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Child Witnesses in Sexual Abuse Cases and
the Sixth Amendment Confrontation Clause

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Senior Research Honors Project

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ABSTRACT

The legal debate over statutes which allow special treatment for child witnesses of sexual abuse has sparked recent discussion. These statutes permit the testimony of the children to be videotaped or transmitted via one- or two-way closed circuit television into the courtroom. Critics argue these statutes violate the defendant's Sixth Amendment Confrontation Right - to be confronted by the witnesses against him/her. Supporters feel these measures are necessary to protect the interests of young victims of sexual abuse. The goal of this paper is to address the tension between society's interest in protecting child victims and the right of defendants to confront witnesses against them, discussing statutes, cases, and arguments concerning this issue.

The paper begins by introducing the problem of child sexual abuse, including the factors which contribute to the problem of under-reporting and the difficulties of prosecuting child sexual abuse cases. The next section, Statutory Comparison, presents the response of many state legislatures - various child protection statutes that permit modification of courtroom procedure in sexual abuse cases. The third section examines the cases which occurred as a result of these statutes, including two main Supreme Court cases - **Coy v. Iowa** and **Maryland v. Craig**. The arguments on both sides of this issue are then presented. Finally, the conclusion evaluates the current standing of the issue, realizing that this is an unsettled issue which is likely to continue to change and spark future debate.

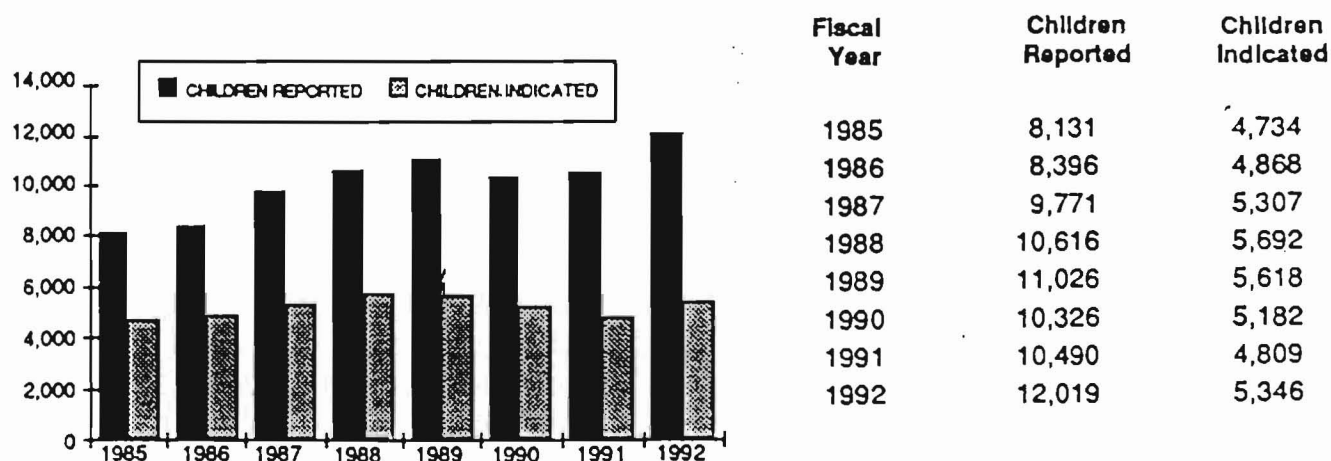
INTRODUCTION OF PROBLEM - Statistics

In April of 1993, the National Committee for the Prevention of Child Abuse (NCPA) estimated that 2,936,000 cases of child abuse were reported to public social service/child protective services agencies in 1992 throughout America. Approximately 17% of all cases reported were sexual abuse cases. This figure translates to nearly 500,000 children reported for some sort of molestation or sexual abuse in 1992 (American Humane Association).

As shown in the following table, 12,019 children in Illinois alone were reported for sexual abuse in 1992 (Illinois Department of Children and Family Services).

Table 1

Sexual Abuse Reported and Indicated Fiscal Years 1985 through 1992



Source: Child Abuse and Neglect Statistics, Annual Report Fiscal Year 1992. IL Department of Children and Family Services.

Recent statistics indicate that at least one in four American females and one in ten American males experience sexual victimization before the age of eighteen ("Rape Shield Laws..." 1993). However, the incident rate of child sexual abuse is not fully known. Under-reporting of cases added to the secrecy and stigma that surround this issue makes most statistics unreliable.

Under-reporting

It is believed that the incidence of child sexual abuse is grossly under-reported; an estimated 100,000 to 500,00 American children will be sexually abused a year (Russell 1983). Other estimates have reached as high as 200,000 to 500,000 cases of sexual abuse perpetrated on female children alone (Collins 1982). Statistics understate the problem because a substantial number of cases are never revealed. The main reason for the lack of reporting is that children do not reveal the incident. Children are the "perfect " targets because of this reluctance to disclose. Children are conditioned to comply with authority their whole lives. They are in a subordinate position and are fearful of threats. Also, children are susceptible to bribes and promises of reward.

Additionally, they are more easily victimized because children are intensely curious, naive with regard to social

norms, and may respond willingly to intimate and gentle contact because they associate this with feelings of being loved. For these reasons, physical violence is rarely necessary or utilized (Yun 1983). Force is not necessarily used because the perpetrator is most often a child's authority figure and/or family member or friend, as shown by table 2.

Table 2
Detail Tables: Indicated Sexual Abuse
Fiscal Year 1992
Perpetrators: Relationship to Victims

Relationship	Number Perpetrators	Number Male	Number Female
Natural Parent	1,085	780	300
Step-Parent	457	446	11
Other	1,099	873	68
Parental Substitute	500	486	13
Babysitter	424	383	40
Sibling	471	436	35
Aunt/Uncle	417	402	15
Adoptive Parent	40	38	2
Foster Parent	16	13	3
Day Care Provider	6	2	4
Institutional Staff	14	11	2
Grandparents	180	164	16
TOTAL	4,709	4,034	509

*Note: Non-Duplicated Count
 166 perpetrators are of an unknown sex.

Source: Child Abuse and Neglect Statistics, Annual Report Fiscal Year 1992, Illinois Department of Children and Family Services.

Secrecy is enforced in cases where the child and the family know the abuser, which also adds to the child's reluctance to

reveal that he or she has been sexually abused. "A child is three times more likely to be molested by a recognized, trusted adult than by a stranger" (Summit p.182 1983). With sexual abuse often occurring in or near the home, the stigma and secrecy is enhanced and reporting diminished. The National Center on Child Abuse and Neglect asserts accurate statistics for child sexual abuse may never be obtained because it is possibly the most concealable form of child maltreatment (Russell p.183 1983).

Obviously, because most offenders are usually friends, neighbors, or family members of victims, the child molester is not the stereotypical low-life lurking about in a trenchcoat. Although many parents warn their children to stay away from strangers offering candy, few offenders wear raincoats and carry candy. Molesters come from all walks of life and all socioeconomic categories, and "they look just like the neighbor next door. They may even be the neighbor next door" (Yun 1983). Anyone, even members of the most respected professions, may commit sexual abuse upon children (Crewdson 1988). "Molesters cut across economic, social, and educational lines. They may be rich or poor, well-educated or ignorant, blue-collar or white, married or single" ("The Child Molester. . p.1 1984). Child molesters do not fall into one particular age group. Thus, there is no typical profile of a child molester. As tables 3 and 4 (on the top of the next page) demonstrate, perpetrators fall into all race/ethnic groups and age groups.

Table 3

Perpetrators: Race/Ethnic Group

Race/ Ethnic Group	Number Perpetrators	Number Male	Number Female
White	2,776	2,425	348
Black	1,188	1,052	122
Hispanic	425	393	28
Other	31	29	1
Not Identified	289	135	10
TOTAL	4,709	4,034	509

*Note: Non-Duplicated Count; male and female numbers do not include 166 perpetrators whose sex is not known.

Table 4

Perpetrators: Age

Age Group	Number Perpetrators	Number Male	Number Female
Under 20	1,026	943	80
20-29	922	792	127
30-39	1,349	1,149	197
40-49	567	501	65
50-59	238	222	16
60 or Older	169	163	6
Not Identified	438	264	18
TOTAL	4,709	4,034	509

*Note: Non-Duplicated Count; male and female numbers do not include 166 perpetrators whose sex is not known.

Source: Child Abuse and Neglect Statistics, Annual Report Fiscal Year 1992. Illinois Department of Children and Family Services.

Children of all socioeconomic backgrounds and ages are at risk of sexual abuse. The ages of victims range from early infancy (one to two months) to 17 to 18 years old. No particular age group is immune to sexual abuse, nor are the victims confined to any particular class (Sgroi 1975). Table 5 illustrates that child victims are from both sexes and all ages and ethnic groups.

Graph 5

Victims: Age, Sex, Race/Ethnic Group

Child Characteristics	Number	Percent
<u>Age of Child</u>		
0-2	200	3.7
3-5	1,080	20.2
6-9	1,418	26.5
10-13	1,459	27.3
14-17	1,188	22.2
Age not reported	1	0.0
<u>Sex of Child</u>		
Boys	1,142	21.4
Girls	4,189	78.4
Sex not reported	15	0.3
<u>Child's Ethnic Group</u>		
White	3,359	62.8
Black	1,425	26.7
Hispanic	447	8.4
Other/not reported	115	2.1
TOTAL	5,346	100.0

Source: Child Abuse and Neglect Statistic, Annual Report Fiscal Year 1992. Illinois Department of Children and Family Services.

The reluctance to report is also common on the part of the parent. Parents are often unwilling to believe or admit the possibility that their child has been sexually assaulted (Yun 1983). The unwillingness of parents to admit the occurrence of sexual abuse upon their children contributes both to under-reporting and to difficulty in prosecuting sexual abuse cases. Even if parents do report abuse, they are reluctant to proceed for two main reasons: (1) fear that justice will not be served because of the difficulty in successfully prosecuting sexual abuse cases and (2) fear that pursuing the case will further traumatize the child (Rogers 1980).

(1) The first fear is justified by statistical evidence. In a 1969 study of 250 cases of child sex abuse that had been reported in to New York City's protective services, less than one percent of the molesters were sent to jail. A more recent study of sex offenders (238 men) in the Sexual Behavior Clinic of the New York State Psychiatric Institute showed that only 50% had ever spent time in jail. These perpetrators had committed a total of 16,666 acts of child molestation, an average of 68.3 molestations per offender, according to the director of the clinic, Dr. Gene Abel (Collins 1982). A separate study by the American Psychological Association revealed that of the 261 child sexual abuse cases tracked over a two-year period in the District of Columbia, only 8 cases actually came to trial (Rogers 1980).

(2) The fear of traumatizing the child victim by reporting the abuse and pursuing prosecution is the second factor which deters parents from following through when a child discloses. Children may be traumatized by interviews and/or testifying in court. "Many researchers and commentators have suggested that the trauma associated with testifying in open court in the presence of the defendant, judge, and jury is nearly as great as that associated with the abuse itself" (Shaffer p.78 1990). This trauma is sometimes referred to as the second victimization of the child, and it is the reason many cases never go to trial.

Difficulty in Prosecution

Successful prosecution of child abuse so difficult for a number of reasons. Child sexual abuse is an act rarely witnessed by others. It is very difficult to prove; lack of corroborative physical evidence is common. Therefore, prosecutors may often decide not to litigate a child sexual abuse case (Fields 1992). As earlier noted, parents often do not want their child to have to testify, making prosecution nearly impossible. Even when the child does testify in court, he or she is commonly met with skepticism, from the court and the public. An additional obstacle and fear of prosecutors is that children will be unable to provide adequate testimony (Nuce 1990). Many cases may come down to the victims word against the accused. Therefore, the prosecutor is forced to rely heavily on the testimony of the child (Cusick 1991). The child victim's testimony becomes crucial to obtaining convictions because their eyewitness testimony is usually the only direct link between the victim, the crime, and the offender (Forman 1989).

STATUTORY COMPARISON

In response to public outcries, state legislatures nationwide have been summoned to respond to the crisis of child sexual abuse (Shaffer 1990).

Because of the unusual nature of child sexual abuse -- the length of time over which it occurs, the lack of force or violence, the failure of the child to report or to seem traumatized -- and the subsequent difficulty of proving the offense, courts are liberalizing certain evidentiary rules and courtroom procedures. In recognition of this need for change, most state legislatures have enacted child protection statutes which permit certain modifications of courtroom procedure in sexual abuse cases" (Nuce 1990).

Responding to growing public alarm, many states have adopted statutory measures that attempt to minimize the psychological trauma experienced by victims during the courtroom procedure (Cusick 1991). The result has been an array of child shield statutes. Many states allow the transmission of the child's testimony by one- or two-way closed-circuit television. Others permit the use of videotaped interviews of children witnesses (Nuce 1990). Many of these statutes also make it easier to prosecute child molesters.

But this is not a new development. Since 1977 several states have enacted statutes allowing the testimony of sexually abused children to be videotaped. All but one of these statutes placed an age limit on the use of the procedure. The statutes also varied in three other areas: (1) the findings that must be

made to have the child's testimony videotaped prior to the trial; (2) the procedures that must be followed while videotaping; (3) the findings that must be made in order to have the tape admitted into evidence at the trial (Weintraub 1985).

By 1985, ten states had enacted statutes allowing for videotape depositions of child victims of sexual offenses (Kelly 1985). By 1989 that number had risen to twenty-seven states that had created statutes authorizing the videotaping of children's testimony. Additionally, twenty-one states had enacted provisions which permitted the use of one-way closed-circuit televisions, one-way screens, and one-way mirrors (Forman 1989). Two years later, thirty-seven states had provisions for admission of videotaped testimony of a child; and thirty-one states allowed the use of closed-circuit television when taking a child's testimony (Lang 1991).

But, just as in 1977, these statutes vary from state to state. Ordering the taping is one area where statutes differ. At least eight videotape statutes do not require that the court make a specific finding regarding the child's ability to testify at trial before ordering that the child's testimony be taped. For the most part, these statutes rely only on the request or motion by the prosecutor or the victim. On the other hand, statutes in at least five states provide that the child's testimony can be taped prior to the trial only if the court

finds that the child is likely to suffer some degree of emotional harm if required to appear in court. Colorado and Wisconsin both have the latter type of statute, while Kentucky, Arizona, and Texas (virtually identical) require merely a request by the prosecutor. The Indiana statute does not mention the need for a court order prior to taping. The statutes of Maine, Montana, New Mexico, New York, and South Dakota require a case by case analysis of the possible trauma the child witness may suffer (Weintraub 1985). Texas and Kentucky statutes contain a separate provision. It specifies that during a videotaping session, "[t]he court shall permit the defendant to observe and hear the testimony of the child in person, but shall ensure that the child cannot hear or see the defendant"

("The Testimony . . ." p.806 1985). The Iowa legislature's purpose was to "assure the fair and compassionate treatment of victims" and to "protect them from intimidation and further injury." The Iowa statute allows for a child to testify via closed-circuit television or by videotape (Shaffer 1990).

Illinois does not have a statute that allows for procedural exceptions to the Confrontation Clause in the case of sexual abused children. According to Judge Charles Witte of the McLean County Circuit Court, videotaping and closed circuit testimony is not allowed because it violates the defendant's Sixth Amendment Confrontation Right (Witte 4/8/94). Illinois does appoint court guardians who will prepare child witnesses for

what to expect during the trial. Guardians show children around the courtroom and let them become more comfortable in their situation. Judge Witte added that he has let children testify while sitting in the lap of a parent or trusted adult, provided the adult does not physically influence the testimony of the child.

COURT RESPONSE TO STATUTES

The various statutes, designed to facilitate the legal process and ease the pain of testifying in the presence of the accused, have caused controversy because they potentially conflict with the defendant's constitutional right to confrontation. (Shaffer 1990). The confrontation clause of the sixth amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . ." (Fields 1990). But there is debate over the literal meaning of the confrontation clause and the original intent. The Founding Fathers' original intent of the Confrontation Clause is controversial. Justice Harlan stated in **California v. Green** 399 U.S. 149, 157 (1970), "the Confrontation Clause comes to us on faded parchment." He added,

History seems to give us very little insight into the intended scope of the Sixth Amendment Confrontation Clause [because]. . .the Confrontation Clause of the Sixth Amendment is not one that we may assume the Framers understood as the embodiment of settled usage at common law (**California v. Green** p.158 1970).

But, since **Mattox v. United States**, 156 U.S. 237, 244 in 1895, the Supreme Court has acknowledged the truth-finding purpose of the Confrontation Clause. **Mattox** was a landmark Supreme Court case on this issue. The opinion held that the practice of trying

defendants based on affidavits and depositions denied the defendant the opportunity to challenge his accuser face to face before a jury. Therefore, the purpose of the Confrontation Clause was interpreted to insure the witness makes a statement under oath, to force a cross examination of the witness, and to allow the jury to observe the witness' demeanor during testimony (Forman 1989).

Yet, more recent rulings in the area of child sexual abuse have proven to be less stringent on the Confrontation Clause, particularly if there is reason to believe that testifying would be so traumatic to the child that he or she would be unable to communicate clearly in the courtroom. **People v. Rivera** (N.Y. Sup. 1988) held that it was sufficient for the court to make findings of necessity by its own conclusions and observations. In **State v. Crandall** (N.J. 1989) the opinion stated that in the absence of reasons to the contrary a child witness should be evaluated by a psychiatrist to determine potential trauma. Additionally, although the conviction was reversed in **State v. Eaton** (Kan. 1989) because the trial court erroneously held that the Kansas statute did not require a finding that the child witness would be traumatized such that the witness would be unable to communicate effectively to testify, the court upheld the constitutionality of the statute by implying a need requirement for future case (Shaffer 1990). In Florida, its Supreme Court found that the introduction at trial of a child

victim's videotaped testimony under section 92.53, Florida Statutes, did not violate the defendant's right of confrontation (Lang 1991).

The United States Supreme Court, however, applied the Confrontation Clause more strictly than the above mentioned case rulings had in the important ruling, **Coy v. Iowa**, 487 U.S. 1012.

Coy v. Iowa - THE CASE

John Avery Coy was arrested in August of 1985. He was charged with sexually assaulting two thirteen-year-old girls. The state made a motion, at the trial of Coy, to allow the two girls to testify behind a screen or using closed-circuit television, to avoid further traumatizing the thirteen year olds. Because of an Iowa statutory procedure, the court allowed a large screen to be placed between the defendant and the girls while they testified. Neither of the girls could see the defendant, but Coy could see them faintly through the screen. After John Avery Coy was found guilty, he appealed; Coy attacked the constitutionality of the procedure in the state courts (Shaffer 1990).

The Iowa Supreme Court upheld the statute, the procedure and the use of the screen (Forman 1989). Therefore, the Supreme Court of Iowa affirmed Coy's Conviction (State v. Iowa 1986).

Coy then sought review by the Supreme Court. The United States Supreme Court reversed the decision. The Court ruled that the use of the screen violated the defendant's rights under the Confrontation Clause (Shaffer 1990).

THE SUPREME COURT DECISION - The Majority Opinion

By a 6-2 decision, the Supreme Court reversed the conviction of Coy. In **Coy**, the majority opinion was delivered by Justice Scalia. Joining in the majority opinion were Justices Brennan, Marshall, O'Connor, Stevens, and White. Justice O'Connor filed a concurring opinion which was joined by Justice White. The dissent was filed by Justice Blackmun and was joined by Chief Justice Rehnquist. Although Justice Kennedy had been appointed at this time, he did not participate in the decision (Shaffer 1990).

The majority found that the defendant's right to face-to-face confrontation had been violated in this case. Justice Scalia wrote for the majority that the clause guarantees a criminal defendant the right to confront witnesses giving evidence against him (or her) at the trial (**Coy v. Iowa**, 487 U.S. p.1016 1988). The Court rejected the argument from the state that the necessity of protecting the victims of sexual abuse outweighed the right of confrontation (**Coy**, p.1021 1988). The majority asserted that the use of the screen during the

girls testimony made the defendant appear guilty, therefore denying the defendant the presumption of innocence. The majority opinion exclaimed "It is difficult to imagine a more obvious violation of the defendant's right to a face-to-face encounter." Scalia traced the history of the right to confront witnesses and concluded that "there is something deep in human nature that regards face-to-face confrontation between accused and accuser as 'essential to a fair trial in a criminal prosecution'" (Coy, p.1020 1988). Justice Scalia also described the "irreducible literal meaning" of the Confrontation clause as the "'right to meet face to face all those who appear and give evidence at the trial'" (Coy, p.1020 1988).

This was the first time that the Court had conclusively stated that the Confrontation Clause guarantees the defendants the right to a face-to-face meeting with the witnesses against them. The majority did acknowledge that "face-to-face presence may, unfortunately, upset the truthful. . . abused child. . ." (Coy, p.1021 1988). But, Scalia added confrontation may also reveal a child witness who has been coached by a malevolent adult. Justice Scalia stated, "It is a truism that constitutional protections have costs (Coy, p.1021 1988).

Scalia continued by addressing the States suggestion that the confrontation interest was outweighed by the necessity of protecting the victims. He acknowledged that the Court has, in the past, indicated that the "rights conferred by the

Confrontation Clause are not absolute and may give way to other important interests" (Coy, p.1022 1988). But, he asserted the rights referred to in those cases were not the rights explicitly set forth in the Confrontation Clause. The rights which may give way to other interests are the reasonably implicit rights of the Confrontation Clause, such as the right to cross-examine or the right to exclude out-of-court statements. Scalia continues,

To hold that our determination of what implications are reasonable must take into account other important interests is not the same as holding that we can identify exceptions, in light of other important interests, to the irreducible literal meaning of the Clause: 'a right to meet face to face all those who appear and give evidence at trial' (Coy, p.1022 1988).

Justice Scalia adds, "We leave for another day, however, the question whether any exceptions exist" (Coy, p.1022 1988). He refutes the State's argument that an exception should be allowed in this case to further the important public policy established by the Iowa statute. He argues

Our cases suggest that even as to exceptions from the normal implications of the Confrontation Clause, as opposed to its most literal application, something more than the type of generalized finding underlying such a statute is needed (Coy, p.1022 1988).

Therefore, Scalia concluded, because there has been no individualized finding that the witnesses in this case needed special protection, "the judgment here could not be sustained by any conceivable exception" (Coy, p.102 1988).

The Concurring Opinion

Justice O'Connor, while agreeing that Coy's confrontation rights were violated in this particular situation, added that

Confrontation Clause rights may give way in an appropriate case to other competing interests so as to permit the use of certain procedural devices designed to shield a child witness from the trauma of courtroom testimony (Coy, p.1025 1988).

Justice O'Connor stressed in her concurrence that the majority opinion did not "doom such efforts by state legislatures to protect child witnesses" (Coy, p.1025 1988). O'Connor felt Coy's confrontation rights were violated because requirements of the clause may give way if the court makes a case-specific finding, and the Iowa Supreme Court made no such finding. The Court has consistently maintained the Confrontation Clause merely reflects a preference for a face-to-face meeting, according to Justice O'Connor's concurrence; thus, she stressed the clause is not absolute. The significant societal problems that child sexual abuse prosecution encounters are elaborated in the concurrence. Because of these obstacles, Justice O'Connor acknowledged that one-half of the states have statutes allowing child testimony via one- or two-way closed circuit television (Coy, p.1024 1988). She noted that many of these statutes raise no confrontation rights violation claim, since testimony is taken in the presence of the accused. Arguing against the literal right to

face-to-face confrontation as absolute, O'Connor adds that it may give way to an "important public policy" in the case where a court makes a "case-specific finding of necessity." Regarding a case-specific finding of necessity, O'Connor favored each case and child witness be individually analyzed to determine the amount of trauma which would be inflicted, the child's ability to testify, and whether a procedural exception (such as videotaping) would be necessary.

Justice O'Connor states that the protection of child witnesses is, in her opinion, "just such a policy." The Justice pointed out that protecting child witnesses is a compelling state interest, according to precedent set by **Globe Newspaper Co. v. Superior Court of Norfolk County** (457 U.S. 596, 607 - 1982) . Therefore, according to the concurrence, if there is an individualized finding of potential trauma to the child witness in a sexual abuse case the confrontation clause may be secondary. In conclusion, Justice O'Connor offered an important guideline - followed by many state courts since the **Coy v. Iowa** decision. She predicted that in future cases "[t]he primary focus. . . will likely be on the necessity prong, whether the procedure used is necessary to further an important state interest" (**Coy**, p.1025 1988).

The Dissenting Opinion

The dissenting opinion was written by Justice Blackmun and joined by Chief Justice Rehnquist. The opinion expressed strong disagreement with the majority's analysis of the Confrontation Clause in the case of **Coy** (Forman 1989). Justice Blackmun found no sixth amendment violation. The dissent expressed that "the ability of a witness to see the defendant while the witness is testifying does not constitute an essential part of the protections afforded by the Confrontation Clause" (**Coy**, p.1027 1988). Like Justice O'Connor, Justice Blackmun followed the view that the confrontation clause merely asserts a preference for face-to-face confrontation. The dissent elaborated on the important state interests underlying the Iowa statute and the effect fear and trauma has on the testimony of a witness, thus undermining truth-finding process of the trial (Forman 1989). Also agreeing with the concurrence, the dissent asserts that protecting child witnesses is an important public policy that outweighs the right of the defendant. However, unlike Justice O'Connor, the dissent rejected the case-by-case inquiry requirement when deciding if such procedures were necessary. In conclusion, Justice Blackmun wrote that the procedure authorized by the Iowa statute was constitutionally upheld; thus, Coy's conviction should not have been overturned.

ANALYSIS OF THE COY OPINIONS

In cases where the violation of a right guaranteed by a constitutional amendment is in question, the Supreme Court asserts that the state must have a compelling reason for infringing upon that right. This standard of strict scrutiny was first established in Justice Stone's footnote four of **United States v. Carolene Products Co.**, 304 U.S. 144 (1938). The burden is placed upon the government to prove that there is a compelling public interest at stake that should take precedence over the individual constitutional right (Murphy, et. al. p.689 1986).

In **Coy**, the welfare of child victims and protecting them from trauma is the public interest. The Majority opinion finds the defendant's constitutional right takes precedence over this public interest. In this case, the public interest is not compelling enough to measure up to the test of strict scrutiny. Justice Scalia states that the right to confrontation is explicitly set forth in the Sixth Amendment and cannot be outweighed by a generalized finding that child witnesses experience trauma. Although Scalia "leave[s] for another day . . . the question whether exceptions exist," his absolutist language used in the decision demonstrates his position on this future question. Justice Scalia, who most likely included that statement to gain the support Justice O'Connor and Justice White,

believes in the literal application of the Confrontation Clause and the need for face-to-face confrontation.

But, Justice O'Connor's concurrence asserts the importance of protecting child witnesses. In her conclusion she states,

But if a court makes a legislative finding of necessity, as is required by a number of state statutes, our cases suggest that the strictures of the Confrontation Clause may give way to the compelling state interest of protecting child witnesses (Coy p.1018 1988).

O'Connor's concurrence, which Justice White joined, indicates they joined the majority because there was no case specific finding of necessity in this case.

The Dissenting opinion views protection of child witnesses as an important public policy. Justice Blackmun's view is that this important public policy outweighs "the narrow Confrontation Clause right at issue here-- the 'preference' for having the defendant within the witness' sight while the witness testifies" (Coy, p.1031 1988). He adds, disagreeing with the concurrence, that it should not be necessary to show in each case that a special procedure is needed to protect the welfare of the child, the State should not be required to make a predicate showing in each case.

IMPACT OF COY V. IOWA

The impact of **Coy** has created confusion for the lower courts in determining what exceptions, if indeed there are any, to the Confrontation Clause are constitutionally acceptable (Nuce 1990).

Citing **Coy**, many states have upheld the constitutionality of their child witness statutes. On the other hand, other states have declared their child witness statutes to be unconstitutional. But, considering the ambiguity of **Coy** and its unique facts and divergent decisions, this varied reaction from the state courts is natural, although problematic (Shaffer 1990). While some commentators and courts declare that the **Coy** decision from the Supreme Court calls for a per se standard demanding face-to-face confrontation in all child sexual abuse cases, other state courts have relied on the concurrence of Justice O'Connor and created their own interpretations (Nuce 1990).

The case of Robert James Tafoya demonstrates this route. The defendant was convicted of several sexual offenses perpetrated against six young girls (and one adult woman). The state had a procedural exception statute which the court allowed to be utilized at the trial. The statute provided for the child victims to testify via videotape. The defendant watched from a control booth, so the witnesses could not see

him, as the testimony was taped. This satisfied, according to trial court, the statute's provision that the deposition be taken " in the presence of . . . the defendant." Tafoya could see the witnesses and communicate with his attorney.

The Court of Appeals of New Mexico affirmed the conviction of Tafoya prior to **Coy**, finding no violation of the Confrontation Clause or the procedure mandated by the statute. New Mexico's highest court denied certiorari. But, the United States Supreme Court granted the writ of certiorari, and in light of **Coy**, vacated and remanded the case for further consideration. The state court once again affirmed Tafoya's conviction on remand. The court ruled that because there was ample evidence that established the child witnesses would be traumatized if required to testify in the presence of the defendant and in open court, **Tayfoya** was differentiated from **Coy**. Therefore, while the New Mexico court acknowledged Justice Scalia's opinion of the majority, it placed more weight in Justice O'Connor's concurrence (Shaffer 1990). This was the standard followed by many state courts after the Coy decision. Critics of this standard claim states are "carving out their own interpretations of Coy. . . camouflaged by case law and nibbled by necessity" with the essential rights guaranteed to the accused being jeopardized (Shaffer p.807 1990) Shortly after, the Supreme Court followed this trend of the state courts as demonstrated by the next important case **Maryland v. Craig** (497 U.S. 836; S. Ct. 3157).

Maryland v. Craig - THE CASE

In October 1986, a Howard County grand jury charged Sandra Ann Craig with child abuse, first and second degree sexual offenses, perverted sexual practice, assault, and battery. The victim named in each count was a six-year-old girl who had attended, from August 1984 until June 1986, the kindergarten and pre-kindergarten center operated by Craig. In March 1987 Craig was tried in a Maryland court on several charges for sexually abusing the six-year-old child. Before the trial began, the court approved the testimony of the child witness, including the examination and cross-examination by the prosecutor and defense counsel, taking place in another room. In the adjacent courtroom, the child's testimony was transmitted to the jury, judge, and defendant. Craig, the defendant, could communicate with her attorney by a private telephone line. Craig was convicted on charges of first degree sexual assault after a twelve day trial (G. Fields 1992).

The court rejected Craig's objection that the use of a one-way television procedure violated the Confrontation Clause of the Sixth Amendment. The State Court of Special Appeals affirmed, but the State Court of Appeals reversed. The case was then argued before the Supreme Court on April 18, 1990 and decided on June 27, 1990.

THE SUPREME COURT DECISION - The Majority Opinion

The Supreme Court examined whether the use of the one-way closed circuit television, in the case of child abuse victims, violates the Confrontation Clause (G. Fields 1990). Justice O'Connor delivered the majority opinion. She was joined by Chief Justice Rehnquist, Justice White, Justice Blackmun, and Justice Kennedy. The majority approved of child testimony via one-way closed circuit television when there were individualized findings that child victims would suffer severe trauma in testifying. In asserting that the right to face-to-face confrontation is not absolute, the majority took a "liberal constructionist" approach in interpreting the confrontation clause (Fields 1990). Justice O'Connor stated that a finding of necessity coupled with the state's interest in protecting child witnesses from trauma was so compelling in the case of Craig that the trial court was justified in obtaining the child witness's testimony by the use of the one-way closed circuit television. The Court held that the procedure was not categorically prohibited by the Confrontation Clause, and the child was not required to be in the presence of the defendant to determine if he or she would be traumatized (**Maryland v. Craig**, p.852 1990). While O'Connor admitted that the face-to-face confrontation is the core of the Confrontation Clause, she

countered that "it is not the sine non of the confrontation right" (**Craig**, p.853 1990).

The majority held that Maryland's procedure preserved elements of confrontation. Although the procedure prevented the child from seeing the defendant, it "adequately ensure[d] the testimony was both reliable and subject[ed] to adversial test in a manner functionally equivalent to that accorded live, in-person testimony." Therefore, the court felt the use of the one-way closed circuit television did "not impinge upon the Confrontation Clause's truth-seeking or symbolic purposes" (**Craig**, p.852 1990).

Justice O'Connor stressed that an adequate showing of necessity was demonstrated in **Craig**, which was the important element missing in **Coy**. Referring to her concurrence in **Coy**, Justice O'Connor stated,

That the face-to face confrontation requirement is not absolute does not mean that it may easily be dispensed with. As we suggested in **Coy**, our precedents confirm that a defendant's right to confront accustory witnesses may be satisfied absent physical, face-to-face confrontation at trial where denial of such confrontation is necessary to further an important public policy. . . .
(**Craig**, p.855 1990).

Justice O'Connor added that the admission of hearsay exceptions demonstrate the mere preference for confrontation and not an absolute guarantee (**Craig**, p.856 1990).

The Dissenting Opinion

Justice Scalia dissented and was joined by Justices Brennan, Marshall, and Stevens. The dissent begins "Seldom has this Court failed so conspicuously to sustain a categorical guarantee of the Constitution against the tide of prevailing current opinion" (Craig, p.861 1990). Justice Scalia goes on to stress the fundamental nature of the right to confront physically the witness during the trial. Looking to **Kentucky v. Stincer** 482 U.S. 730; 107 S. Ct. 2658, Scalia argues that the Court has "never doubted that the Confrontation Clause guarantees the defendant a face-to-face meeting with the witnesses appearing before the trier of fact" (Craig, p.861 1990). The dissent recognizes the majority's attempt to draw comparison to traditional hearsay precedents to create an exception to the Confrontation Clause. But, Scalia counters that exceptions, in general, hinge on a finding of unavailability of the witness.

Justice Scalia suggests the majority opinion is a "subordination of explicit constitutional text to current favored policy" (Craig, p.863 1990). Following this line of argument Scalia adds, "Because the text of the Sixth Amendment is clear, and because the Constitution is meant to protect against, rather than conform to, current 'widespread belief,' I respectfully dissent" (Craig, p.864 1990).

Justice Scalia concludes,

The Court today has applied interest-balancing analysis where the text of the Constitution simply does not permit it. We are not free to conduct a cost-benefit analysis of clear and explicit constitutional guarantees, and then to adjust their meaning to comport with our findings. The Court has convincingly proved that the Maryland procedure serves a valid interest, and gives the defendant virtually everything the Confrontation Clause guarantees (everything, that is, except confrontation). I am persuaded, therefore, that the Maryland procedure is virtually constitutional. Since it is not, however, actually constitutional I would affirm the judgment of the Maryland Court of Appeals reversing the judgment of conviction (**Craig**, p.870 1990).

ANALYSIS OF CRAIG OPINIONS

In this case the majority rules in favor of an exception to the Confrontation Clause. Justice O'Connor, for the Majority, reiterates her support of the compelling interest society has in protecting the welfare of child victims. She writes,

We likewise conclude that a State's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court (**Craig** p.853 1990).

The difference between the two cases is that a case specific finding is called for in the Maryland statute. The majority ruled that the state made an adequate showing of necessity in this case, thereby justifying the use of a special procedure. This case specific factor is what seems to have lured over Justice White and Justice O'Connor and why this case turned out differently than **Coy**.

The dissent, on the other hand, does not believe the Confrontation Clause should be violated or that the strict scrutiny can be lowered to an interest balancing evaluation. Justice Scalia asserts,

I have no need to defend the value of confrontation because the Court has no authority to question it. It is not within our charge to speculate that 'where face-to-face confrontation causes emotional distress in a child witness,' confrontation might 'in fact disserve the Confrontation Clause's truth-seeking goal'. . . For good or bad, the Sixth Amendment requires confrontation, and we are not at liberty to ignore it (**Craig**, p.870 1990).

Justice Scalia sticks to his literal interpretation of the Confrontation Clause in his **Craig** dissent which he asserted in his majority opinion in **Coy**. While he did concede to some exceptions from past cases to the Confrontation Clause in **Coy**, Scalia excluded face-to-face confrontation as a possible exception because it was explicit in the text of the Sixth Amendment.

This case is the "day" when the court answered the "question whether any exceptions exist" to this literal right to face-to-face confrontation. As Justice Scalia indicated in **Coy**, when it comes to the literal application of the Confrontation Clause, the face-to-face confrontation, he answered (in his dissenting opinion) No. Scalia stated that an exception cannot be granted. Likewise, as she indicated in her concurring opinion in **Coy**, Justice O'Connor replied Yes. O'Connor believes in a case where an exception to face-to-face confrontation is necessary to further an important public policy, a case specific exception should be allowed.

Although **Craig** is the current precedent on this issue, it is tentative one. The court is almost equally divided on this issue and could rule differently in future cases, depending on the circumstances and the opinions of incoming justices.

THE AFTERMATH OF **Maryland V. Craig**

In this case the Supreme Court approved of a procedure which struck a balance in favor of protecting children involved in child sexual abuse cases. **Maryland v. Craig** created an exception to the Sixth Amendment's Confrontation Clause and established child sexual abuse victims as a class of witnesses who may testify at a trial while avoiding face-to-face confrontation (Cusick 1991).

While children's rights advocates and prosecutors rejoice in this decision, the ruling has met criticism. Some critics predict that prosecutors will attempt to invoke a similar statute and procedure whenever the presence of the defendant renders a child's testimony "ineffective." This would force trial courts to interpret **Craig** liberally on behalf of child witnesses. Critics fear that used in this manner, the exception set forth in **Craig** "becomes a prosecutorial sword which may put many innocent defendants behind bars" (Cussick p.967 1991). Similar to sentiments expressed by Justice Scalia in his dissent, part of the difficulty in accepting the **Craig** opinion is that it is motivated by public opinion rather than legal analysis of constitutional right. It appears to many critics of the majority's decision in this case that public policy concerns motivated the Court and an exception was created where none could be easily found in current law (Bainor 1990). One author

compares the extreme public response to the media attention focused on child sexual abuse to the Salem witch hunts and McCarthy's Red Scare (Cusick 1991).

The **Craig** decision also generated additional problems. The decision seems to have left legal and practical questions unanswered (Lang 1991). Specifically, **Craig** does not clarify what the level of evidence needed to invoke the exception and the characteristics of the class entitled to its protection (Cusick 1991). Although this case created guidelines, issues regarding similar statutes remain. Additionally, uncertainty as to whether the decision in this case will facilitate future and further exceptions continues (Fields 1990). In general, **Craig** provides little guidance on when and if statutory procedures should be utilized. This has resulted in a continuing struggle for the state courts and legislatures (Montoya 1992). Therefore, it is unlikely that this case represents the final challenge to these statutes or the final decision on this legal controversy (Lang 1991).

PRO DEFENDANT CONFRONTATION CLAUSE ARGUMENT

The strongest defense against videotaped and closed circuit testimony of children is that it is a violation of the defendant's constitutional right. "Sacrificing the rights of the accused for the comfort of the victim is an unprecedented step in the wrong direction," claims Randall Shaffer in the Kentucky Law Journal. He asserts that although the goal is legitimate, the procedure is flawed; closed-circuit or videotaped testimony infringes on the defendant's constitutional right to confrontation (Shaffer 1990). Although most critics agree that there is a need to protect children in these cases, they argue that the right to be confronted is one of the personal liberties guaranteed within the Bill of Rights (Fields 1992). Additionally, prosecution is difficult in sexual abuse cases, but "[s]ociety's need to prosecute accused abusers is no greater than its need to preserve the Constitution" (Nuce 1990).

The truth finding value of face-to-face confrontation is another argument against videotape and closed circuit statutes. The jury is denied the chance to witness and evaluate the demeanor of the child witness in the presence of the accused if the testimony is shown by closed circuit television or from a videotape (Shaffer 1990). By allowing this type of testimony, the jury cannot accurately assess the trustworthiness of the testimony and the credibility of the witness (Fields 1990).

PRO CHILD VICTIM ARGUMENT

Supporters of legislation that allows taped or televised testimony refute the argument that this type of testimony violates the defendant's constitutional rights. One point asserted is that when the Confrontation Clause was ratified, television did not exist (Montoya 1992). "When the Framers constructed the Confrontation Clause, they had neither child witnesses nor closed circuit television in mind" (Fields p.167 1990). Children were labeled incompetent and television was not invented.

The compelling state interest of protecting children is a second argument. Because sexual abuse is a growing societal problem, concessions are vital. "In the face of growing awareness of the national problem of child sexual abuse, the modification of defendants' confrontation rights under narrowly defined circumstances should be held constitutional" (Nuce p.581 1990). This argument asserts that protecting the children is a compelling interest of such great magnitude that it overrides the sixth amendment right to Confrontation. This is a balancing of interests method and the balance is struck in favor of the child and the society over the defendant.

Avoiding inflicting further trauma upon child witnesses is a strong argument supporting these statutes. The threat of additional psychological damage to a child if the child is

are easily influenced and led, making them less reliable witnesses.

It is well recognized that children are more highly suggestible than adults. Sexual activity, with the aura of mystery that adults create about it, confuses and fascinates them. Moreover they have, of course, no real understanding of the serious consequences of the charges they make. . . " (Yun p.1746 1983).

Supporters of confrontational testimony by victims of sexual abuse also refute the inevitability of trauma being inflicted upon the child by the courtroom situation. Empirical evidence has proven inconclusive. Psychological studies of actual victims have shown that it is quite difficult to distinguish between the trauma caused by the abuse itself and the trauma from the experience in the courtroom (Forman 1989). "Some children report feeling empowered by their participation in the process. Some have complained, when the offender plead guilty, that they did not have an opportunity to be heard in court" (Montoya 1992). While this is not true in all cases, physically confronting the accused can be therapeutic for the victim. Although any child who has been sexually abused will find it difficult or traumatizing to testify, the same can be said of adult rape victims or murder witnesses or any of a number of witnesses to various crimes. This is a tragic aspect of our judicial system, but it is nonetheless vital to the truth finding process (Shaffer 1990).

Statutes that allow exceptions to the Confrontation Clause for children also violate another tenant of our judicial system, the presumption of innocence. The argument that testifying in front of a perpetrator will be traumatic for the victim assumes guilt inasmuch as it assumes a victim and a perpetrator (Montoya 1992). Those who support confrontational testimony by victims of sexual abuse argue that "to abrogate a defendant's right to confrontation compromises the foundation of the American judicial system [because] the presumption of innocence is a hallmark of our judicial system" (Nuce 1990).

An additional point which has recently been sensationalized in the media is the possibility that children lie or fabricate stories of abuse. The popular belief that a child will not be able to testify in front of the accused due to trauma or fear assumes the child is telling the truth. "This reasoning is not only illogical, it is unconstitutional" (Shaffer 1990). A Denver study in 1987 found that 8% of sexual abuse reports were purely fictitious and an additional 22% were unsupported by evidence. Furthermore, a University of Michigan study found that charges of sexual abuse were raised in approximately 30% of Michigan's contested child custody cases (Nuce 1990). Allegations of abuse commonly arise in divorce and/or custody proceedings. Studies indicate that the likelihood of false accusations of sexual abuse increases dramatically in divorce and custody situations (Montoya 1992). Additionally, children

forced to testify in court in the presence of the defendant motivates many of these statutes. Psychologists believe that the psychological damage is caused by both the sexual abuse and the subsequent events, such as the reaction of the family, repeatedly having to talk about the abuse, and testifying in court (Bainor 1990). "Only a rare child could fail to be traumatized by the experience of testifying in court" (Cusick p.967 1991). In some cases the horror of reliving the abuse is intensified by the child's fear that the accused, who possibly threatened the child during the sexual abuse, will attack them in the courtroom (Nuce 1990). Children are, therefore, forced to cope with the trauma of the sexual abuse and the stress of the courtroom experience. Often, "system-induced trauma" occurs and children may end up contradicting themselves. Overall, the stress forced on the victim and the family can result in additional psychological damage during prosecution (Nuce 1990). One of the major reasons sexual abuse cases never make it to trial is because the parents are unwilling to further traumatize their children by forcing them to participate in a courtroom procedure (Bainor 1990). Supporters of shielding statutes argue that the state has an interest in protecting young children from the trauma of repeated appearances and extended testimony in open court in the presence of the alleged assailant. Therefore, a trial judge should allow testimony to be transmitted by videotape or television if

testifying in open court would inflict substantial trauma upon the witness ("The Testimony . . 1985).

In addition to the reduction of trauma rationale, some supporters feel these procedures actually improve the truth-finding process. Not only does videotaping protect the child witness from continually having to repeat their testimony, it also allows the child to withdraw early from the court proceedings and secures the child's testimony against forgetfulness and retraction ("The Testimony of Child . ." 1985). Because in many cases the prosecutions strongest evidence is the testimony of the child, it is important the testimony be intelligible. But, guilt, fear, and trauma may undermine the child witness's ability to testify effectively (Forman 1989). Supporters, who favor closed circuit televised testimony, argue that permitting victims to testify via closed circuit television is the best way to "effectuate the state's interest in prosecuting these cases without diminishing the defendant's confrontation rights. . ." (Bainor p.996 1990). While the other side argues that confrontation elicits truth, an argument can be made that when confrontation causes significant emotional distress in a child, such a confrontation would actually disserve the Confrontation Clause's truth-seeking goal. "If the child is telling the truth, the fact-finding process will be better served by making testifying less stressful" (Montoya p1259 1992).

An additional argument favoring the use of videotaped depositions for child witnesses is that videotape is uniquely qualified to present the demeanor of the child witness as he or she gives the statement. The jury is better able to assess the credibility of the witness because the child is less upset, frightened, shy, or humiliated, and therefore, the jury is provided with a more accurate and less emotional deposition (Kelly 1985). Taping may also preserve the child's statements while fresh in the child's mind and reduce the number of times the witness has to repeat the testimony (Fields 1990). Similarly, closed-circuit television also allows the jury to better assess the child's testimony. Closed-circuit is sometimes favored because it is instantaneous and "the substantive concerns of the confrontation clause remain fully protected" (Bainor 1990). An important note is that cross-examination is still utilized during this procedure.

Supporters of protective statutes also refute the claim that children are not credible witnesses.

Distrust of children is illogical in child sexual abuse prosecutions because false accusations are extremely rare. Studies have reported the fabrication rate to be between two and five percent. The majority of false reports are adult initiated ("Rape Shield Laws . . ." p. 751 1993).

For the most part, children lack the requisite knowledge to fabricate sexual stories. Additionally, they are not likely to lie to their parents or authority figures about sexual abuse (Cusick 1991). False accusations are most prominent during divorce proceedings and custody disputes.

CONCLUSION

This issue of the welfare of the child victim versus the rights of the defendant still remains unsettled. It is an ever changing area of the law. After some rather ambiguous Supreme Court decisions, the burden of the issue has once again shifted back to the state level. At the state level, interpretation, procedure, and the balance of interests varies from state to state.

Alternatives do exist to these child witness statutes which would alleviate the trauma suffered by child witnesses yet preserve the rights of the accused. One suggestion is to place special priority on sex abuse cases on the docket to reduce the amount of time the child spends in the judicial system. Another alternative is to coordinate joint investigative effort in following up reports of sexual abuse. This coordination decreases the time and trauma of the child getting interviewed repeatedly, having to relive over and over the details of the abuse (Shaffer 1990). Currently, in advocacy centers across Illinois and the nation, such as McLean County's Child Protection Network, these coordination efforts are being attempted. The police, the Department of Children and Family Services, and the State's Attorney's Office all work together to eliminate repeat interviews and speed up the investigative process.

From interning at the McLean County Child Protection Network, I have seen firsthand the unsettling effect

confrontation has upon children's testimony. One little girl on the witness stand looked over at her father, the defendant, before answering every question. During her testimony she became very flustered and upset. Because Illinois does not have a statute that allows for special procedures with child witnesses, it was necessary for this little girl to face her father during her testimony.

Illinois needs to place greater public policy emphasis on the sexual abuse of children and the welfare of children, in general. The current system is adult based and does not take into consideration the needs of child victims and witnesses. If the legislature refuses to design a statute which allows for closed circuit or videotaped testimony, it should develop an alternative which takes into consideration child witnesses. Suggestions have included child designed courtrooms, which are less intimidating and arranged so that the defendant is not in the child's direct line of sight, and child advocates which assist the children in preparing for the court experience. Some improvements have been made in Illinois, such as the development of Child Advocacy Centers, but additional reform is vital.

Additional research in the area of child witnesses and the Confrontation Clause would be very beneficial. A state by state comparison of the current statutes in this area is one possibility. This type of study could compare the

guidelines, restrictions, and procedures utilized by different. This type of analysis may be able to determine who has the most successful statute and/or provide a model for other states.

One aspect not yet touched upon is the importance of prevention. Child sexual abuse perpetuates itself, it is important to stress that more than eighty percent of child sexual abusers were themselves abused. Legislatures need to concentrate on creating legislation that will target prevention (Shaffer 1990). At the same time, victims of sexual abuse obviously need special treatment within our judicial system today. These victims are so vulnerable; "arguably, the fabric of society is revealed from the way these most vulnerable victims are treated" (Montoya 1992). Yet, as the debate between Sixth Amendment confrontation rights and protecting child witnesses continues, it remains to be seen how these victims (and these defendants) will be treated in the future.

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