutional an Arizona statute allowing the use of televised testimony at the discretion of the trial judge. The defendant in Vess was convicted of child molesting, sexual abuse, and furnishing obscene materials to a minor based on the victim’s videotaped testimony

87. Id. at 231.
88. Id. at 230.
89. Id. The court concluded that construing the statute to require a showing of unavailability “would provide no further protection for child witnesses than was already available.” Id. The court reasoned that the legislature did not intend to do a “vain act.” Id.
90. See supra notes 81-89 and accompanying text.
91. Willis, 716 S.W.2d at 230-31.
92. Supra notes 50-64 and accompanying text.
95. Ariz. Rev. Stat. Ann. § 13-4253 (1989). The statute provides: “The court, on motion of the prosecution, may order that the testimony of the minor be taken in a room other than the courtroom and be televised by closed circuit equipment in the courtroom to be viewed by the court and the finder of fact in the proceeding.” Id.
96. Vess, 157 Ariz. at 238, 756 P.2d at 335.
taken in conformance with the state's child shield statute. While the court indicated that such testimony may be constitutional if there is a showing that a particular child would be either traumatized or unable to communicate in the presence of the defendant, the court refused to sanction the creation of a class of witnesses who need not testify before the jury if the prosecutor does not want them to, regardless of whether the prosecution has demonstrated a need for such a procedure.

On the other hand, statutes requiring the court to find that a particular child needs to present televised testimony can result in the court sustaining the statute. In State v. Twist, the Maine Supreme Court upheld the state's child shield statute, which set a standard requiring the court to "expressly find[] that the emotional or psychological well-being of the person would be substantially impaired if the person were to testify at trial." In Twist, two child victims presented videotaped testimony pursuant to Maine's child shield statute, which resulted in the conviction of Elwood Twist for rape and unlawful sexual contact. The Maine Supreme Court found that the statutory standard justified dispensing with face-to-face confrontation because it "advanced the important public policy of protecting the emotional and psychological well-being of young children."

97. Id. at 237-38, 756 P.2d at 333-34.
98. Id. at 238, 756 P.2d at 335.
99. Id. at 237, 756 P.2d at 334.
100. 528 A.2d 1250 (Me. 1987).
101. Id. at 1253 & n.4 (quoting 15 ME. REV. STAT. ANN. tit. 15, § 1205 (West Supp. 1984)). Unlike the majority of state statutes, the Maine law classified videotaped testimony as hearsay. Id. In 1985, the Maine legislature repealed and replaced subsections 1 and 2 quoted below; however, at the time of trial, the statute read as follows:

A hearsay statement made by a person under the age of 14 years, describing any incident involving sexual intercourse, a sexual act or sexual contact . . . shall not be excluded as evidence in criminal proceedings in courts of this State if:

1. Emotional or psychological well-being of a person. On motion of the prosecution and in camera hearing, the court expressly finds that the emotional or psychological well-being of the person would be substantially impaired if the person were to testify at trial; and

2. Examination and cross-examination. . . . the statement is made under oath, the defendant has been given the same rights in regard to the examination and cross-examination of the person as if the person were testifying in open court, and the statement has been recorded stenographically or on videotape or by another means approved by the court.

Id.
102. Id. at 1253 n.4.
103. Id. at 1251.
105. Twist, 528 A.2d at 1251.
106. Id. at 1256.
Using a more restrictive analysis than the *Twist* court, the Connecticut Supreme Court, in *State v. Jarzbek*,\textsuperscript{107} upheld the state's statute providing that a child sex abuse victim under the age of twelve may be permitted to present videotaped testimony.\textsuperscript{108} The court, however, rejected a "per se" rule that "protecting the well-being of children" alone justifies infringement of a defendant's confrontation rights.\textsuperscript{109} The defendant in *Jarzbek* was convicted of sexually abusing his five-year-old daughter.\textsuperscript{110} Her testimony was videotaped following a pre-trial hearing in which the state presented testimony of two clinical psychologists who testified that the child would be traumatized if called upon to testify in the presence of the defendant.\textsuperscript{111} The court concluded that the state had failed to justify the use of televised testimony.\textsuperscript{112} Absent a compelling need, the defendant's right to "eyeball-to-eyeball" confrontation cannot be eliminated.\textsuperscript{113} The court mandated a case-by-case analysis,\textsuperscript{114} whereby the state would be required to establish a compelling need to allow the child witness to testify outside the presence of the defendant.\textsuperscript{115} This compelling need could be established if the trial court determines that physical confrontation would make a child less likely to testify truthfully, thus undermining the truth-enhancing function of the Confrontation Clause.\textsuperscript{116}

Similarly, the Maryland Court of Appeals, in *Wildermuth v. State*,\textsuperscript{117} struck down the conviction of a man accused of sexually abusing his nine-year-old daughter because she testified via closed circuit television.\textsuperscript{118} The court held that the evidence did not support a finding that the child would suffer such emotional harm that she would be unable to reasonably communicate.\textsuperscript{119} Maryland's child shield statute explicitly requires that the trial


\textsuperscript{108.} Id.

\textsuperscript{109.} Id. at 702-03, 529 A.2d at 1254. The court rejected the generalization that "children are uniquely vulnerable witnesses who must be treated more delicately than adult witnesses in order to protect their psychological and emotional well-being." Id.

\textsuperscript{110.} Id. at 685-87, 529 A.2d at 1245-47.

\textsuperscript{111.} Id. at 685, 529 A.2d at 1246.

\textsuperscript{112.} Id. at 694, 529 A.2d at 1250.

\textsuperscript{113.} Id.

\textsuperscript{114.} Id. at 704, 529 A.2d at 1255.

\textsuperscript{115.} Id.

\textsuperscript{116.} Id. The court's analysis focused on the truth-enhancing properties of physical confrontation. "[P]hysical confrontation contributes significantly, albeit intangibly, to the truth-seeking process." Id. at 695, 529 A.2d at 1251. The court was also concerned about the effect of the televised procedures on the "defendant's dignity and the presumption that he is innocent until proven guilty." Id.

\textsuperscript{117.} 310 Md. 496, 530 A.2d 275 (1987).

\textsuperscript{118.} Id. at 502-04, 530 A.2d at 278-80.

\textsuperscript{119.} Id. at 523-25, 530 A.2d at 288-89.
court make such a finding.\textsuperscript{120} In overturning the conviction, the \textit{Wildermuth} court adopted the traditional standards of admissibility laid down in \textit{Ohio v. Roberts}.\textsuperscript{121} The court held that both the necessity of admitting the evidence and the reliability of the testimony were applicable to child testimony.\textsuperscript{122} The court concluded that "cross-examination, testimony under oath, ability of judge, jury, and accused to view the witness during the testimony," even if only through a television screen, satisfied the reliability requirement.\textsuperscript{123} The court further held that a finding that the child cannot reasonably communicate "is tantamount to a finding of unavailability in the \textit{Roberts} sense, and meets the necessity prong."\textsuperscript{124} Unavailability cannot be established by "mere nervousness or excitement or some reluctance to testify" in the particular child involved,\textsuperscript{125} but by an inability to "reasonably communicate" at trial.\textsuperscript{126}

Under the \textit{Wildermuth} and \textit{Jarzbek} holdings, the right to physical confrontation has significantly greater weight when measured against the need to protect child sex abuse victims from trauma.\textsuperscript{127} Televised testimony can only be used when it is justified by the possibility that significant harm to the particular child involved will undermine the judicial process.\textsuperscript{128}

\section*{E. The Right to Confrontation is Nearly Absolute}

A handful of states do not permit the use of videotaped testimony if the child witness cannot see and be seen by the defendant. This requirement defeats the purpose of the child shield procedures discussed above.\textsuperscript{129} The Massachusetts Supreme Court, for example, struck down a provision of the Massachusetts child shield statute that allowed the taking of testimony by

\begin{footnotesize}
\begin{itemize}
\item 121. 448 U.S. 56 (1980).
\item 122. \textit{Wildermuth}, 310 Md. at 514-15, 530 A.2d at 284-85.
\item 123. \textit{Id.} at 515, 530 A.2d at 285.
\item 124. \textit{Id.} at 519, 530 A.2d at 286.
\item 125. \textit{Id.} at 524, 530 A.2d at 289. Embedded even in this more rigorous approach is a presumed need to protect child victims from courtroom trauma: "to force a child to give this sort of testimony, in open court, in the presence of the accused, may further traumatize the child." \textit{Id.} at 516, 530 A.2d at 285.
\item 126. \textit{Id.} at 519, 530 A.2d at 286.
\item 127. \textit{Supra} notes 107-26 and accompanying text.
\item 128. \textit{See, e.g., State v. Jarzbek, 204 Conn. 683, 704-05, 529 A.2d 1245, 1255 (1987), cert. \textit{denied}, 484 U.S. 1061 (1988); Wildermuth, 310 Md. at 518, 530 A.2d at 286 (holding that "(unavailability) must be specific to the particular witness").
\item 129. This process protects the child from the trauma of testifying in open court, but not from the trauma invoked by the presence of the defendant. \textit{See, e.g., Commonwealth v. Bergstrom, 402 Mass. 534, 552-53, 524 N.E.2d 366, 377-78 (1988) (striking portions of Mass. Gen. L. ch. 278, § 16D, allowing the taking of televised testimony outside the presence of the defendant).}
\end{itemize}
\end{footnotesize}
videotape or closed-circuit television outside the presence of the defendant.\textsuperscript{130} The Massachusetts statute allowed taping outside the presence of the defendant if the court found by a preponderance of evidence that facing the defendant in court would cause the child victim psychological or emotional trauma.\textsuperscript{131} In \textit{Commonwealth v. Bergstrom},\textsuperscript{132} the Massachusetts court held that this provision of the statute, on its face, violated the state constitution's explicit right to face-to-face confrontation.\textsuperscript{133} As a result, the court overruled the conviction of a father for sexually abusing his two young daughters. The court also emphasized the importance of physical confrontation under the Federal Constitution.\textsuperscript{134} The court argued that a witness's veracity is tested not only by cross-examination, but by meeting the defendant face-to-face at trial.\textsuperscript{135} The court found that the exception for child sex abuse victims was both too broad and "crime specific"\textsuperscript{136} because "no principled distinction can be drawn between a child witness and any other class whom the Legislature might in the future deem in need of special treatment."\textsuperscript{137} Although the court found concerns about the difficulties an individual child may encounter in open court to be valid, it was not willing to dispense with face-to-face confrontation on that ground.\textsuperscript{138} The court held that "[t]he right of the accused to be tried in the manner which our Constitution guarantees cannot dissolve under the pressures of changing social circumstance or societal focus."\textsuperscript{139} While the court did not reject outright the use of videotaped testimony where it was necessary to "avoid severe and long lasting emotional trauma to the child,"\textsuperscript{140} the court held that to satisfy

\textsuperscript{130} Id. at 552-54, 524 N.E.2d at 377-78.
\textsuperscript{131} MASS. ANN. LAWS ch. 278, § 16D (Law. Co-op. 1991). Alternative procedures may be used provided "the court finds by a preponderance of the evidence ... that the child witness is likely to suffer psychological or emotional trauma as a result of testifying in open court, [and] as a result of testifying in the presence of the defendant." \textit{Id.}
\textsuperscript{133} Article 12 of the Massachusetts Constitution states that "every subject shall have a right to produce all proofs, that may be favorable to him; [and] to meet the witnesses against him face to face. . . ." \textit{MASS. CONST. pt. I, art. XII} (emphasis added). The \textit{Bergstrom} court reasoned that "constitutional language more definitively guaranteeing the right to a direct confrontation between witness and accused is difficult to imagine." \textit{Bergstrom}, 402 Mass. at 541-42, 524 N.E.2d at 371.
\textsuperscript{134} \textit{Id.} at 542, 524 N.E.2d at 372.
\textsuperscript{135} \textit{Id.}
\textsuperscript{136} \textit{Id.} at 546-47, 524 N.E.2d at 374. "The recognized exceptions to the right of direct confrontation . . . apply impartially to all situations which the constitutional guarantee governs." \textit{Id.} at 546, 524 N.E.2d at 374.
\textsuperscript{137} \textit{Id.} at 546-47, 524 N.E.2d at 374.
\textsuperscript{138} \textit{Id.} at 552-53, 524 N.E.2d at 377.
\textsuperscript{139} \textit{Id.} at 553, 524 N.E.2d at 377.
\textsuperscript{140} \textit{Id.} at 550-51, 524 N.E.2d at 376. The court was reluctant to allow the use of taped testimony under less than compelling circumstances, because televised testimony is not "the
the Sixth Amendment rights, the defendant must be present and visible to
the witness at the taping of the testimony.\textsuperscript{141}

By 1988, a majority of states had enacted a patchwork of child shield
statutes, which permitted defendants varying degrees of protection from in-
fringement of their confrontation rights. While the state courts were active
in attempting to balance the use of televised testimony in child sex abuse
prosecutions against the right of an accused to face his accuser at trial, the
United States Supreme Court was silent. The Supreme Court attempted to
end the differences between the states in \textit{Coy v. Iowa}, but simply added to the
confusion by sending a dual message.

\textbf{II. THE SUPREME COURT SPEAKS: \textit{Coy v. Iowa}}

In \textit{Coy v. Iowa},\textsuperscript{142} the United States Supreme Court addressed directly, for
the first time, the states's use of procedures to shield child abuse victims
from confronting their alleged abusers in the courtroom.\textsuperscript{143} In \textit{Coy}, the
Court overturned a man's conviction of sexually molesting two thirteen-
year-old girls because Iowa's child shield statute\textsuperscript{144} allowed the girls to test-
ify with a screen placed between them and the defendant that removed him
from their view.\textsuperscript{145} With the screen in place, the defendant, judge and jury
could see the witnesses, but the witness could not see the defendant.\textsuperscript{146}

Writing for the majority, Justice Scalia rejected the screen method of pro-
tection, reasoning that a face-to-face meeting is "'essential to a fair trial in a
criminal prosecution.'"\textsuperscript{147} Justice Scalia concluded that it would be "diffi-
cult to imagine a more obvious or damaging violation of the defendant's
right to a face-to-face encounter" than screening the defendant from his ac-
equivalent of personal observation." \textit{Id.} at 550, 524 N.E.2d at 376. "Especially where child
witnesses are involved, and great leeway for leading questions is allowed, jurors must be able to
choose their own focus in looking for any direct or indirect influences on a child's testimony." \textit{Id.}

\begin{itemize}
\item \textsuperscript{141} \textit{Id.} at 551, 524 N.E.2d at 376.
\item \textsuperscript{142} 487 U.S. 1012 (1988).
\item \textsuperscript{143} An earlier case, \textit{Kentucky v. Stincer}, 482 U.S. 730 (1987), concerned the right of a
criminal defendant in a child sex abuse case. In \textit{Stincer}, the Court addressed whether the
defendant had a right to be present during the children's competency hearing. \textit{Id.} at 732. The
Court ruled that because the children were not asked any substantive questions about the
crime during the competency hearing, and because the defendant "had the opportunity for full
and effective cross-examination of the two witnesses during trial," the defendant's exclusion
from the hearing did not violate his Sixth Amendment rights. \textit{Id.} at 744. The Court did not
consider the constitutionality of state laws that permit the accusers to testify and avoid physi-
cal confrontation at trial.
\item \textsuperscript{144} \textit{Iowa Code Ann.} § 910A.13 (West Supp. 1991).
\item \textsuperscript{145} \textit{Coy v. Iowa}, 487 U.S. at 1014-15.
\item \textsuperscript{146} \textit{Id.} at 1015.
\item \textsuperscript{147} \textit{Id.} at 1017 (quoting \textit{Pointer v. Texas}, 380 U.S. 400, 404 (1965)).
\end{itemize}
According to Justice Scalia, the "legislatively imposed presumption of trauma" in the Iowa statute did not establish the necessity that might allow an exception to the literal meaning of the Confrontation Clause. In contrast to Justice Scalia's strongly worded opinion, Justice O'Connor's concurring opinion suggested that a state law permitting a procedure that is "necessary to further [sic] an important public policy" and requiring a "case-specific finding of necessity" might justify an exception to the Confrontation Clause.

_Coy_ invalidated state approaches relying on legislatively-imposed presumptions of trauma, but it did not automatically render such laws void. Justice O'Connor's concurrence established a framework for evaluating the constitutionality of child shield statutes. First, the statutes must further an important public policy; second, the court must make a case-specific finding of necessity before permitting the use of a child shield procedure.

### A. The State Court's Rush to Protect Child Shield Statutes

State courts acted to preserve their child shield laws within the _Coy v. Iowa_ framework. Various state courts found that impaired truthfulness, traumatization or harm to the child, inability to communicate, or unavailability satisfied the _Coy_ requirement of necessity.

148. _Id._ at 1020.

149. _Id._ at 1021. Justice Scalia's opinion stressed the fundamental nature of the right to physical confrontation at trial. _Id._ at 1016. Pointing to _Kentucky v. Stincer_, Scalia maintained that the Court has "never doubted . . . that the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact." _Id._

150. _Id._ at 1025 (O'Connor, J., concurring).

151. _Id._


153. See, e.g., _State v. Bonello_, 210 Conn. 51, 554 A.2d 277, _cert. denied_, 490 U.S. 1082 (1989). The Connecticut Supreme Court's decision in _State v. Jarzbek_, 204 Conn. 683, 529 A.2d 1245 (1987), _cert. denied_, 484 U.S. 1061 (1988), preceded _Coy_ and required that the trial court determine that testifying in the presence of the accused would cast serious doubt on the "trustworthiness and reliability" of the child witness. _Bonello_, 210 Conn. at 54, 554 A.2d at 279. The _Bonello_ court concluded that _Jarzbek_ standards were consistent with _Coy_ because "the rationale of promoting the search for truth that underlies _Jarzbek_ is identical to the concerns expressed . . . in _Coy_." _Id._ at 60, 554 A.2d at 282. The court went as far as to argue that _Jarzbek_ "promote[s] rather than restrict[s] the sixth amendment's fundamental objective of establishing . . . the facts." _Id._

154. See, e.g., _State v. Chisholm_, 245 Kan. 145, 777 P.2d 753 (1989). The court remanded to the trial court to make the "necessary individualized findings as to the probability, degree, and duration of psychological injury to the child" if the child testifies in court in the presence of the defendant. _Id._ at 152, 777 P.2d at 759.

155. See, e.g., _State v. Conklin_, 444 N.W.2d 268, 271 (Minn. 1989). The statute, MINN. STAT. § 595.02, subd. 4(c) (1988), allows a child witness to give testimony via videotape if the
In states with “presumptive” statutes, state supreme courts generally up
held the statutes by engrafting a requirement that the trial court make a
particularized finding of necessity before invoking the statute.\textsuperscript{156} For example, in \textit{State v. Eaton},\textsuperscript{157} because the trial court allowed the use of closed
circuit television absent a particularized finding of necessity, the Kansas
Supreme Court overturned a child sex abuse conviction.\textsuperscript{158} The court sus-
tained the state law, however, provided a trial court first finds, by clear and
convincing evidence, that testifying in the presence of the defendant ren-
dered the child unable to communicate reasonably or unavailable to
testify.\textsuperscript{159}

In light of \textit{Coy}, the more restrictive Connecticut court reevaluated and
reaffirmed its \textit{Jarzbek} standards,\textsuperscript{160} which had earlier imposed a necessity
requirement onto its presumptive state law. State courts also upheld laws
already requiring a particularized finding of necessity,\textsuperscript{161} as well as many
pre-\textit{Coy} decisions conforming to these statutes.\textsuperscript{162}

\begin{footnotesize}
\begin{footnotes}
156. See, e.g., \textit{State v. Vincent}, 159 Ariz. 418, 768 P.2d 130 (1989) (overturning the conviction of first degree murder because defendant's six-year-old son and eight-year-old daughter provided videotaped testimony without individualized findings, but sustaining the state law if its application is limited to situations where there is an "individualized showing . . . that face-to-face testimony would so traumatize a child witness as to prevent the child from reasonably communicating"). \textit{Id.} at 432, 768 P.2d at 164.

The Iowa Court itself glossed over the \textit{Coy} decision and concluded that \textit{Coy} permitted ex-
ceptions to face-to-face confrontation “when necessary to further an important public policy” and that “[p]rotection of child witnesses” was just such a policy meriting an exception. \textit{State v. Hoversten}, 437 N.W.2d 240, 241 (Iowa) (citations omitted), \textit{cert. denied}, 110 S. Ct. 212 (1989).

158. \textit{Id.} at 378, 769 P.2d at 1162-63.
159. \textit{Id.} at 384-85, 769 P.2d at 1167-68.
160. \textit{See supra} notes 107-16 and accompanying text.
162. \textit{See, e.g.}, \textit{State v. Murrell}, 393 S.E.2d 919, 922 (S.C. 1990) (upholding conviction for sexual assault of five-year-old because trial judge made “specific findings” of need before determin-
ing that child could provide videotaped testimony); \textit{State v. Davis}, 229 N.J. Super. 66, 74, 550 A. 2d 1241, 1245 (1988) (upholding conviction for sexually assaulting two boys, aged three and four, because trial court found that there was a "'substantial likelihood that the witness would suffer severe emotional or mental distress if required to testify in open court'" before allowing child victims to testify via closed-circuit television) (quoting \textit{N. J. STAT. ANN.} \textsection{2A:84A-32.4} (West Supp. 1989); \textit{Glendening v. State}, 536 So. 2d 212, 218 (Fla. 1988) (up-
holding conviction for sexual battery of 3 1/2-year-old daughter because the trial court found that "use of videotaped testimony [was] necessary to prevent the child from suffering emotional or mental harm"), \textit{cert. denied}, 492 U.S. 907 (1989). \textit{Cf. People v. Cintron}, 75 N.Y.2d 249, 254, 551 N.E.2d 561, 564, 552 N.Y.S.2d 68, 71 (1990) (overturning conviction for sexu-
\end{footnotes}
\end{footnotesize}
B. Coy Engenders Restrictions on Child Shield Laws in Some States

Responding to Justice Scalia's rejection of the Iowa child shield procedure, several states saw Coy as limiting the instances in which the child shield statute could be invoked, regardless of whether the trial court makes a particularized finding of necessity. For example, the Maryland Court of Appeals further narrowed the circumstances enunciated earlier in Wildermuth v. State. The court overturned a child care provider's conviction of sexually abusing her charges in Craig v. State even though the child's televised testimony had been provided in conformance with the Maryland child shield statute. The court concluded that an "inquiry which looks generally to a child's inability to testify in open court [is] . . . too broad to satisfy the necessity requirement" of Coy. Instead, the court must find specifically that it is the presence of the defendant that invokes the emotional distress that is preventing the child witness from "reasonably communicating."

Similarly, the Louisiana Supreme Court voided a portion of its statute as unconstitutional under Coy. The Louisiana statute allowed a victim of child sex abuse under the age of fourteen to give testimony by closed circuit television with the defendant present, but behind a screen, so that the child could not hear or see the defendant. The protective procedure could be used whenever "justice so requires" at the discretion of the trial judge. In

---

163. See infra notes 164-74 and accompanying text.
164. 310 Md. 496, 530 A.2d 275 (1987); see supra notes 115-24 and accompanying text.
166. Id. at 564, 560 A.2d at 1126.
167. Id. at 566, 560 A.2d at 1127. A similar conclusion was reached in State v. Conklin, 444 N.W.2d 268 (Minn. 1989). In Conklin, the Minnesota Supreme Court overturned a child sex abuse conviction because the trial court had not determined that it was the presence of the defendant that traumatized the child before allowing the child to give televised testimony outside the presence of the defendant. Id. at 274.
   A. On its own motion or on the motion of the attorney for any party, a court may order when justice so requires that the testimony of a child under fourteen years of age who may have been physically or sexually abused be taken in a room other than the courtroom and be simultaneously televised by closed circuit television to the court and jury.

Id.
169. Id.
170. Id.
State v. Murphy, the Louisiana Supreme Court overturned the defendant’s conviction for sexually abusing a four-year-old child because the Louisiana statute “contain[ed] at best a generalized legislative finding of the desirability of conferring special protection to child witnesses.” Reasoning that the “non-specific” standard of “when justice so requires . . . clearly violates [the] defendant’s constitutional right of confrontation under . . . Coy,” the court invalidated the portion of the statute that required the child witness to be kept from seeing or hearing the defendant while giving televised testimony.

The Coy decision did not address other differences in state approaches to the implementation of child shield laws. For example, some states that enacted child shield laws established age limits for child witnesses beyond which they are ineligible to invoke the protections of the statute. These age limits vary from state to state. In addition, the states have required, by statute or by judicial interpretation, that certain types of evidence be presented to establish the requisite need or harm to the child before permit-

---

171. 542 So. 2d 1373 (La. 1989).
172. Id. at 1376.
173. Id.
174. Id.
175. Glenn F. Lang, To See or Not to See the Defendant: Expanding the Use of Florida’s Special Procedures for Taking the Testimony of Witnesses, 18 FLA. ST. U. L. REV. 321, 340, 434 (1991). Neither the majority nor the concurring opinions effectively guide the states on how to construct a constitutionally valid child shield statute. Id.
177. Statutes commonly preclude access to alternative methods of taking testimony after a child reaches age 12 or 13. See CONN. GEN. STAT. ANN. § 54-86g (West Supp. 1991) (12 or younger); ILL. ANN. STAT. ch. 38, para. 106A (Smith-Hurd Supp. 1991) (12 or younger); KAN. STAT. ANN. § 22-3434 (1988) (12 or younger); WIS. STAT. ANN. §§ 967.04(7)-(10) (West Supp. 1989) (under 12). At least one state sets the cut off point at less than ten years old. MINN. STAT. § 595.02 (1988). Others states’s statutes shield “child” victims as old as 16 or 17. See, e.g., N.J. REV. STAT. § 2A:84A-32.4 (1990) (under 16); R.I. GEN. LAWS § 11-37-13.2 (Supp. 1989) (17 or younger). In one state, South Carolina, the child shield statute can be invoked on behalf of a broad class of special witnesses, including the very young, the elderly or disabled persons. S.C. CODE ANN. § 16-3-1530(G) (Law. Co-op. 1985). This section of the South Carolina Code provides that:

VICTIMS AND WITNESSES WHO ARE VERY YOUNG, ELDERLY, WHO ARE HANDICAPPED OR WHO HAVE SPECIAL NEEDS, HAVE A RIGHT TO SPECIAL RECOGNITION AND ATTENTION BY ALL CRIMINAL JUSTICE, MEDICAL, AND SOCIAL SERVICE AGENCIES.

The court shall treat “special” witnesses sensitively, using closed or taped sessions when appropriate. The solicitor or defense shall notify the court when a victim or witness deserves special consideration.

Id.
ting the use of the protective procedures. State courts analyze the quantum and type of evidence sufficient to support a finding of necessity in fundamentally different ways. This burden cannot be reconciled from state to state.

178. See, e.g., CAL. PENAL. CODE § 1347(b)(2) (West Supp. 1991) (requiring that prosecution show by clear and convincing evidence that impact of testifying in presence of defendant would be "so substantial as to make the minor unavailable as a witness"); DEL. CODE ANN. tit. 11, § 3511 (1987) (allowing the videotaping of a child witness under 12 in criminal cases upon motion of the Attorney General and notice to defendant); IND. CODE ANN. § 35-37-4-6 (Burns Supp. 1990) (allowing videotaping of a child 14 or under in crimes involving physical and sexual abuse, kidnapping, rape, and deviant sexual conduct only if the court finds at a hearing that the child's statements are reliable and that the "substantial likelihood of emotional or mental harm" renders the child unavailable to testify).


180. Shaffer, Comment, supra note 179, at 811-12 ("inconsistencies run rampant on the issues of the degree of potential trauma necessary and the method of proof required") (footnotes omitted).

Convictions have been overturned because a trial judge used a child shield procedure and relied solely on his own observation or failed to use expert witnesses. See People v. Cintron, 75 N.Y.2d 249, 253, 551 N.E.2d 561, 564, 552 N.Y.S.2d 68, 71 (1990). In Cintron, the four-year-old victim was called as a witness and was unable to testify on the stand in the presence of the defendant. Based on the trial judge's "close observation of the child during her two hours on the stand," the judge ordered her testimony taken via closed circuit television. Id. at 256-57, 551 N.E.2d at 566, 552 N.Y.S.2d at 73. The New York Court of Appeals reversed, saying that the determination that a child needs to provide testimony in this manner must "be based on something more than the disputed subjective impressions of the Trial Judge, no matter how sincere." Id. at 263, 551 N.E.2d at 570, 552 N.Y.S.2d at 77; see also State v. Crandall, 231 N.J. Super. 124, 555 A.2d 35 (1989), rev'd, 120 N.J. 649, 577 A.2d 483 (1990). In Crandall, the defense asked for expert psychological testimony, but the judge relied on the mother's testimony that the victim "would clam up and say nothing" if she saw [the] defendant in ordering the testimony of a seven-year-old child to be taken by closed circuit television. Id. at 128, 555 A.2d at 37. The court held that in New Jersey if the defense requests expert psychological testimony, it must be given, absent specific reasons, which must be stated on the record. Id. at 133, 555 A.2d at 39-40. The court remanded the case for an evidentiary hearing. Id. at 135, 555 A.2d at 40. After the United States Supreme Court's decision in Maryland v. Craig, 110 S. Ct. 3157 (1990), the New Jersey Supreme Court reversed, holding that expert testimony was not needed. State v. Crandall, 120 N.J. 649, 663, 577 A.2d 483, 490 (1990).

On the other hand, state courts have struck down convictions, in part because the judge failed to personally observe the child or because the judge relied mainly on nonexpert opinion witnesses. See, e.g., Wildermuth v. State, 310 Md. 496, 523, 530 A.2d 275, 289 (1987) (striking down conviction because expert testimony presented regarding need for nine-year-old girl to testify via closed circuit television not specific enough and the judge "never questioned or even observed the child"); cf. State v. Spigarolo, 210 Conn. 359, 370-74, 556 A.2d 112, 119-21 (holding the use of expert testimony not required when father and stepmother, who had ample opportunity to observe the child witnesses, testified that children would not testify truthfully if confronted with defendant), cert. denied, 110 S. Ct. 322 (1989). In one case, a state court upheld the use of televised testimony as proper based solely on the trial judge's in camera conversation with the child and her mother. See State v. Cooper, 291 S.C. 351, 353, 353
The *Coy* decision, particularly Justice O'Connor's concurring opinion, set some outer limits on the application of child shield statutes. It did not, however, address the issues of evidentiary requirements or age limitations. Despite the *Coy* majority's clear disapproval of such laws, state courts acted to preserve their statutes. Two years after *Coy*, the Supreme Court ruled on the constitutionality of the states' responses to *Coy* in *Maryland v. Craig*. Although *Craig* refined the constitutional limits of child shield statutes under *Coy*, it left many of the same questions unanswered.181

III. *MARYLAND v. CRAIG SIMULTANEOUSLY LIMITS THE USE OF CHILD SHIELD PROCEDURES AND CREATES A NEW CONFRONTATION CLAUSE EXCEPTION

A. The Majority View

Justice O'Connor, the author of the concurring opinion in *Coy v. Iowa*,182 wrote the majority opinion in *Maryland v. Craig*.183 *Craig* involved the Maryland child shield statute.184 The Maryland statute allows the use of one-way closed circuit television to take the testimony of a child sex abuse victim, if the trial 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."185 Under the statute, the defendant, along with the judge and jury, are present in the courtroom.186 The child gives testimony via closed circuit television from a separate room and in the presence of the attorneys for both the defense and the state.187 The child cannot see or hear the defendant but is subject to full cross-examination by the defendant's attorney.188 In apparent conformance with the Maryland statute, before invoking the procedure, the trial court heard evidence from expert witnesses that the child victim "would suffer 'serious emotional distress such that [he] could not] reasonably communicate,' if required to testify in the courtroom."189

Justice O'Connor, writing for the majority, struck a balance in favor of protecting the child witness and against the right of physical confrontation.

---

181. See Lang, supra note 175, at 321.
185. Id.
186. Craig, 110 S. Ct. at 3161.
187. Id.
188. Id.
189. Id. (quoting MD. CTS. & JUD. PROC. CODE ANN. § 9-102 (a)(1)(ii)).
She refined the framework established by her concurring opinion in *Coy.*\(^{190}\) The *Coy* majority opinion had stated that "'the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact.'"\(^{191}\) Justice O'Connor in *Craig* stressed that this right is not absolute,\(^{192}\) but could be infringed when the court found it necessary to further an important public policy.\(^{193}\) Justice O'Connor concluded that protecting the child sex abuse victims from physical and psychological harm is an important public policy that can outweigh a defendant's right to a face-to-face encounter.\(^{194}\)

Justice O'Connor found that in certain circumstances, non face-to-face confrontation is sufficiently reliable to serve the traditional function of the Sixth Amendment's confrontation right. Justice O'Connor argued that physical confrontation is but one aspect of the confrontation right.\(^{195}\) The other elements include testimony under oath, cross-examination of the witness by defendant's counsel, and providing the judge or jury the opportunity to observe the demeanor of the witness.\(^{196}\) All these elements together, according to Justice O'Connor, serve the purpose of "ensuring that evidence admitted against an accused is reliable and subject to . . . rigorous adversarial testing. . . ."\(^{197}\)

Justice O'Connor indicated that the absence of face-to-face encounter does not, in itself, defeat the purposes of the Confrontation Clause. While Justice O'Connor recognized that the physical aspects of the confrontation right have "symbolic"\(^{198}\) as well as practical value for testing the truth, she argued that physical confrontation in the courtroom is "not the *sine qua non* of the confrontation right."\(^{199}\) Justice O'Connor supported this contention by citing the numerous hearsay exceptions to the Confrontation Clause.\(^{200}\)

She argued that the exceptions to the right to confrontation indicate that no component of that right, including the face-to-face component, is absolute.\(^{201}\) She found that the reliability prong of *Ohio v. Roberts* is satisfied if

\(^{190}\) *Coy v. Iowa,* 487 U.S. 1012, 1025 (1988).

\(^{191}\) *Craig,* 110 S. Ct. at 3162 (quoting *Coy,* 487 U.S. at 1016).

\(^{192}\) *Id.* at 3163.

\(^{193}\) *Id.*

\(^{194}\) *Id.* at 3167.

\(^{195}\) *Id.* at 3163-64.

\(^{196}\) *Id.* at 3163.

\(^{197}\) *Id.*

\(^{198}\) *Id.* at 3164.

\(^{199}\) *Id.*

\(^{200}\) *Id.* at 3164-65. Justice O'Connor, however, explicitly declined to hold that televised testimony is hearsay. *Id.* at 3167. "[T]he child witness' testimony may be said to be technically given out-of-court (though we do not so hold)." *Id.*

\(^{201}\) *Id.* at 3166.
the child witness is found to be competent, the child testifies under oath, the defendant has an opportunity for cross-examination during the child's testimony, and the judge, jury, and defendant are able to view the child via a video monitor.202 The absence of any one of these elements, according to the majority, does not destroy a defendant's sixth amendment right.

Justice O'Connor dispensed with the unavailability prong of Roberts, by implicitly substituting a "necessary to further an important public policy" standard.203 Justice O'Connor did not offer a rationale for doing so.204 She simply argued that protecting the welfare of children is a sufficiently important public policy.205 The Court relied heavily on its earlier decision in Globe Newspaper Co. v. Superior Court206 to support its contention that the Supreme Court has recognized and supported legislation to protect the well-being of children in criminal trials.207 Justice O'Connor pointed out that a majority of states have enacted child shield laws, which "attests to the widespread belief" that shielding children is an important public policy.208 Justice O'Connor argued that the Maryland statute, for example, reflects public sentiment regarding the role of the state in guarding the well-being of children. She concluded that the Court would not scrutinize the judgment of the Maryland legislature, which recognized that protecting child abuse victims from the emotional trauma of courtroom confrontation was a state interest209 "sufficiently important to justify the use of a special procedure. . ."210

Justice O'Connor also stated that the Sixth Amendment requires trial courts to make a finding of necessity before invoking the child shield procedure, and the Maryland statute at issue comported with this requirement.211 The Craig majority stressed that protection from generalized courtroom trauma is not sufficient to justify denial of face-to-face confrontation.212 Instead, the majority held that the trial court must demonstrate that the child

202. Id.
203. Id. at 3167-70. Cf. Wildermuth v. State, 310 Md. 496, 530 A.2d 275 (1987). The Wildermuth court and the Craig Court both evaluated "reliability" using the Ohio v. Roberts test. Craig, 110 S. Ct. at 3167; Wildermuth, 310 Md. at 514-16, 530 A.2d at 285. Only the Wildermuth court used Roberts to evaluate necessity, requiring a finding of necessity which is "tantamount to a finding of unavailability in the Roberts sense." Id. at 519, 530 A.2d at 286.
204. Craig, 110 S. Ct. at 3167-70.
205. Id. at 3167.
206. 457 U.S. 596 (1982); supra notes 20-24 and accompanying text.
207. Craig, 110 S. Ct. at 3167.
208. Id. at 3167-68.
209. Id. at 3168-69.
210. Id. at 3169.
211. Id.
212. Id.
witness would experience trauma in the physical presence of the defendant and not merely from the pressure of testifying in court.213 In addition to direct causation between the child's trauma and the presence of the defendant, the trial court must be satisfied that the trauma is more than de minimis.214 Justice O'Connor found that the Maryland statutory provision, requiring the trial court to find that the child witness would suffer "'serious emotional distress such that the child cannot reasonably communicate,'" met the constitutional standard.215 She did not hold, however, that the Maryland standard is the only, or the minimum standard. Indeed, Justice O'Connor hinted that there may be other, less stringent standards that would pass constitutional muster.216

In addition, the majority required that the trial court hear evidence to determine whether the use of the procedure is necessary to guard the welfare of that particular child witness.217 Justice O'Connor declined to set federal constitutional requirements for the quality of the evidence used by the trial court in making its case specific findings of necessity.218 She refused to require the trial court to "explore less restrictive alternatives" or to "observe the children's behavior in the defendant's presence"219 before invoking the procedure. She did not disallow a trial court's reaching its conclusion relying solely on expert testimony.220

With adequate safeguards of reliability221 in place, Justice O'Connor concluded that providing testimony by one-way closed circuit television does not undermine the truth enhancing or symbolic purposes of the Confrontation Clause.222 States may only use the procedure, however, after determin-

213. Id. This is the one issue upon which the Maryland Court of Appeals and the Supreme Court agreed. The Court of Appeals reversed the lower court decision in Craig because the trial judge did not make a specific finding that it was the presence of the defendant that triggered the child victim's trauma. Craig v. State, 316 Md. 551, 566, 560 A.2d 1120, 1127 (1989), vacated and remanded, 110 S. Ct. 3157 (1990). The Court of Appeals's other grounds for reversal included reliance on expert testimony, the judge's failure to observe personally the child victim in the presence of the defendant, and failure to attempt to use less restrictive procedures. Craig, 110 S. Ct. at 3170.

214. Id. at 3169. Justice O'Connor states that "more than 'mere nervousness or excitement or some reluctance to testify'" must be present to justify use of the exception. Id. (quoting Wildermuth v. State, 310 Md. 496, 524, 530 A.2d 275, 289 (1987)).

215. 110 S. Ct. at 3169 (quoting MD. CTS. & JUD. PROC. CODE ANN. § 9-102(a)(l)(ii)).

216. Id. Justice O'Connor wrote: "We need not decide the minimum showing of emotional trauma required for use of the special procedure. . . ." Id.

217. Id.

218. Id. at 3171.

219. Id.

220. Id.

221. Id. at 3166.

222. Id. at 3167.
ing that it is necessary to further the state's interest "in protecting children who are allegedly victims of child abuse from the trauma of testifying against the alleged perpetrator." 223

B. The Dissent

The dissent, written by Justice Scalia, 224 denounced the majority's failure to "sustain a categorical guarantee of the Constitution against the tide of prevailing current opinion." 225 The dissent first dismissed the majority's rationale that public support for the exception allowing child sex abuse victims to avoid confrontation justifies its creation. 226 The dissent argued that the Constitution is meant to "protect against, rather than conform to" public opinion. 227

Next, Justice Scalia pointed out that the plain meaning of the Confrontation Clause requires a face-to-face encounter, 228 and that this encounter is not a dispensable element of the confrontation right. 229 According to Justice Scalia, the majority opinion, while claiming to maintain its purpose of ensuring the reliability of evidence, eliminated the right of confrontation. 230

While Justice Scalia agreed with the majority that exceptions to the Confrontation Clause do exist, he argued that the precedents for dispensing with direct physical confrontation stem from the necessity of accepting hearsay evidence from declarants who are unavailable at trial. 231 Therefore, the dissent characterized the majority's newly minted exception to the Confrontation Clause as "utterly unheard-of," because it allows a witness to appear at trial and still not confront the accused. 232 Justice Scalia argued that face-to-face confrontation of the accused by his accusers who testify at trial "is a constitutional right unqualifiedly guaranteed," not a mere preference. 233 According to the dissent, the majority eliminated the right to physical confrontation as a constitutional protection.

Justice Scalia recognized that the majority attempted to draw support from traditional hearsay precedents to create an exception to the Confronta-

223. Id.
224. Justices Brennan, Marshall and Stevens joined the dissent.
225. 110 U.S. at 3171 (Scalia, J., dissenting).
226. Id. at 3171-72.
227. Id. at 3172.
228. Id.
229. Id.
230. Id.
231. Id. at 3173.
232. Id.
233. Id.
Catholic University Law Review

He noted that, in general, exceptions to the Confrontation Clause hinge on a finding of unavailability of the witness. He also noted that other exceptions are allowed because the truth-bearing properties of the hearsay could not be replicated at trial. Justice Scalia objected to the result in Craig because it allowed a child to provide televised testimony who was not “unavailable” under Roberts. Justice Scalia argued that the standard in the Maryland statute should be interpreted to mean that the trauma actually makes it impossible for the child to communicate, not the majority’s lesser standard of unable to communicate reasonably.

While Justice Scalia acknowledged that convicting more child abusers is a laudable goal, he argued that protecting “innocent defendants accused of particularly heinous crimes” is equally worthy. Justice Scalia noted studies indicating that children are more vulnerable to suggestion than adults and less able to separate fantasy from reality. Therefore, Justice Scalia argued that the guarantees of reliability are more important when children testify because there is greater risk that children may not testify accurately. The requirement of face-to-face confrontation between the accused and his accuser is thus even more important as an additional means of promoting the truth.

Finally, Justice Scalia argued that the majority’s assessment of the relative interests of defendants and child witnesses does not comport with the text of the Constitution. While the Maryland procedure may be “virtually” con-

234. Id. at 3174.
235. Id.; see, e.g., FED. R. EVID. 804 for hearsay statements that require that the declarant be unavailable to testify, including former testimony. FED. R. EVID. 804(b)(1).
236. Craig, 110 S. Ct. at 3174. Justice Scalia cites the example of statements by a co-conspirator, which can be admitted even if the declarant is available to testify because the “effect cannot be replicated by live testimony” and their reliability is based on the circumstances under which they were originally uttered. Id.
237. Id.
238. Id. at 3174 n.1.
239. Justice Scalia maintained that the new exception articulates an essentially pro-prosecution policy, because the defendant loses his right to physical confrontation only when that physical confrontation would prevent a child witness from testifying against him. The exception allows prosecutors to call witnesses to testified who otherwise would not testify or who could not be effective at trial. Id. at 3174-75.
240. Id. at 3175.
241. Id. (citations omitted).
242. Id. Justice Scalia cited the “tragic” Scott County, Minnesota, investigation as an example of this “risk.” Id. In that case, investigators charged 24 adults with abusing 37 children. Twenty-five children were placed in foster homes. Ultimately, all but one of the accused were found not guilty or had the charges dismissed. Id. (citing Feher, supra note 5, at 239-40).
243. Id.
244. Id. at 3176.
stitutional in that it gives the defendant everything that is required except physical confrontation, the dissent argued that it is not "actually" constitutional because it deprives the defendant of the very right vested by the Constitution.245

IV. MARYLAND v. CRAIG: GUIDANCE TO THE STATES, BUT WITH POTENTIAL FOR ABUSE

Maryland v. Craig246 generally upholds the validity of state laws that permit the use of televised testimony in child abuse cases where there is a legislatively or judicially imposed requirement of a particularized finding of necessity.247 In addition, under Craig, a trial court must specifically find that it is the presence of the defendant that triggers such trauma that the child is unable to communicate reasonably.248 Limited to its facts, Craig approves the use of one-way closed circuit television in child sex abuse prosecutions.249 It is almost certain that Craig will be read to apply to all televised testimony in child abuse cases.250

The Craig decision will have the least impact on the "strict" state laws251 because these laws already embody the basic requirements of Craig.252 For example, Maryland's necessity requirement, that the trauma of facing the defendant will render a child unable to communicate reasonably, meets the criteria articulated in Craig.253 A number of state courts already mandate a standard similar to the one approved in Craig.254 Moreover, because the

---

245. Id.
248. Craig, 110 S. Ct. at 3170.
249. Id. at 3171.
250. The majority opinion does not distinguish between state statutes allowing videotaping and those allowing closed circuit television. Craig, 110 S. Ct. at 3167. The Court's treatment of these two types of statutes indicates that the Court views these two methods as serving the same function and as engendering the same constitutional questions. Id. Similarly, state courts also view these different "shield" procedures as raising identical constitutional questions, as evidenced by their response to Coy v. Iowa, 487 U.S. 1012 (1988). See supra notes 156-62 and accompanying text. The Coy case involved the use of a one-way screen to block the witnesses' view of the defendant in open court; yet the rule was applied equally to statutes allowing the use of closed circuit television as well as to those allowing the use of videotaped testimony.
252. See supra notes 153-54 and accompanying text.
253. See supra notes 117-20 and accompanying text.
254. See supra notes 153-54 and accompanying text. Craig may also have an impact on the few states that view videotaped and closed circuit television as hearsay and allow such testi-
Craig Court did not suggest the level of necessity as the minimum or the sole standard; it left open the possibility that other criteria might be acceptable for measuring an exception to the right to physical confrontation. For example, Connecticut's Jarzbek test, allowing televised testimony when confronting the accused would undermine the child witness's truthfulness, may well pass constitutional muster, because the standard requires an individualized finding of need and furthers the Confrontation Clause's goal of enhancing the truth. A bare statutory standard which allows a child victim to avoid physical confrontation if such an encounter would impair the emotional and psychological well-being of the child witness or cause trauma to the child, however, may not be sustained under a strict reading of Craig because these standards do not protect the truthseeking goals of the Confrontation Clause. Mirroring the states's response to Coy, state courts will likely find that child shield laws pass constitutional muster if their application is limited to those specific situations where the presence of the defendant will have an effect on the child which is roughly equivalent to the Craig standard of inability to communicate reasonably.

The requirement that the trial judge must find that it is the presence of the defendant which traumatizes the child, not simply the prospect of testifying in open court, will probably be the part of the Craig decision that will restrict state courts the most. Few state supreme courts have scrutinized the

mony under the state exception to the hearsay rules. The United States Supreme Court has distinguished exceptions to the hearsay rule from exceptions to the right to face-to-face confrontation in child sex abuse prosecutions. See Idaho v. Wright, 110 S. Ct. 3139 (1990) (finding that statutory exceptions to the hearsay rule will withstand constitutional challenge only if declarant is unavailable and particularized guarantees of trustworthiness are present). Exceptions to the hearsay rule that are not deeply rooted are still analyzed using the Roberts test, which requires a showing of unavailability. Ohio v. Roberts, 448 U.S. 56, 65 (1980). The effect of Craig on these laws is unclear; they may meet and exceed the Craig standard of availability. See, e.g., KAN. STAT. ANN. § 60-460(dd) (Supp. 1989) (requiring the trial judge to find that the child is unavailable or disqualified, that the child's statements appear to be reliable, and that the child was not induced or coerced to make the statements before admitting hearsay statements). On the other hand, the use of televised testimony is classified as an exception to the hearsay rule, a classification the Craig Court implicitly rejected. Craig, 110 S. Ct. at 3167.

255. Craig, 110 S. Ct. at 3169.
257. Id. at 703-04, 529 A.2d at 1255.
259. See, e.g., State v. Davis, 229 N.J. Super. 66, 74-75, 550 A.2d 1241, 1245 (1988); see also supra note 64.
261. See supra notes 153-59, 162 and accompanying text.
262. Id.
child shield statutes this closely; rather, they simply gloss over the distinction between courtroom-induced trauma and defendant-induced trauma. In addition, the Craig decision deliberately gives little guidance on the type of evidence needed to support this finding of necessity. Clearly, the taking of televised testimony must be supported by some evidence and the evidence must support a finding that the child will be traumatized by the defendant's presence. The requirement for hearing evidence means that a trial judge cannot rely solely on his own observations in allowing the use of televised testimony. In practice, the requirement that a judge issue findings will undoubtedly lead to an additional pre-trial procedure to determine the necessity of televised testimony. The absence of such a finding may result in reversals or remands of previously valid convictions to determine if the finding of necessity can be sustained in light of Craig.

Part of the difficulty with the Craig opinion may be that it is driven by public opinion rather than a straightforward legal analysis of a constitutional right. It appears that the Court sought to find an exception to the Sixth Amendment's Confrontation Clause that would enable evidence to be proffered against sex abuse defendants while protecting the alleged victims from courtroom trauma. Yet, no exception existed and none could be easily extrapolated from current law. Thus, it seems that public policy concerns may have motivated the Craig majority to reject the Roberts test of necessity—unavailability.

The Roberts approach is more conservative than that of Craig and does not necessitate as great a departure from precedent. Reasoning that the

---

263. See Leading Cases, supra note 247, at 137 n.70.

264. The Craig Court declined "to establish, as a matter of federal constitutional law, any such categorical evidentiary prerequisites for the use of the one-way television procedure." Craig, 110 S. Ct. at 3171. This lack of guidance as to the minimum standards "will likely encourage lower courts to uphold" child shield procedures "despite lower necessity thresholds than that of the Maryland statute." Leading Cases, supra note 247, at 137.

265. Craig, 110 S. Ct. at 3169.

266. Id. at 3171; see also Lang, supra note 175, at 368 (stating that under Craig "a trial court may invoke a special procedure only after it has received evidence and made a case-specific finding" of necessity).

267. See Lang, supra note 175, at 368.

268. Id. at 369-70.

269. See, e.g., Leggett v. State, 565 So. 2d 315, 317 (Fla. 1990) (reversing post-Craig decision because trial judge failed to make findings of fact that child would suffer moderate mental or psychological harm).

270. One observer has noted that the media attention focused on child sexual abuse "has kindled a public outcry for greater protection of children." Feher, supra note 5, at 228. The extreme public response, however, is "startlingly reminiscent of the Salem witch hunts and McCarthy's 'Red Scare.'" Id. at 228-29.

271. See generally Randall L. Hagen, Comment, Maryland's Child Abuse Testimony Statute: Is Protecting the Child Witness Constitutional?, 49 MD. L. REV. 463 (1990). In this pre-
trauma induced by testifying in the presence of the defendant renders a child unavailable under *Roberts*, a few state courts have adopted the *Roberts* test. The *Craig* Court did not choose this approach perhaps because the *Roberts* requirement of unavailability applies equally to all witnesses and does not necessarily make it easier for children, as opposed to other classes of witnesses, to avoid facing the accused. The *Craig* majority wanted the child witness to be able both to testify and to avoid physical confrontation without demonstrating unavailability; therefore, the Court created a lower level of “necessity,” called “unable to reasonably communicate,” and made it applicable only to child witnesses.

Advocates of criminal defendants’s rights might view the *Craig* requirements as granting sex abuse defendants at least some protection from being automatically stripped of the right to physically confront their accusers. The *Craig* decision, however, may eventually weaken a criminal defendant’s ability to claim this same right. The *Craig* standard is vague and the Court chose to leave it to the state courts to decide proof requirements. Relying on expert testimony or the testimony of lay witnesses, usually a parent or guardian, the trial court will be called upon to predict how the child would behave if called to testify. While merely ineffective testimony should not qualify the child to present televised testimony under the *Craig* standard, the line between being unable to communicate reasonably and providing ineffective testimony is not clear. It is almost certain that prosecutors will at-
tempt to invoke the statute whenever the presence of the defendant renders a child's testimony "ineffective," thus pushing trial courts to construe 

Craig liberally on behalf of child witnesses. Used in this way, the exception becomes a prosecutorial sword which may put many innocent defendants behind bars.279

While this exception is presently limited to child sex abuse victims, the 

Craig rationale can be extended to a broader class of witnesses. It is difficult to distinguish logically between children and other classes of people who may have special needs.280 The Craig Court did not address the age of the child victim, leaving it to the states to decide the maximum age at which public policy may require the use of a child shield procedure. Some state laws allow "children" as old as seventeen the benefit of these protective statutes.281 The powers of memory and degree of impressionability of a sixteen-year-old rape victim and an eighteen-year-old rape victim differ little,282 yet in some states the sixteen-year-old will be protected while the eighteen-year-old will not be protected. Certainly, both may be equally traumatized.283

The narrow reading of Craig is that a child sex abuse victim may avoid physical confrontation of the accused if the trial court finds that the child will be so traumatized by facing the defendant that he will be unable to communicate reasonably. But the broader reading of Craig is that when it is necessary to further an important public policy, a court may order the taking of televised testimony out of the presence of the defendant upon making a finding of particularized need.

V. CONCLUSION

Maryland v. Craig allows child sex abuse victims to testify without physically confronting their alleged abusers if such a confrontation would render them unable to reasonably communicate. The constitutionality of this procedure is established by creating a new exception to the right to confronta-

and in general casting false doubt upon his or her credibility and veracity. If the child is unable to testify effectively, the case may be dismissed.

Id. (emphasis added) (omission in original).

279. One observer has noted that in divorce or custody battles "the initial allegation may either be made by the parent or by the child as coached or conditioned by the parent." Feher, supra note 5, at 235.

280. Elderly or developmentally disabled persons, for example, may have special vulnerabilities and yet may be found competent to testify. Lang, supra note 175, at 367.


283. "[R]ape victims suffer severe emotional distress or trauma while testifying, especially when face-to-face with the accused." Graham, supra note 48, at 560.
tion under the Sixth Amendment. For the first time, an available witnesses may testify in court and avoid facing the accused.

Craig puts some much needed restraints on states' use of child shield statutes. By imposing such restraints, the United States Supreme Court begins to offer the barest outlines of federal guidance. Craig, however, stops short and leaves many important questions unanswered for yet another day. In the meantime, the Craig Court, in the name of protecting children, has planted seeds that could have a profound impact on the nature of trials as we know them today.

Theresa Cusick