A Law and Economics Analysis of the Right to Face-to-Face Confrontation Post-Maryland v. Craig: Distinguishing the Forest From the Trees

Peter T. Wendel
A LAW AND ECONOMICS ANALYSIS OF THE RIGHT TO FACE-TO-FACE CONFRONTATION
POST-MARYLAND V. CRAIG: DISTINGUISHING THE FOREST FROM THE TREES

Peter T. Wendel*

CONTENTS

I. INTRODUCTION ............................ 407

II. A LAW AND ECONOMICS PRIMER ................ 417
   A. Introduction ........................... 417
   B. The Law and Economics Theory of Criminal Law .......................... 419
   C. A Law and Economics Analysis of Child Sexual Abuse ............... 421

III. A LAW AND ECONOMICS ANALYSIS OF THE ROLE OF THE RIGHT TO FACE-TO-FACE CONFRONTATION IN THE EFFECTIVE ENFORCEMENT OF CRIMINAL LAWS .............. 421
   A. The Law and Economics Theory of Procedural Rules .......................... 422

* Associate Professor of Law, Pepperdine University School of Law. B.A. 1979, University of Chicago; M.A. 1980, St. Louis University; J.D. 1983, University of Chicago. The author thanks Professors Robert Cochran and Harry Caldwell of Pepperdine University School of Law for their helpful comments on earlier drafts of this Article, and Judge Richard Posner for his reading of the article and words of support. The author also thanks Peter Brown and Lori Spillane for their invaluable research assistance.
B. A Law and Economics Analysis of the Right to Face-to-Face Confrontation

IV. THE COURT’S OPINION IN MARYLAND V. CRAIG
   A. The Supreme Court’s Analysis
   B. The Dissent

V. A LAW AND ECONOMICS ANALYSIS OF THE MARYLAND PROCEDURE AND OF THE COURT’S OPINION IN MARYLAND V. CRAIG
   A. An Economic Analysis of the Maryland Procedure
      1. How the Maryland Procedure Affects the Expected Costs of an Erroneous Judgment
      2. How the Maryland Procedure Affects the Probabilities of an Erroneous Judgment
      3. How the Maryland Procedure Affects the Direct Costs of the Procedural System
      4. Comparing the Magnitude of the Increase in the Expected Cost of Error with the Magnitude of the Expected Savings from Eliminating the Emotional Distress Caused by Face-to-Face Confrontation
   B. Criticisms of the Court’s Economic Analysis of the Maryland Procedure
      1. The Court Underestimated the Increase in the Probability of an Erroneous Conviction
      2. The Evidence Admitted Under the Maryland Procedure is Not as Reliable as the Evidence Admitted Under the Hearsay Exceptions
      3. The Court Overestimated the Savings that Would Derive from the Elimination of Face-to-Face Confrontation

http://scholarlycommons.law.hofstra.edu/hlr/vol22/iss2/2
I. INTRODUCTION

In a criminal case, should the defendant have the right to confront, face-to-face, the witnesses who appear at trial and testify against the defendant? In analyzing this issue, the courts have repeatedly recognized that there are costs and benefits associated with a right to face-to-face confrontation. The principal cost is the potential

1. Although the right to face-to-face confrontation and the right to cross-examination will be one and the same for most purposes, see Ohio v. Roberts, 448 U.S. 56, 63-64 (1980), the right to face-to-face confrontation as an independent right is the focus of this Article.

2. See Coy v. Iowa, 487 U.S. 1012, 1014, 1020-21 (1988) (reversing the Iowa Supreme Court's decision, which allowed the use of a screen between the defendant and a child witness, and thereby disallowing the State's assertion that the appellant's right to confrontation was outweighed by the State's interest in protecting the sexual abuse victim); Roberts, 448 U.S. at 64 (recognizing that "competing interests if closely examined... may warrant dispensing with confrontation at trial") (emphasis added) (quoting Chambers v. Mississippi, 410 U.S. 284, 295 (1973); State v. Dolen, 390 So. 2d 407, 409-10 (Fla. Dist. Ct. App. 1980) (remanding a case so that its outcome may properly be based upon "whether the potential detrimental effect upon the witness outweighs the interest or benefit to the defendant"); see also The Supreme Court, 1987 Term—Leading Cases, 102 HARV. L. REV. 143, 157 n.46 (1988) ("The [Supreme] Court has balanced costs and benefits in several confrontation clause cases.").

Published by Scholarly Commons at Hofstra Law, 1993
anxiety, in some cases even trauma, which the witness may experience from having to confront the defendant face-to-face. The principal benefit is the reduced risk of an erroneous conviction. In comparing the costs and benefits, the courts traditionally and generally have held that the benefits of face-to-face confrontation (the savings from the reduced risk of an erroneous judgment) outweigh the costs (the potential anxiety, and even trauma, to the witness)—until Mary-

3. See Coy, 487 U.S. at 1020 ("[F]ace-to-face [confrontation] may, unfortunately, upset the truthful rape victim."); State v. Vincent, 768 P.2d 130, 162 (Ariz. 1989) ("To whatever extent the law insists on face-to-face confrontation, it heightens the anxiety, and perhaps the trauma, of those who are willing to bear witness against crime."); see also Michael H. Graham, Indicia of Reliability and Face to Face Confrontation: Emerging Issues in Child Sexual Abuse Prosecutions, 40 U. MIAMi L. REV. 19, 83 (1985) ("Witnesses who testify in open court often suffer some emotional distress. Many, if not most, rape victims suffer severe emotional distress or trauma while testifying, especially when face to face with the accused. Presumably, so do many other groups of victims.").

4. See Coy, 487 U.S. at 1019-20 (comparing the right to face-to-face confrontation with the right to cross-examine the witness and finding that both serve much the same purpose in that both ensure the integrity of the factfinding process. "[F]ace-to-face presence . . . may confound and undo the false accuser, or reveal the child coached by a malevolent adult."); United States v. Leonard, 494 F.2d 955, 987 (D.C. Cir. 1974) ("Elaboration and application of the rules of evidence and the Confrontation guarantee are themselves directed to a fully pragmatic concern; they are designed to provide some reasonable assurance that defendants found guilty are guilty."); Vincent, 768 P.2d at 162 ("To whatever extent the law cushions a witness against the crucible of confrontation, it diminishes a fundamental courtroom test of truth."); Herbert v. Superior Court, 172 Cal. Rptr. 850, 855 (Ct. App. 1981) ("A witness’s reluctance to face the accused may be the product of fabrication rather than fear or embarrassment."); see also Coy, 487 U.S. at 1019 ("It is always more difficult to tell a lie about a person ‘to his face’ than ‘behind his back."); Roberts, 448 U.S. at 63 n.6 (reiterating the difficulty of lying when in the presence of an innocent defendant).

5. See Coy, 487 U.S. at 1020-22 (holding that the defendant’s confrontation right was violated when the lower court allowed a child witness to testify from behind a screen); Barber v. Page, 390 U.S. 719, 724-26 (1968) (refusing to affirm the lower court’s decision due to the prosecution’s failure to produce a witness residing in a federal prison); United States v. Benfield, 593 F.2d 815, 817, 821 (8th Cir. 1979) (ruling that a procedure which allowed a kidnapping victim to testify via pretrial deposition under circumstances that allowed the defendant to be present at the deposition, but outside of the victim’s view, was violative of the defendant’s confrontation right); Britton v. Maryland, 298 F. Supp. 641, 647 (D. Md. 1969) (holding that the State did not make a good faith effort to produce the witness, who was in the armed services, and therefore use of the deposition was not allowed); Hochheiser v. Superior Court, 208 Cal. Rptr. 273, 278 & n.2 (Ct. App. 1984) (overruling the trial court’s decision to allow children to testify via video, and explaining that physical confrontation falls within the scope of the Sixth Amendment and "[t]he closed-circuit television order . . . raise[d] significant and complex federal and state constitutional issues, potentially affecting petitioner’s fundamental rights to a public trial, confrontation of witnesses against him and due process") (footnote omitted); Herbert, 172 Cal. Rptr. at 853 (agreeing with the defendant that a seating arrangement violated his right to confront accusatory witnesses and stating that hearsay rules indicate that “a personal view of the witness by the defendant at some point is part of the right of confrontation”); Keshishian v. State, 386 A.2d 665, 667 (Del. 1978) (de-
In *Maryland v. Craig*, the Supreme Court implicitly ruled that in child sexual abuse cases, the costs of face-to-face confrontation may exceed the benefits. The Court held that where the trial court makes an individualized finding that the child abuse victim would experience undue emotional distress if compelled to testify face-to-face against the defendant, and the reliability of the evidence is otherwise ensured, the defendant is not entitled to the right to face-to-face confrontation. The Court's holding appears to conflict with the traditional analysis of the right to face-to-face confrontation and raises a host of questions concerning the legitimacy and scope of the Court's opinion. Although these questions can be, and have been, analyzed considering that the lower court incorrectly accepted a psychologist's opinion regarding the witness's instability as the basis for excusing the witness from live testimony; State v. Brookins, 478 S.W.2d 372, 374-75 (Mo. 1972) (disallowing use of a deposition when it was apparent that the prosecution had made no effort to bring the witness to the court); Sheehan v. State, 223 N.W.2d 600, 605 (Wis. 1974) (finding that a witness's fear of questions pertaining to his homosexuality was an insufficient reason to deny the defendant his right to face-to-face confrontation); see also State v. Gilbert, 326 N.W.2d 744, 749 (Wis. 1982) (“In cases in which adult witnesses have asked to be excused from their duty to testify . . . courts have generally been reluctant to excuse the witness, concluding that the public policy in favor of compelling testimony outweighs the possible harm that testifying would cause.”).

In addition to the above authority, there is very compelling Supreme Court dicta which supports the belief that the Confrontation Clause does indeed require a literal interpretation of face-to-face confrontation. See Roberts, 448 U.S. at 63-64 n.6 (“The requirement of personal presence . . . undoubtedly makes it more difficult to lie against someone, particularly if that person is an accused and present at trial.”) (quoting 4 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE ¶ 800[01] (1991)); California v. Green, 399 U.S. 149, 156 (1970) (affording “the defendant the opportunity to challenge his accuser in a face-to-face encounter in front of the trier of fact”); Kirby v. United States, 174 U.S. 47, 55 (1899) (noting that a fact that can only be proved against the defendant by witnesses must be proved “by witnesses who confront him at trial, upon whom he can look while being tried”); Mattox v. United States, 156 U.S. 237, 244 (1895) (noting that the defendant's Constitutional protection is preserved by “the advantage he has once had of seeing the witness face to face”).

7. *Id.* at 853.
8. *Id.* at 857. The reliability of evidence can otherwise be ensured when, e.g., a one-way closed circuit television procedure is used, thereby ensuring the other elements of confrontation: “physical presence, oath, cross-examination, and observation of demeanor by the trier of fact.” *Id.* at 846.
9. *Id.* at 857.
10. See cases cited supra note 5.
11. The following questions are raised by this holding: Does the Court's opinion create a broad new exception to the Confrontation Clause any time the witness is present at trial but "psychologically unavailable" to testify face-to-face against the defendant, regardless of the age of the victim, the nature of the crime, or the manner in which the state interest is asserted? Does the state's interest in protecting children from the trauma associated with face-
to-face confrontation apply only to child abuse cases, or does the state’s interest extend to other cases involving children who are the victims of other crimes? (Suppose a child victim was testifying against a parent in an attempted murder case. Assuming the experience of testifying face-to-face against the parent would inflict extraordinary trauma upon the victim, could the child testify via a one-way closed circuit television monitor?)

Does the state’s interest in protecting witnesses from the trauma associated with face-to-face confrontation apply only to children? (Consider a child sexual abuse case, but by the time the case was tried the victim was an adult. Further, consider a sexual assault case in which the victim was an adult, but the victim suffered from a mental condition which rendered their psychological age that of a minor. Suppose the case was a rape or attempted murder case, and the victim was an adult, but the victim could establish that having to testify face-to-face in front of the defendant would result in extraordinary trauma. Imagine a spousal abuse case in which the victim would experience undue emotional distress if required to testify face-to-face against the defendant.)

Assuming that the reliability of the evidence is otherwise assured, which state interests will justify denying the accused the right to confront face-to-face those testifying against him or her? Does the state’s interest have to be identified by the state legislature, or may a court, in any given case, consider the issue if properly raised by the prosecution? (Suppose there was no statute in Maryland v. Craig, 497 U.S. 836, 856 (1990), but the prosecution petitioned the court to permit the procedure.) Assuming, arguingo, an important state interest which may outweigh the defendant’s right to face-to-face confrontation, what is the “minimum showing of emotional trauma required,” 497 U.S. at 856, before the accused loses the right to face-to-face confrontation? In Maryland v. Craig, the Supreme Court expressly left this issue for another day. “We need not decide the minimum showing of emotional trauma required for use of the special procedure, however, because the Maryland statute, which requires a determination that the child witness will suffer ‘serious emotional distress such that the child cannot reasonably communicate,’ . . . clearly suffices to meet constitutional standards.” (citation omitted). Id. at 856. The Court implied, however, that the threshold need not be very high. See id. at 856-57. When discussing what the state must show to use the special procedure, the Court stated that “the trial court must find that the emotional distress suffered by the child witness in the presence of the defendant is more than de minimis, i.e., more than ‘mere nervousness or excitement or some reluctance to testify.”’ Id. (emphasis added) (quoting Wildermuth v. State, 530 A.2d 275, 289 (Md. 1987)). For a discussion of other cases in which special procedures could be applied, see Toni M. Massaro, The Dignity Value of Face-To-Face Confrontations, 40 U. Fla. L. Rev. 863, 916 (1988):

If “confrontation” is redefined in child abuse cases, then it may be redefined in other categories of cases as well, depending on a judge’s or legislature’s inclination to weigh the victim’s trauma in those cases more heavily than the trauma of victims in other cases. One-way mirrors may appear not only in child abuse cases, but also in adult rape cases, attempted murder cases, kidnapping cases, and any other cases in which the victim has suffered physical and psychological trauma that may be aggravated by facing the defendant.

Id.

The belief expounded above has been applied especially, but not exclusively, in the area of murder cases. See Stoner v. Sowders, 997 F.2d 209, 211-13 (6th Cir. 1993) (overturning the lower court’s decision in a burglary case in which the lower court found that a doctor’s testimony as to the witness’s precarious health conditions was sufficient proof to establish the need for a deposition rather than live testimony); Department of Social Serv. v. Armandos, 19 Cal. Rptr. 2d 404, 407 (Ct. App. 1993) (allowing the use of close-circuit television in a dependency proceeding despite the lack of any Craig-like statutory authorization and explaining its decision as being well within the “inherent powers” of the court to
FACE-TO-FACE CONFRONTATION

from a number of different perspectives, conspicuous by its absence carry out its duties); Hernandez v. State, 597 So. 2d 408, 409-10 (Fla. Dist. Ct. App. 1992) (affirming the holding below and ruling that a lack of statutory protection for child witnesses of murder did not matter because "[the state has an interest in protecting child victims . . . from the additional trauma of testifying in open court, in defendant's presence"); State v. Nutter, 609 A.2d 65, 74 (N.J. Super. Ct. App. Div. 1992) (overturning the finding below that New Jersey's Craig-like statute could also protect a child who had witnessed a murder); State v. Lopez, 412 S.E.2d 390 (S.C. 1991) (finding no fault with the lower court's decision to place a mother at the far end of the defense table out of sight of her children who were testifying against her in a trial for the murder of her stepson); Gonzales v. State, 818 S.W.2d 756 (Tex. Crim. App. 1991) (en banc) (implying that children who witness their mothers being murdered fall within the class of victims that the Craig-like statute seeks to protect); see also Government of Virgin Islands v. Riley, 750 F. Supp. 727, 728-29 (D.V.I. 1990) (considering whether to apply Craig to a murder case, the court did "not believe Craig should be read so narrowly as to apply only in child sexual abuse cases," but declined to make such a decision absent a Craig-like statute in force in the jurisdiction). But see Ford v. State, 592 So. 2d 271, 275 (Fla. Dist. Ct. App. 1992) ("This case does not involve child abuse or sexual abuse upon a child. This is a homicide case . . . . The legislature restricted the procedures . . . . to child abuse/sexual abuse victims or witnesses.").

Even when Craig is employed in the realm for which it was intended, it has still led to confusing decisions. See Larson v. Dorsey, No. 91-2198, 1993 WL 76278, at *2 (10th Cir. 1993) (leaving unanswered the question of whether there should be a new determination of the child's possible trauma when there is a substantial time space between the original ruling on the issue and the actual date of the trial); United States v. Bateman, 805 F. Supp. 1058, 1060 (D.N.H. 1992) (implying that once a child reaches his or her majority, the protection of Craig may no longer be relied upon to avoid face-to-face confrontation); State v. Schaffer, No. 90-0716-CR, 1991 WL 121021, at *2 (Wis. Ct. App. May 2, 1991) (allowing videotaped depositions despite the child witness's ability to freely testify in the defendant's presence during the preliminary hearing). The ruling in Bateman is especially troubling in light of the fact that a minor's trauma will not simply disappear due to the passing of an arbitrary birth date.

12. See Josephine A. Bulkley, Recent Supreme Court Decisions Ease Child Abuse Prosecutions: Use of Closed-Circuit Television and Children's Statements of Abuse Under the Confrontation Clause, 16 NOVA L. REV. 687 (1992) (explaining that recent Supreme Court decisions demonstrate the Court's preference for the prosecution's position in criminal cases); John B. Mitchell, What Would Happen if Videotaped Depositions of Sexually Abused Children Were Routinely Admitted in Civil Trials? A Journey Through the Legal Process and Beyond, 15 U. PUGET SOUND L. REV. 261 (1992) (showing how collateral estoppel principles will not shield a child victim from testifying at trial); Nancy Schleifer, Might Versus Fright: The Confrontation Clause and the Search for "Truth" in the Child Abuse Family Court Case, 16 NOVA L. REV. 783 (1992) (proponding that in child abuse cases the Confrontation Clause actually prevents the trier of fact from hearing the truth); Bryan H. Wildenthal, The Right of Confrontation, Justice Scalia, and the Power and Limits of Textualism, 48 WASH. & LEE L. REV. 1323, 1370-80 (1991) (examining the Supreme Court's response to issues involving admissibility of hearsay in child sexual abuse cases); Kathleen A. Barry, Comment, Witness Shield Laws and Child Sexual Abuse Prosecutions: A Presumption of Guilt, 15 S. ILL. U. L.J. 99 (1990) (claiming that defendants cannot overcome the presumption of guilt brought about due to attempts to protect the child victim); Gall D. Cecchettini-Whaley, Note, Children as Witnesses after Maryland v. Craig, 65 S. CAL. L. REV. 1993 (1992) (arguing that both the standard of proof and the threshold of actual harm to the child victim must be set high before the court opts for any alternative to the defendant's constitutional right of confronta-
is a law and economics analysis.\textsuperscript{13}

Under a law and economics analysis, the function of procedural rules is to minimize the costs associated with the risk of an erroneous judgment ("the expected cost of error") at a cost which produces a net benefit to society.\textsuperscript{14} The expected cost of error ("CE") is (1) the

\textsuperscript{13} A traditional law and economics analysis examines the connection between the costs and benefits of a given scenario. See A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 7 (1983) (describing efficiency in law and economics as "the relationship between the aggregate benefits . . . and the aggregate costs of the situation"); see also WERNER Z. HIRSCH, LAW AND ECONOMICS: AN INTRODUCTORY ANALYSIS 1 (2d ed. 1988); LLAD PHILLIPS & HAROLD L. VOTEY, JR., THE ECONOMICS OF CRIME CONTROL 19 (1981). See generally RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 12-16 (4th ed. 1992) (describing the interrelationships between value, utility, efficiency, and cost/benefit).

The absence of any type of law and economics examination of the issues in Craig is particularly conspicuous given: (1) the Court's cost-benefit analysis of the case, see Maryland v. Craig, 497 U.S. at 853 (1990) (implying that societal wealth would be increased if the well-being of the child abuse victim is recognized over the defendant's right to face-to-face confrontation); and (2) the Court's historical application of a cost-benefit analysis to the issue of the right to face-to-face confrontation. See supra notes 2-5 and accompanying text. The Court's cost-benefit analysis is consistent with, and implicitly embraces, a law and economics analysis of the issue.

\textsuperscript{14} Substantive rules of law, and criminal laws in particular, increase social wealth by discouraging people from engaging in socially harmful conduct and punishing those who engage in such conduct. See POSNER, supra note 13, at 223. Inasmuch as the criminal justice system is not perfect, however, the punishment has to be discounted by the probability that an erroneous judgment may occur. Cf. id. at 224-25 (discussing the implications of legal error). The discounted net punishment means that some people will go ahead and engage in the prohibited conduct even though it will result in a net social loss. Cf. id. at 223-25. Accordingly, the risk of an erroneous judgment produces a cost of error which reduces social wealth. See id. at 553. Society desires to minimize the cost of error, but only if doing so is efficient. Cf. id. at 23 (discussing the positive role of economic analysis of the law). The principal mechanism society uses to reduce the risk of an erroneous judgment, and hence the cost of error, is procedural rules. Id. at 549.
probability of an erroneous conviction ("P of EC") times the expected cost of an erroneous conviction ("C of EC"); plus (2) the probability of an erroneous acquittal ("P of EA") times the expected cost of an erroneous acquittal ("C of EA"):

\[ CE = [(P \text{ of } EC) \times (C \text{ of } EC)] + [(P \text{ of } EA) \times (C \text{ of } EA)] \]

A procedural rule produces a net benefit to society if the net reduction in the expected cost of error exceeds the expected direct cost of the rule.

The traditional and general rule that the defendant is entitled to the right to face-to-face confrontation is consistent with a law and economics analysis. Face-to-face confrontation significantly reduces the expected cost of error by significantly reducing the probability of an erroneous conviction. There is, however, a cost associated with face-to-face confrontation: the potential emotional distress that a witness may experience. The Confrontation Clause and the Supreme Court opinions prior to *Maryland v. Craig* support the qualitative conclusion that the magnitude of the economic benefit of face-to-face confrontation (from the reduced expected costs of an erroneous judgment) exceeds the expected direct cost (in terms of the potential emotional distress to the witness).\(^5\)

Although the Supreme Court's holding in *Maryland v. Craig* conflicts with the general rule and traditional economic analysis of face-to-face confrontation, at first blush the Court's opinion appears defensible because of the differences between the traditional analysis and the Court's analysis.\(^6\) The Court minimized the benefits of face-to-face confrontation by (1) characterizing face-to-face confrontation as simply one of many elements of the Confrontation Clause, and (2) analogizing the Maryland procedure to the hearsay exceptions and claiming that the evidence admitted under the Maryland procedure is just as reliable as the evidence admitted under the hearsay exceptions.\(^7\) On the other hand, the Court emphasized the costs associated with face-to-face confrontation and reasoned that the individualized finding that the witness would experience trauma if required to testify face-to-face against the defendant means that there are exceptionally

\(^{15}\) See supra note 5. Since absolute values cannot be assigned to either the cost or the benefit figure, however, the analysis of the issue is as much qualitative as quantitative.

\(^{16}\) See Craig, 497 U.S. at 851-54.

\(^{17}\) Id.
high costs associated with face-to-face confrontation in such cases\(^8\) (a much higher cost than the expected cost to the witness used in the traditional analysis of face-to-face confrontation). Accordingly, in line with the hearsay exceptions, the Court concluded that due to the high costs of face-to-face confrontation in child abuse cases, the Maryland procedure adequately ensured the reliability of the evidence in such cases at a cheaper cost (thereto producing a net benefit to society).\(^9\)

There are problems, however, with each step of the Court's analysis.\(^2\) First, the Court underestimated the benefit of face-to-face confrontation, one of the principal mechanisms for minimizing the risk of an erroneous conviction. Second, the evidence admitted under the Maryland procedure is not as reliable as the evidence admitted under the hearsay exceptions. Evidence is admitted under the hearsay exceptions only because of its inherent indicia of reliability, which also permits the jury to properly assess its credibility. In contrast, the child abuse testimony admitted under the Maryland procedure lacks any indicia of reliability, and the appearance of confrontation without face-to-face confrontation only heightens the risk that the jury will over assess the credibility of the evidence (thereby increasing the probability of an erroneous conviction). Third, the Court overestimated the costs of face-to-face confrontation (and thus the benefits of the Maryland procedure). Before the direct cost (the potential trauma) will exceed the benefit of face-to-face confrontation, the direct cost will exceed the costs associated with an increase in the probability of an erroneous acquittal if the witness was not called to testify. Accord-

---

18. Id. at 855-56.
19. Id. at 851, 857.
20. The Court exacerbates this problem by declining to define the exact level of trauma required to allow the witness to invoke the protective procedure. See id. at 856. Instead, the Court rules generally that "a State's interest in the . . . well-being of child abuse victims may be sufficiently important to outweigh . . . a defendant's right to face his or her accusers in court," id. at 853, and more specifically that the Maryland statute meets constitutional standards. Id. at 856. Unfortunately, a quick glance at various statutes offering the same or similar types of protection to child abuse witnesses in other states reveals an alarming disparity in the level and description of the trauma required to invoke the procedure. See infra notes 265-66. Justice Scalia, in his dissent, levels more basic criticisms to the Court's ability to judge the necessary degree of trauma. See Craig, 497 U.S. at 869-70 (Scalia, J., dissenting). He points out that this ruling allows a child witness to escape face-to-face confrontation merely because of an unwillingness to face the defendant, and that "unwillingness cannot be a valid excuse under the Confrontation Clause, whose very object is to place the witness under the sometimes hostile glare of the defendant." Id. at 866. Furthermore, Justice Scalia expresses incredulity at the basic premise of any statute which would allow the prosecution to call any witness "who cannot reasonably communicate." Id. at 867.
ingly, in any given case it is more efficient not to call a witness who would suffer trauma from face-to-face confrontation than to call the witness and not require face-to-face confrontation.\textsuperscript{21} Moreover, whatever benefits may exist from eliminating the trauma associated with face-to-face confrontation have to be reduced by the direct costs inherent in the Maryland procedure. The Court failed to include in its cost-benefit analysis the administrative costs of the Maryland procedure, which are much higher than the administrative costs of the hearsay exceptions.

The problem with the Supreme Court's opinion in \textit{Maryland v. Craig} is that the Court missed the forest for the trees. Because the cost of an erroneous conviction is so high, any increase in the probability of an erroneous conviction will significantly increase the expected cost of error, which will exceed the benefits associated with eliminating face-to-face confrontation in any given case. For the benefits from eliminating face-to-face confrontation to overcome this increased cost, there will have to be a disproportionately high number of cases in which obtaining direct evidence in compliance with face-to-face confrontation is either prohibitively expensive or simply impossible. Just as the hearsay exceptions to the right to face-to-face confrontation can be justified from a macro perspective, so too can the Maryland procedure. The problem underlying \textit{Maryland v. Craig} was not the emotional trauma that a child abuse victim may experience from face-to-face confrontation, but rather the frequency with which such trauma may occur. Because of the potential trauma inherent in obtaining the evidence in child abuse cases, in a disproportionately high number of cases the cost of obtaining the evidence becomes prohibitively expensive or simply impossible to obtain. The practical effect of the high costs is that a disproportionately high number of witnesses fail to participate in the prosecution process. Each witness who fails to participate increases the probability of an erroneous acquittal, which in turn decreases the effective enforcement of child sexual abuse laws.\textsuperscript{22} The effective enforcement of a criminal law requires that the net punishment for the offense is high enough that a sufficient number of individuals are deterred from engaging in the criminalized conduct.\textsuperscript{23} If a state is not achieving the effective en-

\textsuperscript{21} \textsc{Posner}, \textit{supra} note 13, at 553.

\textsuperscript{22} Each erroneous acquittal decreases the net punishment for the offense, which in turn increases the probability that more individuals will commit the offense.

\textsuperscript{23} \textit{See} \textsc{Posner}, \textit{supra} note 13, at 223-28; Gary S. Becker, \textit{Crime and Punishment: An
forcement of a criminal statute, the most efficient response is first, to increase the penalty associated with the conduct,\textsuperscript{24} and if that does not achieve the desired level of net punishment, then to take steps to increase the probability that individuals violating the law will be apprehended and convicted.\textsuperscript{25} Having exhausted the more efficient methods of attempting to achieve the effective enforcement of child abuse statutes, the states modified the traditional right to face-to-face confrontation in an effort to increase the apprehension and conviction rate.\textsuperscript{26} The states determined that the net social loss from the unacceptably high level of child abuse exceeded the increased costs produced by modifying the right to face-to-face confrontation.

The macro view of the problem underlying Maryland v. Craig puts the Court’s holding and its opinion into perspective. The Court’s opinion as written focuses too much on the micro level, individualized finding of high costs to the witness if face-to-face confrontation were required. The result is a conclusory opinion which flies in the face of both the spirit and the letter of the Confrontation Clause, lacks a persuasive rationale for why the right to face-to-face confrontation is not a part of the constitutional Confrontation Clause, and provides no guidance as to the scope of the opinion or the right to face-to-face confrontation. The Court’s focus on the micro level, individualized finding of trauma arguably constitutes a broad attack on


\textsuperscript{24} See Becker, \textit{supra} note 23, at 177-78; \textit{see also} Dau-Schmidt, \textit{supra} note 23, at 12 (describing the common response of more severe incarceration for repeat as opposed to first-time offenders). \textit{See generally} Posner, \textit{supra} note 13, at 223-31 (acknowledging society’s heavy reliance upon imprisonment, but then offering the possible alternative of a far-reaching fine system).

\textsuperscript{25} See Posner, \textit{supra} note 23, at 1204, 1206; \textit{see also} Becker, \textit{supra} note 23, at 176-78; Dau-Schmidt, \textit{supra} note 23, at 10 n.48.

\textsuperscript{26} In Maryland v. Craig, the Maryland procedure was interpreted as intending to “both protect the child and enhance the public interest by encouraging effective prosecution of the alleged abuser.” 497 U.S. 836, 855 (1990) (quoting Wildermuth v. State, 530 A.2d 275, 285 (Md. 1987)). The traditional analysis of face-to-face confrontation focuses on the expected costs and benefits of face-to-face confrontation at trial. The traditional analysis assumes that enough complainants are coming forward and pressing charges for the state to achieve effective enforcement of its criminal laws, and thus the analysis focuses on whether face-to-face confrontation minimizes the cost of error under this assumption. The problem, however, is that for the crime of child abuse, not enough complainants were coming forward and pressing charges for the state to achieve the net punishment level necessary to enforce its child abuse laws effectively. Not enough complainants were coming forward and effectively participating in the prosecution process because of the trauma inherent in face-to-face confrontation.
the right to face-to-face confrontation, subjecting the right to a case by case analysis. Based on the Court's micro level analysis, the Maryland procedure arguably should be employed in any case where there is an individualized finding that the witness would experience undue emotional distress from face-to-face confrontation, regardless of the age of the victim and/or the nature of the offense.27 Such a broad attack on the right to face-to-face confrontation is indefensible both quantitatively and qualitatively.

If, however, the Court's holding is viewed in light of the macro level problem underlying Maryland v. Craig, it constitutes a relatively narrow exception to the Confrontation Clause. The general rule that the defendant is entitled to face-to-face confrontation remains intact unless the state establishes: (1) that the state is not able to achieve the effective enforcement of the criminal statute in question; (2) that the reason the state cannot achieve effective enforcement of the statute in question is because not enough witnesses are coming forward and participating in the prosecution process; and (3) that the reason not enough witnesses are participating in the prosecution process is because of the costs inherent in face-to-face confrontation. Then, and only then, should the state conduct an individualized hearing to determine if the witness would be unable to participate in the prosecution process unless face-to-face confrontation were eliminated. The macro level analysis of the Court's holding in Maryland v. Craig is consistent with both a normative and a positive economic analysis of the issue underlying the case.

II. A LAW AND ECONOMICS PRIMER

A. Introduction

The traditional law and economics theory is based upon an opportunity-shaping theory of human behavior,28 which, in turn, is based upon the premise that individuals desire to and act to maximize their own personal preferences.29 When an individual is presented

27. Just as the hearsay exceptions apply across the board regardless of the age of the victim or the nature of the crime, so too should the Maryland procedure.
28. Dau-Schmidt, supra note 23, at 1-2; see POSNER, supra note 13, at 223-24 (referring to literature on crime that shows the response of criminals to changes in opportunity costs); Becker, supra note 23, at 179 (explaining that a criminal will decide whether "crime pays" based upon his or her attitude toward risk). See generally Dau-Schmidt, supra note 23, at 5, 9 (describing how society may choose to influence individual behavior and the factors that may affect an individual's decision to behave criminally).
29. See POSNER, supra note 13, at 3; see also GARY S. BECKER, THE ECONOMIC AP-
with a choice, the individual calculates the costs and benefits associated with the different options, and chooses the option which maximizes his or her personal preferences. In calculating the costs and benefits associated with the different options, however, the individual calculates only (1) the costs imposed upon him or her, and (2) the benefits he or she shall receive. Any costs and/or benefits imposed upon third parties are not included in the individual's calculations with respect to whether to engage in the activity.

While the actor calculates the costs and benefits from a micro point of view (the costs and benefits to the actor only), society calculates the costs and benefits from a macro point of view (the costs and benefits to all affected parties). Society calculates the macro level costs and benefits of different activities because society seeks to maximize social wealth by seeking Pareto optimality. In Pareto optimality, society's resources are distributed among individuals in such a manner that no redistribution of resources can be made among the members of society without making another member worse off. In pursuit of Pareto optimality, society wants to encourage those activities which result in a net social benefit and discourage those activities which result in a net social cost. As long as an individual considers only the costs and benefits to him or her from a contemplated activity, however, there is the risk that the individual will

30. "This decision will depend on the individual's . . . opportunities, and the individual's preferences with respect to these opportunities." Dau-Schmidt, supra note 23, at 5; see also Becker, supra note 29, at 6-8; Phillips & Votey, supra note 13, at 19-20; Posner, supra note 13, at 223.

31. See Becker, supra note 23, at 179; see also Dau-Schmidt, supra note 23, at 5 (describing the decision to engage in crime as one in which the criminal opportunities are sufficiently remunerative to outweigh the noncriminal opportunities). See generally Becker, supra note 29, at 3-14 (defining the economic approach to human behavior as the utility derived from partaking in an activity versus the utility derived from not partaking).

32. Dau-Schmidt, supra note 23, at 8. These costs/benefits upon third parties are called externalities because they are external to the actors decision making process. There is no market in which the third parties can charge the actor for the external costs or in which the actor can charge the third parties for the external benefits. Id. See generally Posner, supra note 13, at 71.

33. See generally Richard A. Posner, Economic Analysis of Law 62, 205-12 (3d ed. 1986); Posner, supra note 13, at 71 (explaining which costs different entities will take into account).

34. See Posner, supra note 13, at 13; Becker, supra note 23, at 207; Dau-Schmidt, supra note 23, at 6.

35. See Posner, supra note 13, at 13; Dau-Schmidt, supra note 23, at 6.

36. See Dau-Schmidt, supra note 23, at 5.
engage in activity which may result in a net benefit to him or her, but the externality costs to third parties may be so high as to result in a net social loss. Accordingly, one of society's goals is to develop policies and mechanisms through which the external costs of activities are internalized to the activity and the individuals engaging in the activities. By internalizing the true costs of an activity, society hopes that individuals will engage in only those activities which result in both a net personal benefit and a net social benefit. One such mechanism designed to internalize such externalities is the institution of criminal law.

B. The Law and Economics Theory of Criminal Law

Criminal activity is activity which imposes external costs upon victims and other third parties which society deems to be unacceptable. To deter individuals from engaging in such activity, society punishes the individual who engages in the activity to internalize to the actor the external costs the actor imposes upon the victim and others.

In theory then, the actor contemplating engaging in criminal activity must include in his or her calculations the cost of the punishment he or she may receive for engaging in the activity. If the punishment is severe enough, the costs of engaging in the activity will exceed the benefits to the individual, and the individual will not engage in the activity. One must remember, however, that unlike

37. See Dau-Schmidt, supra note 23, at 8-9; Posner, supra note 23, at 1196-97.
38. Dau-Schmidt, supra note 23, at 10.
40. See Posner, supra note 13, at 217-23; Becker, supra note 23, at 191 n.35, 192; Posner, supra note 23, at 1201; see also Dau-Schmidt, supra note 23, at 10 (stating that criminal sanctions are society's way of making criminal opportunities less remunerative).
41. See Becker, supra note 23, at 172-73; Dau-Schmidt, supra note 23, at 8; Posner, supra note 23, at 1195-96.
42. Dau-Schmidt, supra note 23, at 10 (construing Becker, supra note 23, at 191-92); see also Posner, supra note 23, at 1195-96.
43. See Posner, supra note 13, at 217-23; Becker, supra note 23, at 191 n.35, 192; Posner, supra note 23, at 1201; see also Dau-Schmidt, supra note 23, at 10 (showing that when the ex ante expected value of the penalty equals the external costs of the crime, those external costs will be internalized).
44. See Posner, supra note 13, at 223; Becker, supra note 23, at 180, 192; Dau-Schmidt, supra note 23, at 10.
45. Posner, supra note 13, at 223; see also Becker, supra note 23, at 176, 191 n.35; Dau-Schmidt, supra note 23, at 10; Posner, supra note 23, at 1201.

A person commits a crime because the expected benefits of the crime to him exceed
some of the other costs borne by the actor, punishment is not a certainty. The punishment imposed for engaging in the illegal activity must be discounted by the probability that the actor will be apprehended and convicted. Accordingly, for any given criminal activity, the key is not the punishment which will be imposed if the defendant is convicted, but rather the net punishment: the punishment if convicted, discounted by the probability of apprehension and conviction. Thus, if an individual is contemplating engaging in a particular crime, the individual includes in his or her calculations not the cost of the absolute punishment which would be imposed if the individual were caught and convicted, but the net punishment: the absolute punishment discounted by the probability of apprehension and conviction.

The net punishment associated with each offense is important because the net punishment is society’s principal method of deterring people from engaging in criminal activity. It is society’s job to determine the net punishment necessary to achieve the desired level of deterrence for each offense. The desired level of deterrence means that in a sufficient percentage of cases, when an individual who is contemplating engaging in the criminal activity includes in his or her calculations the net punishment associated with the activity, the net punishment causes the expected costs to the individual of engaging in the activity to exceed the expected benefits. But determining the optimal net punishment for each offense is not the end of the matter. Society must also determine the appropriate and most efficient mix of the two variables comprising the net punishment: (1) the severity of punishment, and (2) the probability of apprehension and conviction.

In summary, the effective enforcement of criminal laws is important because it furthers the pursuit of Pareto optimality. Effective
enforcement of criminal laws is intended to discourage individuals from engaging in conduct which may result in personal net benefits to the principal actor, but which imposes such high costs upon the victim and other third parties that the result is a net social loss. The effective enforcement of criminal laws is achieved through the net punishment associated with the criminal activity in question.

C. A Law and Economics Analysis of Child Sexual Abuse

Applying the law and economics theory of criminal law to child sexual abuse, there is no doubt that child sexual abuse is conduct which a society seeking Pareto optimality would seek to deter. Although the child sexual abuser may receive physical and psychological benefits from the activity, the costs to the child and to others indirectly affected are unquestionable and enormous. In addition to the obvious physical injuries the child may suffer, the literature is replete with evidence of both immediate and long term psychological damage and scarring to victims of child abuse.\textsuperscript{49} There is no doubt that the social costs of child sexual abuse far exceed any benefits the abuser may receive. The decision to criminalize child abuse is unquestionable. The effective enforcement of the child abuse laws simply requires that society set the net punishment for the crime high enough that the desired level of deterrence is achieved.

III. A LAW AND ECONOMICS ANALYSIS OF THE ROLE OF THE RIGHT TO FACE-TO-FACE CONFRONTATION IN THE EFFECTIVE ENFORCEMENT OF CRIMINAL LAWS

At first blush, one might think that the Confrontation Clause's right to face-to-face confrontation, or for that matter anything which hinders the prosecution of criminals, is counter to the law and economics goal of the effective enforcement of criminal laws. It is well recognized that the Confrontation Clause may impose a cost upon the complainant or witness in terms of the uneasiness, and in some cases even trauma, which face-to-face confrontation may cause.\textsuperscript{50} More-


\textsuperscript{50} "To be sure, face-to-face confrontation may be said to cause trauma . . . ." Mary-
over, there is the risk that the victim’s apparent reluctance to testify face-to-face against the defendant because of the emotional distress involved may be misinterpreted by the finder of fact as indicating that the witness is lying. If the finder of fact misinterprets the witness’s emotional distress and acquits a guilty defendant because the finder of fact incorrectly believes the witness is lying, the effect is to decrease the net punishment associated with the crime in question. If Pareto optimality is furthered by the effective enforcement of criminal laws, and if the effective enforcement of criminal laws is furthered by maintaining the optimal net punishment, how then does the Confrontation Clause’s right to face-to-face confrontation further the effective enforcement of criminal laws? The answer lies in the benefits of face-to-face confrontation.

A. The Law and Economics Theory of Procedural Rules

Substantive rules of law affect human behavior by creating incentives for people to act in a way which maximizes social wealth. Some conduct may produce a net benefit to the actor but a net loss
to society. Society wants to discourage such conduct. Accordingly, society creates incentives in the form of civil and criminal penalties which are imposed if a person breaches the substantive rule. If the penalty, when added to the actor's other expected costs of engaging in the act, results in a sum which is greater than the expected benefit, the rational actor will not engage in the activity. The penalty, however, has to be discounted by the risk that there may be an erroneous judgment. If the sum of the expected penalty (the penalty discounted by the probability of an erroneous judgment) plus the actor's other expected costs is less than the expected benefit, the substantive rule will not deter the rational actor. The actor will engage in the activity even though it results in a net social loss. The net social loss incurred as a result of an erroneous judgment is the "cost of error" associated with the judicial process.

Procedural rules are intended to reduce the risk of an erroneous judgment, and thus the expected cost of error, at a cost which results in a net benefit to society.

The objective of a procedural system, viewed economically, is to minimize the sum of two types of cost. The first is the cost of erroneous judicial decisions. Suppose the expected cost of a particular type of accident is $100 and the cost to the potential injurer of avoiding it is $90 (the cost of avoidance by the victim, we will assume, is greater than $100). If the potential injurer is subject to either a negligence or a strict liability standard, he will avoid the accident—assuming the standard is administered accurately. But suppose that in 15 percent of the cases in which an accident occurs, the injurer can expect to avoid liability because of erroneous factual determinations by the procedural system. Then the expected cost of the accident to the injurer will fall to $85, and since this is less than the cost of avoidance to him ($90), the accident will not be prevented. The result will be a net social loss of $10—or will it?

We must not ignore the cost of operating the procedural system. Suppose that to reduce the rate of erroneous failures to impose liability from 15 percent to below 10 percent would require an additional investment in the procedural system of $20 per accident. Then we should tolerate the 15 percent probability of error, because the cost of error ($10) is less than the cost necessary to eliminate it.

55. See Dau-Schmidt, supra note 23, at 3 ("[P]eople rationally choose among their opportunities to achieve the greatest satisfaction of their preferences.").
56. See POSNER, supra note 13, at 549.
57. See id.; see also supra notes 14, 34-39 and accompanying text.
Accordingly, in analyzing the benefits of a procedural rule, the comparison is between: (1) the expected cost of error without the procedural rule ("CE w/out PR"), and (2) the sum of (i) the expected cost of error with the procedural rule ("CE w/ PR"), plus (ii) the expected direct costs of the procedural rule ("C of PR"):

\[(CE \text{ w/out PR}) \text{ vs. } (CE \text{ w/ PR}) + (C \text{ of PR}).\]

Inasmuch as society's goal is to minimize the social costs associated with the effective enforcement and administration of criminal laws, the key is whether the expected cost of error can be reduced at a cost which is less than the net reduction in the expected cost of error. A procedural rule should be adopted only if (1) the sum of (i) the expected cost of error under the procedural rule coupled with (ii) the expected direct cost of the procedural rule is less than (2) the expected cost of error without the procedural rule. If the expected cost of error without the procedural rule is less than the sum of the expected cost of error with the procedural rule plus the expected direct cost of the rule (i.e., if the left side of the formula is less than the right side), the benefits of the procedural rule do not justify its cost, and the procedure should not be employed. On the other hand, if the expected cost of error without the procedural rule is greater than the sum of the expected cost of error with the procedural rule plus the expected direct cost of the rule (i.e., if the left side of the formula is greater than the right), adopting the procedural rule would result in a net social benefit, and the procedure should be adopted.

The economic formula for the analysis of procedural rules can be applied to the procedural right to face-to-face confrontation. The economic formula and analysis will help to explain the traditional view that the defendant had an absolute right to face-to-face confrontation and will serve as the basis for analyzing whether the Court's opinion in Maryland v. Craig\(^59\) is consistent with a law and economics analysis.

---


B. A Law and Economics Analysis of the Right to Face-to-Face Confrontation

Applying the economic analysis of procedural rules to the right to face-to-face confrontation in criminal cases, the analysis requires the comparison of the sum of the expected cost of error with the right to face-to-face confrontation ("CE w/ FTFC"), plus the expected direct cost of the right ("C of FTFC"), versus the expected cost of error in the absence of the right to face-to-face confrontation ("CE w/out FTFC"):

\[
(CE \text{ w/ FTFC}) + (C \text{ of FTFC}) \text{ vs. } (CE \text{ w/out FTFC}).
\]

The first step in the analysis is to calculate the net reduction in the expected cost of error: to compare the expected cost of error with the right to face-to-face confrontation ("CE w/ FTFC") versus the expected cost of error without the right to face-to-face confrontation ("CE w/out FTFC").

The expected cost of error is the expected cost of an erroneous judicial decision ("C of ED") times the probability of an erroneous judicial decision ("P of ED"):

\[
CE = (C \text{ of ED}) \times (P \text{ of ED}).
\]

Each of these two variables, however, can be further broken down. In a criminal case there are potentially two types of erroneous judicial decisions: an erroneous conviction ("EC") and an erroneous acquittal ("EA"). Moreover, each type of erroneous judicial decision may have its own probability of occurring. Therefore, a more accurate statement of the expected cost of error must give separate consideration to each variable in the computation:

\[
CE = (C \text{ of EC}) \times (P \text{ of EC}) + (C \text{ of EA}) \times (P \text{ of EA}).
\]

The crux of the analysis then is to assign values to each of these variables for each of the possible scenarios: the expected cost of error with the right to face-to-face confrontation, and the expected cost of error without the right to face-to-face confrontation. In assigning values, the first variables to consider are the expected cost of an erroneous conviction and the expected cost of an erroneous acquittal.
1. The Expected Cost of an Erroneous Conviction and the Expected Cost of an Erroneous Acquittal

Consistent with the economic analysis of the institution of criminal laws, the expected cost of an erroneous conviction is much greater than the expected cost of an erroneous acquittal.\(^6\)

\[ C_{\text{EC}} > C_{\text{EA}}. \]

The truth of this assertion, while arguably self-evident, can be established by considering more carefully the costs of each. First, both an erroneous conviction and an erroneous acquittal affect the net punishment for an offense by decreasing the probability that those who actually engage in the criminal activity will be apprehended and convicted.\(^6\) The result is a net social loss limited to the "increase in the [total] social cost of crime as a result of [having] reduce[ed] . . . the probability of punishing criminal activity."\(^6\) For an erroneous acquittal, this is the only cost.\(^6\) In the case of an erroneous conviction, however, there is an even greater net social loss. In addition to the net social loss caused by the decrease in the net punishment for the criminal activity, the individual erroneously convicted incurs all of the costs associated with his or her wrongful conviction and punishment, and society incurs all of the costs inherent in imposing the punishment.\(^6\) The individual wrongly convicted of a crime no doubt suffers great personal costs: the social stigma and psychological costs inherent in any criminal conviction (the latter no doubt enhanced by the fact that the defendant knows it is an erroneous conviction); potential loss of employment costs; and if the conviction entails imprisonment, the costs inherent in the loss of one's freedom.\(^6\) In addition, society incurs whatever costs are inherent in the administration of the defendant's punishment.\(^6\) If the defendant is put on probation, society incurs the administrative costs inherent in supervising the

\(^{60}\) See POSNER, supra note 13, at 553.
\(^{61}\) See id.
\(^{62}\) See id.
\(^{63}\) See id. An argument can be made that even where a guilty defendant is acquitted, the defendant incurs the costs of his or her defense and incurs the more abstract costs associated with being charged with a crime. These additional costs may be sufficient to make the defendant better appreciate the costs of criminal conduct, thereby discouraging at least that defendant from engaging in further criminal activity.
\(^{64}\) See id.
\(^{65}\) See id.; see also Becker, supra note 23, at 179-80.
\(^{66}\) See POSNER, supra note 13, at 227, 553; see also Becker, supra note 23, at 179-80.
probation. If the defendant is sentenced to prison, society incurs all of the costs inherent in incarcerating an individual. Accordingly, in evaluating the cost of error for a criminal case, the aggregate cost of an erroneous conviction is substantially greater than the cost of an erroneous acquittal, and thus most of the procedural rules in the criminal justice system are intended to minimize the risk of an erroneous conviction (i.e., the "beyond a reasonable doubt" standard of proof).

The second point to notice about the expected cost of an erroneous conviction and the expected cost of an erroneous acquittal is that each of the respective expected costs is the same regardless of whether or not the defendant is accorded the right to face-to-face confrontation:

\[
\begin{align*}
C \text{ of } \text{EC w/ FTFC} &= C \text{ of } \text{EC w/out FTFC}; \\
C \text{ of } \text{EA w/ FTFC} &= C \text{ of } \text{EA w/out FTFC}.
\end{align*}
\]

The net social loss resulting from the reduced probability of punishing the criminal activity, inherent in both an erroneous conviction and an erroneous acquittal, is the same regardless of the presence of the right to face-to-face confrontation. Moreover, the costs to the individual and the costs to society inherent in imposing the punishment upon an erroneously convicted individual are the same regardless of the presence of the right to face-to-face confrontation. The right to face-to-face confrontation does not affect the respective expected costs of an erroneous conviction or an erroneous acquittal. Thus, in comparing the expected cost of error with and without the right to face-to-face confrontation, the focus shifts to the respective probabilities of an erroneous judgment.

67. POSNER, supra note 13, at 553. It would take "several erroneous acquittals to impose a social cost equal to that of one erroneous conviction for the same offense." Id. Hence the maxim "it is better to acquit ten guilty defendants than to convict one innocent defendant." This maxim is supportable from a law and economics perspective. Following Maryland v. Craig, however, there may be a new maxim: it is better for one innocent defendant to be found guilty than for one victim to be traumatized by face-to-face confrontation.

68. One might argue there is a slightly reduced cost to a conviction without the right to face-to-face confrontation in that society may not trust the conviction as much. But any such reduction in the cost is minimal at most.

69. The first step in the analysis of the economic worth of the right to face-to-face confrontation was to compare the total cost of error with and without the right. The total cost of error is the cost of an erroneous conviction times the probability of an erroneous conviction plus the cost of an erroneous acquittal times the probability of an erroneous acquittal. Although no absolute values can be assigned to any of these variables, relative order of magnitude variables can be assigned based upon the analysis: the cost of an erroneous...
2. The Probability of an Erroneous Conviction and the Probability of an Erroneous Acquittal

As established above, there are two probabilities of error: the probability of an erroneous conviction (P of EC) and the probability of an erroneous acquittal (P of EA). While the respective expected costs of an erroneous conviction and an erroneous acquittal can be compared to each other rather easily, it is not as easy to compare the respective probabilities of an erroneous conviction and an erroneous acquittal to each other.70 It is, however, relatively easy to compare each variable to itself across the two possible scenarios: the probability of each with and without the right to face-to-face confrontation:

P of EC w/ FTFC ⇔ P of EC w/out FTFC;
P of EA w/ FTFC ⇔ P of EA w/out FTFC.

On the one hand, the probability of an erroneous conviction is much greater if there were no right to face-to-face confrontation than if there were face-to-face confrontation:

P of EC w/out FTFC > P of EC w/ FTFC.

This observation follows from the generally accepted principle that it

---

70. Based upon the number of procedural rules designed to reduce the probability of an erroneous conviction, however, including the requirement that guilt be established beyond reasonable doubt, the better view, and hence the starting point for any comparison, is that at least for the scenario when the defendant is entitled to the right to face-to-face confrontation, the probability of an erroneous acquittal is greater than the probability of an erroneous conviction. This theory is implied by the Court's understanding that the Confrontation Clause may "upset the truthful rape victim or abused child." Coy v Iowa, 487 U.S. 1012, 1020 (1988); see also id. at 1032 (Blackmun, J., dissenting) (describing how the possible trauma will block any attempt to discover the truth thus leading to possible erroneous acquittals); POSNER, supra note 13, at 553-54.
is more difficult to tell a damaging lie about a person to their face.\textsuperscript{71} Thus, requiring a witness in a criminal case to testify face-to-face against the defendant significantly decreases the probability of an erroneous conviction in two ways. First, the right to face-to-face confrontation reduces the probability that a witness would actually tell a lie about the defendant. And second, the right to face-to-face confrontation increases the probability that if the witness does lie, the trier of fact could detect the fabrication. Accordingly, if the witness were permitted to testify \textit{without} face-to-face confrontation, the probability of an erroneous conviction is significantly higher than the probability of an erroneous conviction if face-to-face confrontation were required.

While the right to face-to-face confrontation should significantly decrease the probability of an erroneous conviction, the right to face-to-face confrontation should increase the probability of an erroneous acquittal:

\[ \text{P of EA w/ FTFC} > \text{P of EA w/out FTFC}. \]

This increase, however, arguably is not as great as the decrease in the probability of an erroneous conviction. The increase in the probability of an erroneous acquittal stems from the risk that the trier of fact may misinterpret a witness’s apparent reluctance to testify face-to-face against the defendant as evidence that the witness is lying.\textsuperscript{72} The vast majority of witnesses, however, experience no, or minimal, emotional distress from testifying face-to-face against a defendant. Accordingly, under the right to face-to-face confrontation, it is reasonable to assume that the increase in the probability of an erroneous acquittal should be less than the decrease in the probability of an erroneous conviction.

Even assuming, however, that the increase in the probability of an erroneous acquittal with face-to-face confrontation equalled the decrease in the probability of an erroneous conviction, the expected cost of error with the right to face-to-face confrontation would still be less than the expected cost of error without the right.\textsuperscript{73} This is due

\textsuperscript{73} The first step in the analysis of the economic worth of the right to face-to-face confrontation was to compare the total cost of error with and without the right. The total cost of error is the cost of an erroneous conviction times the probability of an erroneous conviction plus the cost of an erroneous acquittal times the probability of an erroneous acquittal. Although no absolute values can be assigned to any of these variables, relative order
to the actual costs of the respective errors. As noted above, an erroneous acquittal results in a net social loss limited to the extent of the increase in criminal activity which occurs as a result of the decrease in the net punishment for the criminal activity. On the other hand, an erroneous conviction results in a net social loss not only to the extent of the increase in criminal activity which occurs as a result of the decrease in the net punishment, but the erroneous conviction also in-

of magnitude variables can be assigned based upon the analysis. Based upon the analysis of the probabilities of an erroneous conviction and the probability of an erroneous acquittal, relative numbers can be assigned to these variables. The statement that more procedural rules are designed to reduce the risk of an erroneous conviction than the risk of an erroneous acquittal implies that the risk of an erroneous acquittal in fact may be higher than the risk of an erroneous conviction. Accordingly, the following formulas for the total cost error with and without the right to face-to-face confrontation:

\[
\begin{align*}
TCE_{w/FTFC} &= (C_{of\ EC}) \times (P_{of\ EC}) + (C_{of\ EA}) \times (P_{of\ EA}) \\
TCE_{w/o\ FTFC} &= (C_{of\ EC}) \times (P_{of\ EC}) + (C_{of\ EA}) \times (P_{of\ EA})
\end{align*}
\]

vs.

can be rewritten:

\[
\begin{align*}
TCE_{w/FTFC} &= (C_{of\ EC}) \times 10\% + (C_{of\ EA}) \times 20\% \\
TCE_{w/o\ FTFC} &= (C_{of\ EC}) \times 15\% + (C_{of\ EA}) \times 22\%
\end{align*}
\]

Numbers were assigned to the cost of an erroneous conviction and cost of an erroneous acquittal based on the analysis of those variables. Inserting those numbers into the formulas developed above, the formulas can be rewritten:

\[
\begin{align*}
TCE_{w/FTFC} &= 100 \times 10\% + 10 \times 20\% \\
TCE_{w/o\ FTFC} &= 100 \times 15\% + 10 \times 22\%
\end{align*}
\]

Completing the calculations, the total cost of error with and without the right to face-to-face confrontation are:

\[
\begin{align*}
TCE_{w/FTFC} &= 10 + 2 = 12 \\
TCE_{w/o\ FTFC} &= 15 + 2.2 = 17.2
\end{align*}
\]

The total cost of error with the right to face-to-face confrontation is less than the total cost of error without the right to face-to-face confrontation. This is true even if the increase in the probability of an erroneous conviction equals the increase in the probability of an erroneous acquittal, or if the probability of an erroneous acquittal is less than the probability of an erroneous conviction. As long as the cost of an erroneous conviction is greater than the cost of an erroneous acquittal, and the increase in the probability of an erroneous acquittal is no greater than the increase in the probability of an erroneous conviction, the total cost of error with the right to face-to-face confrontation will always be less than the total cost of error without the right to face-to-face confrontation.
volves the additional costs to the individual from his or her wrongful conviction and punishment, and the additional costs society incurs in imposing the punishment. Accordingly, as long as the decrease in the probability of an erroneous conviction with face-to-face confrontation equals or exceeds the increase in the probability of an erroneous acquittal, the expected cost of error with the right to face-to-face confrontation must be lower than the expected cost of error without the right to face-to-face confrontation:

\[ CE_{w/\ FTFC} < CE_{w/out\ FTFC}. \]

Accordingly, since society wants to minimize the expected cost of error, society will be better off adopting the right to face-to-face confrontation as long as the benefit from the net reduction in the cost of error is greater than the expected direct cost of face-to-face confrontation ("C of FTFC"):

74. See supra notes 60-67 and accompanying text. Although no absolute figures can be assigned to the economic costs a witness suffers in having to confront the defendant face-to-face and to the economic benefits society incurs from the reduced risk of an erroneous conviction, the order of magnitude of the latter arguably is greater than the order of magnitude of the former. An erroneous conviction involves costs to both the individual defendant in question and to society. The individual defendant suffers psychological costs and potentially lost employment costs. Becker, supra note 23, at 179-80. Society incurs the costs inherent in punishing the defendant. If the defendant is placed on probation, there are administrative costs involved in supervising the defendant's probation. If the conviction requires imprisonment, the obvious costs of imprisonment can be staggering. Thus, the aggregate costs of an erroneous conviction can be enormous. Posner, supra note 13, at 227, 553; Becker, supra note 23, at 179-80. On the other hand, the costs face-to-face confrontation imposes on the witness arguably are relatively limited psychological costs. First of all, the psychological costs are secondary and incremental in nature in the sense that the bulk of the psychological costs were inflicted when the crime was committed. Moreover, not all witnesses will suffer meaningful emotional distress from face-to-face confrontation. The amount of distress inflicted will vary based upon the crime in question and the person. See Craig, 497 U.S. 836, 856 (1990) (implying by its requirement of "more than de minimis" trauma that the effect of confrontation will indeed vary with each witness). Accordingly, the net emotional distress inflicted in any given case arguably is less than the net benefit from the reduced risk of an erroneous judgment.

75. The differential between the total cost of error with the right to face-to-face confrontation and the total cost of error without the right will depend on: (1) the magnitude of the differential between the cost of an erroneous conviction and the cost of an erroneous acquittal; (2) the magnitude of the differential between the probability of an erroneous conviction with and without the right to face-to-face confrontation; and (3) the magnitude of the differential between the probability of an erroneous conviction with and without the right to face-to-face confrontation. Inasmuch as no absolute values can be assigned to any of these differentials, there is no way to determine the absolute net benefit derived from the right to face-to-face confrontation.
3. The Expected Direct Cost of Face-to-Face Confrontation

The principal cost of the right to face-to-face confrontation is the anxiety or emotional distress a witness may experience from having to testify face-to-face against the defendant. In contrast to the cost of an erroneous conviction or an erroneous acquittal, which are more objective and quantifiable in nature (and thus lend themselves more easily to an economic analysis), the cost of anxiety or emotional distress is more subjective and not as easily calculable. Nonetheless, as evidenced daily in tort claims, calculating the cost of anxiety or emotional distress is possible and something society does routinely. Moreover, the economic analysis of the right to face-to-face confrontation does not require an absolute determination of the cost of face-to-face confrontation, only a qualitative order of magnitude computation relative to the net benefit derived from the reduction in the expected cost of error.

The key to calculating the expected direct cost of face-to-face confrontation is to remember that not all witnesses experience emotional distress, and that those who do experience different degrees of emotional distress. Whether or not a witness experiences emotional distress from face-to-face confrontation is a function of the crime in question, the particular facts of how the crime was committed in that particular case, and the emotional make-up of that particular witness. The point, however, is that just as the cost of error is the expected cost of an erroneous judgment (the probability of an erroneous judgment times the cost of an erroneous judgment), the cost to the witness from face-to-face confrontation is the expected cost (the weighted average of the different possible costs of emotional distress times the probability a witness would experience each such amount of emotional distress).

The task of analyzing the expected cost of face-to-face confrontation to the witness is a two step process: (1) assessing the cost of the different degrees of emotional distress a witness may experience; and (2) assessing the probability that a witness will experience each such

76. See supra note 3.
77. See e.g., Garfoot v. Avila, 261 Cal. Rptr. 924, 926 (Ct. App. 1989) ("A plaintiff in a personal injury action is entitled to recover damages for pain and suffering proximately caused by the defendant and calculation is left to the 'subjective discretion' of the jury.").
78. See Posner, supra note 13, at 553-54; see also Charles J. Goetz, Law and Economics 77-79 (1984).
amount of emotional distress. For the vast majority of witnesses, the amount of emotional distress from face-to-face confrontation is negligible. For these witnesses there is little doubt that the net benefit of face-to-face confrontation in terms of the reduced risk of an erroneous judgment exceeds the cost of the anxiety the witness may experience from face-to-face confrontation. There are, however, extraordinary cases where the witness would experience severe emotional distress and even trauma from face-to-face confrontation. In such cases, the cost of the trauma to the witness may even exceed the net benefit derived from the reduction in the total cost of error attributable to the right to face-to-face confrontation. But these cases are the exception, and as such are statistically insignificant when compared to the overwhelming majority of the witnesses for whom the cost of the emotional distress from face-to-face confrontation is minimal. Thus, even when the limited number of cases in which the cost of the emotional trauma is substantial are included in the computations, because the cost of face-to-face confrontation is negligible in the overwhelming majority of the cases, the expected cost of face-to-face confrontation is still less than the expected benefit of face-to-face confrontation. While this conclusion is based more upon intuitive, order of magnitude economic analysis than definitive calculations, this intuitive conclusion is supported by the Confrontation Clause and Supreme Court case law prior to Maryland v. Craig.

In the end, the comparison of the expected costs and benefits of face-to-face confrontation is as much qualitative as quantitative. Although the separate analysis of each variable gives some sense of the order of magnitude of each, since no absolute numbers can be assigned to any of the variables the final comparison is highly qualita-

79. See Goetz, supra note 78, at 77-79.
80. See supra note 3.
81. U.S. CONST. amend. VI.
82. Although a law and economics analysis of the right to face-to-face confrontation is helpful, there are limitations to the analysis. Inasmuch as no definitive values can be assigned to any of the variables, the analysis is as much intuitive as numerical, and more order of magnitude than definitive. Nevertheless, there is a high degree of certainty in the conclusion that face-to-face confrontation reduces the total cost of error by decreasing the probability of an erroneous conviction. In addition, there is a high degree of certainty in the conclusion that face-to-face confrontation has a potentially significant cost associated with it in some cases in terms of the emotional distress to the witness. The key then is comparing the magnitudes of these respective costs and benefits. The economic analysis, based on intuitive as much as numerical analysis, supports the conclusion that the expected benefit exceeds the expected cost; and this conclusion is supported by the case law prior to Maryland v. Craig. See cases cited supra notes 4-5.
tive. Until *Maryland v. Craig*, the Confrontation Clause arguably represented, and traditionally had been interpreted as standing for, a constitutional presumption that the expected economic benefits of face-to-face confrontation when the witness appears and testifies exceed the expected costs of the emotional distress the witness may experience. The traditional presumption that the Confrontation Clause includes the right to face-to-face confrontation is consistent with a law and economics analysis. It is against this economic background that the Court’s opinion and holding in *Maryland v. Craig* should be evaluated.

**IV. THE COURT’S OPINION IN MARYLAND V. CRAIG**

In *Maryland v. Craig*, the Supreme Court confronted the constitutionality of a Maryland statute which permits child abuse victims to testify via one-way closed circuit television in lieu of testifying against the defendant face-to-face in the courtroom. The statute

---

83. Viewed abstractly, this presumption is reasonable both from an aggregate perspective and from an individual perspective. The expected cost of the amount of uneasiness experienced by a witness as a result of face-to-face confrontation is minimal, while the expected costs associated with the increased risk of an erroneous conviction in the absence of the right to face-to-face confrontation are substantial. While some witnesses may be reluctant to testify face-to-face against a defendant, and a few may even experience trauma, the potential uneasiness and trauma pales in comparison to the costs incurred both to the individual and to society if an innocent defendant is wrongly convicted. Moreover, if the potential trauma to a potential witness were that severe, the worst that can happen is that the witness does not testify and defendant is erroneously acquitted. As established above, the cost of an erroneous acquittal pales in comparison to the cost of an erroneous conviction.

Rather than subjecting the right to face-to-face confrontation to a costly case by case cost-benefit analysis, it has long been held that the Confrontation Clause of the Sixth Amendment constituted a constitutional presumption that the benefits of face-to-face confrontation exceed the costs of face-to-face confrontation. The courts were not to engage in a case by case evaluation of the costs and benefits. The problem is the Supreme Court’s opinion in *Maryland v. Craig* appears to cast aside this long held presumption and open the gates to eliminating face-to-face confrontation anytime the other elements of the Confrontation Clause are preserved and the witness may suffer more than de minimis trauma.

84. *Maryland v. Craig*, 497 U.S. 836, 842 (1990). The Maryland statute in question, provides in pertinent part:

(a) (1) In a case of abuse of a child as defined in § 5-701 of the Family Law Article or Article 27, § 35A of the Code, a court may order that the testimony of a child victim be taken outside the courtroom and shown in the courtroom by means of a closed circuit television if:
   (i) The testimony is taken during the proceeding; and
   (ii) The judge determines that testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child can-
permits child abuse victims to testify via the closed circuit television if "[t]he 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." 5 Once the judge makes such a determination, the victim, the prosecuting attorney, and the attorney for the defendant retire to a separate room where the child testifies via one-way closed circuit television. 6 At no time during the child’s testimony is the child physically present in the same room as the defendant. Moreover, inasmuch as the closed circuit television is one-way, at no time during the child’s testimony does the child even see the defendant. 7 In Maryland v. Craig, the defendant objected to the use of the closed circuit testimony on the grounds that the Maryland procedure violates a defendant’s right to face-to-face confrontation as guaranteed by the Confrontation Clause of the Sixth Amendment. 8

---

not reasonably communicate.

(2) Only the prosecuting attorney, the attorney for the defendant, and the judge may question the child.

. . . .

(b) (1) Only the following persons may be in the room with the child when the child testifies by closed circuit television:

(i) the prosecuting attorney;

(ii) the attorney for the defendant.

. . . .

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

. . . .

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


85. Craig, 497 U.S. at 841 (quoting MD. CODE ANN., CTS. & JUD. PROC. § 9-102(a)(1)(ii) (Supp. 1993)).

86. Id.

87. Id. at 841-42.

88. Id. at 842.
A. The Supreme Court’s Analysis

The Confrontation Clause of the Sixth Amendment expressly provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”90 In Maryland v. Craig, the Court began its opinion by expressly acknowledging that the Court had traditionally and repeatedly interpreted the Confrontation Clause as guaranteeing the defendant the right to “a face-to-face meeting with witnesses appearing before the trier of fact.”90 The Court noted, however, that it had never held “that the Confrontation Clause guarantees criminal defendants the absolute right to a face-to-face meeting with witnesses against them at trial.”91 The Court then distinguished Maryland v. Craig from the precedents by indicating that in Maryland v. Craig the trial court had made individualized findings that each of the child witnesses would experience trauma unless accorded special protection.92 Since the special protection accorded under the Maryland procedure included depriving the defendant of the right to face-to-face confrontation, the issue was “whether any exceptions exist to the irreducible literal meaning of the Clause: ‘a right to meet face to face all those who appear and give evidence at trial.’”93

The Court began its analysis of the issue by setting forth the purpose of the Confrontation Clause: “[t]he central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact.”94 The Court stated that the Confrontation Clause furthers this purpose not only through face-to-face confrontation, but also by:

1. Insuring that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury;
2. Forcing the witness to submit to cross-examination, the “greatest legal engine ever invented for the discovery of truth”; and
3. Permitting the jury that is to decide the defendant’s fate to observe

89. U.S. CONST. amend. VI.
90. Craig, 497 U.S. at 844 (citations omitted).
91. Id.
92. Id. at 845.
94. Id. at 845.
the demeanor of the witness in making his statement, thus aiding
the jury in assessing his credibility.95

Having established that the Confrontation Clause is made up of four
distinct elements, "physical presence, oath, cross-examination, and
observation of demeanor by the trier of fact,"96 the Court then shift-
ed its analysis to the element of physical presence: the right to face-
to-face confrontation.

Although the Court acknowledged both the substantive and sym-
bolic benefits of the right to face-to-face confrontation,97 and that
"face-to-face confrontation forms 'the core of the values furthered by
the Confrontation Clause,'"98 the Court stated that it had "neverthe-
less recognized that it is not the sine qua non of the confrontation
right."99 "[W]e have never insisted on an actual face-to-face encoun-
ter at trial in every instance in which testimony is admitted against a
defendant."100 In support of its position, the Court noted the numer-
ous hearsay exceptions which permit testimony to be admitted against
a defendant without the defendant being able to confront the declarant
face-to-face.101 Accordingly, the Court concluded that although the
Confrontation Clause "reflects a preference for face-to-face confronta-
tion at trial,"102 the right to confront face-to-face witnesses appearing
at trial is not "an indispensable element of the Sixth Amendment’s
guarantee of the right to confront one’s accusers."103 Rather, the
Court ruled that a defendant’s right to face-to-face confrontation may
be denied "where denial of such confrontation is necessary to further
an important public policy and . . . where the reliability of the testi-
mony is otherwise assured."104

Having established that the defendant’s right to face-to-face con-
frontation may be denied if necessary to further an important public
policy as long as the reliability of the evidence is otherwise assured,

95. Id. at 845-46 (quoting California v. Green, 399 U.S. 149, 158 (1970)).
96. Id. at 846.
97. Id. at 846-47 (citing Coy, 487 U.S. at 1017, 1019-20; Ohio v. Roberts, 448 U.S.
56, 63 n.6 (1980)).
98. Id. at 847 (quoting Green, 399 U.S. at 157).
99. Id.
100. Id.
101. Id. at 847-49 (citing Bourjaily v. United States, 483 U.S. 171 (1987); United States
v. Inadi, 475 U.S. 387 (1986); Roberts, 448 U.S. at 63; Pointer v. Texas, 380 U.S. 400, 407
(1965); Manto v. United States, 156 U.S. 237, 243 (1895)).
102. Id. at 849 (quoting Roberts, 448 U.S. at 63).
103. Id. at 849-50.
104. Id. at 850 (citing Coy, 487 U.S. at 1021).
the Court then turned its attention to whether the Maryland statutory procedure in question furthers an important public policy and otherwise assures the reliability of the testimony. The Court had no trouble concluding that Maryland’s one way closed circuit television procedure otherwise assures the reliability of the testimony:

Maryland’s statutory procedure, when invoked, prevents a child witness from seeing the defendant as he or she testifies against the defendant at trial. We find it significant, however, that Maryland’s procedure preserves all of the other elements of the confrontation right: The child witness must be competent to testify and must testify under oath; the defendant retains full opportunity for contemporaneous cross-examination; and the judge, jury, and defendant are able to view (albeit by video monitor) the demeanor (and body) of the witness as he or she testifies. Although we are mindful of the many subtle effects face-to-face confrontation may have on an adversary criminal proceeding, the presence of these other elements of confrontation—oath, cross-examination, and observation of the witness’ demeanor—adequately ensures that the testimony is both reliable and subject to rigorous adversarial testing in a manner functionally equivalent to that accorded live, in-person testimony. Indeed, to the extent the child witness’ testimony may be said to be technically given out-of-court (though we do not so hold), these assurances of reliability and adversariness are far greater than those required for admission of hearsay testimony under the Confrontation Clause. We are therefore confident that use of the one-way closed circuit television procedure, where necessary to further an important state interest, does not impinge upon the truth-seeking or symbolic purposes of the Confrontation Clause.

The Court then turned its attention to the “critical inquiry in this case . . . whether use of the [one way closed circuit television] procedure is necessary to further an important state interest.”

The State of Maryland argued that it had a “substantial interest in protecting children who are allegedly victims of child abuse from the trauma of testifying against the alleged perpetrator and that its statutory procedure for receiving testimony from such witnesses is necessary to further that interest.” In analyzing whether this state interest qualified as an important state interest, the Court noted that it had previously held that the State’s interest in protecting the physical

105. Id. at 851-52 (citing Roberts, 448 U.S. at 66).
106. Id. at 852.
107. Id.
and psychological well-being of minor victims is a compelling state interest which has warranted limiting other constitutionally protected rights. The Court noted the extensive literature documenting the trauma that child abuse victims may experience from face-to-face confrontation. Accordingly, the Court concluded that it would not second-guess the Maryland Legislature with respect to its decision that Maryland has a substantial interest in protecting the physical and psychological well-being of alleged child abuse victims from the trauma associated with testifying against the alleged perpetrator.

Lastly, the Court emphasized that the necessity of invoking the statutory procedure must be made on a case-by-case basis. Furthermore, the necessity must be based upon the state’s interest in protecting the witness from the trauma produced by the presence of the defendant, not simply the courtroom atmosphere generally.

The Court remanded the case for further proceedings not inconsistent with its opinion.

B. The Dissent

The dissent began and ended its opinion by arguing that the express text of the Confrontation Clause categorically guarantees the right to face-to-face confrontation, and hence the Court has no authority to subject the Clause to the “interest-balancing” analysis to


109. Id. at 854-55.

110. Id. at 855.

111. Id.

112. Id. at 856.

113. Id. at 860.

114. Id. at 860-61, 870. Justice Scalia wraps up his dissent by arguing on procedural grounds that even if the trauma associated with the right to face-to-face confrontation in child abuse cases does deserve the Confrontation Clause’s truth-seeking goal, the proper procedure for remedying the net loss would be a Constitutional amendment, not a construction of the Confrontation Clause which repudiates the express words of the Constitution. Justice Scalia’s argument poses an interesting issue from a law and economics perspective. Inasmuch as a substantial majority of the states had already adopted protection measures similar to the one at issue in Maryland v. Craig, is it more efficient to require the states to go through the process of amending the Constitution to achieve the end they are seeking, or is it more efficient for the Court, in essence, to amend the Constitution through its construction of the Constitution in light of the actions of a substantial majority of the states?
which it was subjected.\textsuperscript{115} The dissent, however, was not content to rest on its procedural objections.

The dissent also sharply attacked the substance of the Court's opinion, taking issue with each step of the Court's analysis. The dissent disagreed with the Court's characterization of the purpose of the Confrontation Clause: "[T]he Confrontation Clause does not guarantee reliable evidence; it guarantees specific trial procedures that were thought to assure reliable evidence, undeniably among which was 'face-to-face' confrontation."\textsuperscript{116} The dissent disagreed with the Court's characterization of the Confrontation Clause: "[t]he Court makes the impossible plausible by recharacterizing the Confrontation Clause, so that confrontation (redesignated 'face-to-face confrontation') becomes only one of many 'elements of confrontation . . . .' This reasoning abstracts from the right to its purposes, and then eliminates the right."\textsuperscript{117} The dissent objected to the Court's attempt to rephrase the issue as simply whether the right to face-to-face confrontation is an indispensable element of the Confrontation Clause, an issue which the Court had already resolved in the hearsay context:

The Court supports its antitextual conclusion by cobbling together scraps of dicta from various cases that have no bearing here . . . . Roberts, and all the other "precedents" the Court enlists to prove the implausible, dealt with the implications of the Confrontation Clause, and not its literal, unavoidable text. When Roberts said that the Clause merely "reflects a preference for face-to-face confrontation at trial," what it had in mind as the nonpreferred alternative was not (as the Court implies) the appearance of a witness at trial without confronting the defendant. That has been, until today, not merely "nonpreferred" but utterly unheard-of. What Roberts had in mind was the receipt of other-than-first-hand testimony from witnesses at trial—that is, witnesses' recounting of hearsay statements by absent parties who, since they did not appear at trial, did not have to endure face-to-face confrontation . . . . [T]hat the defendant should be confronted by the witnesses who appear at trial is not a preference "reflected" by the Confrontation Clause; it is a constitutional right unqualifiedly guaranteed.\textsuperscript{118}

The dissent attacked the Court's characterization of the State's interest

\begin{footnotes}
\item[115] \textit{Id.} at 861, 870.
\item[116] \textit{Id.} at 862.
\item[117] \textit{Id.} (quoting and criticizing the majority opinion at 845-47).
\item[118] \textit{Id.} at 863.
\end{footnotes}
at stake in the Maryland procedure:

The Court characterizes the State’s interest which “outweigh[s]” the explicit text of the Constitution as an “interest in the physical and psychological well-being of child abuse victims,” ante, at 853, an “interest in protecting” such victims “from the emotional trauma of testifying,” ante, at 855. That is not so. A child who meets the Maryland statute’s requirement of suffering such “serious emotional distress” from confrontation that he “cannot reasonably communicate” would seem entirely safe. Why would a prosecutor want to call a witness who cannot reasonably communicate? And if he did, it would be the State’s own fault. Protection of the child’s interest—as far as the Confrontation Clause is concerned—is entirely within Maryland’s control. The State’s interest here is in fact no more and no less than what the State’s interest always is when it seeks to get a class of evidence admitted in criminal proceedings: more convictions of guilty defendants. That is not an unworthy interest, but it should not be dressed up as a humanitarian one.

And the interest on the other side is also what it usually is when the State seeks to get a new class of evidence admitted: fewer convictions of innocent defendants—specifically, in the present context, innocent defendants accused of particularly heinous crimes. The “special” reasons that exist for suspending one of the usual guarantees of reliability in the case of children’s testimony are perhaps matched by “special” reasons for being particularly insistent upon it in the case of children’s testimony. Some studies show that children are substantially more vulnerable to suggestion than adults, and often unable to separate recollected fantasy (or suggestion) from reality.1

The dissent concluded by stating that “[t]he 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.”120 The dissent’s criticisms of the Court’s opinion in Maryland v. Craig set the stage for the law and economics analysis of the Maryland procedure and the Court’s analysis thereof.121

119. Id. at 867-68.
120. Id. at 870.
121. What is interesting about the dissent’s opinion, is that even though the dissent rather persuasively makes these arguments, and effectively undercuts the rationale of the Court’s opinion, the dissent contains some language which arguably indicates that it is bothered more by the Court’s rationale and procedural approach than it is by the Court’s conclusion:
V. A LAW AND ECONOMICS ANALYSIS OF THE MARYLAND PROCEDURE AND OF THE COURT'S OPINION IN MARYLAND V. CRAIG

As the dissent in Maryland v. Craig notes, the Supreme Court employed a cost-benefit approach in analyzing the right to face-to-face confrontation; a cost-benefit approach which resembles a law and economics approach. The Court's analysis compared the relative costs and benefits of the right to face-to-face confrontation to those of the Maryland procedure. The Court noted that the principal benefit of the right to face-to-face confrontation is that it increases the reliability of the evidence, i.e., that it minimizes the expected cost

It is not within our charge to speculate that, "where face-to-face confrontation causes significant emotional distress in a child witness," confrontation might "in fact disserve the Confrontation Clause's truth-seeking goal." If so, that is a defect in the Constitution—which should be amended by the procedures provided for such an eventuality, but cannot be corrected by judicial pronouncement that it is archaic, contrary to "wide-spread belief" and thus null and void.

The dissent's statement that the right to face-to-face confrontation may actually "disserve" the effective enforcement of the child abuse laws is interesting. The dissent had just finished showing, through a cost-benefit analysis, how important face-to-face confrontation is to minimizing the risk of an erroneous judgment in any given case. How then could the right to face-to-face confrontation disserve the effective enforcement of child abuse laws? The answer lies in a macro analysis of the problem. See infra notes 255-74 and accompanying text.

122. Craig, 497 U.S. at 870 (Scalia, J., dissenting). The Court spends the opening part of its opinion establishing that the right to face-to-face confrontation is not absolute, but rather the right is a mere preference subject to a cost-benefit analysis:

We have never held . . . that the Confrontation Clause guarantees criminal defendants the absolute right to a face-to-face meeting with witnesses against them at trial . . . [O]ur precedents establish that "the Confrontation Clause reflects a preference for face-to-face confrontation at trial," . . . a preference that "must occasionally give way to considerations of public policy and the necessities of the case."

Id. at 844, 849 (quoting Ohio v. Roberts, 448 U.S. 56, 63 (1980) and Mattox v. United States, 156 U.S. 237, 243 (1895)). The Court's conclusion that the right to face-to-face confrontation is subject to a cost-benefit analysis is consistent with economic theory.

123. Id. at 850. The Court stated the crux of its analysis as follows:

That the face-to-face confrontation requirement is not absolute does not, of course, mean that it may easily be dispensed with. As we suggested in Coy, our precedents confirm that a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured.

Id. (restating the holding in Coy, 487 U.S. at 1025).

Restated in more economic terms, face-to-face confrontation may be denied if there are benefits from dispensing with the right, and the costs inherent in the increased risk of an erroneous conviction are minimized by measures which otherwise assure the reliability of the evidence.

124. The Court began its opinion by pronouncing that: "The central concern of the Con
of error by reducing the risk of an erroneous judgment. In the case before the Court, however, this benefit comes at a rather steep price: trauma to the witness. The Court then implicitly posed the question of whether face-to-face confrontation was the most efficient means of insuring the reliability of the evidence in such cases. The Court minimized the benefits of face-to-face confrontation by: (1) characterizing it as simply one of several elements of the Confrontation Clause; and (2) analogizing to the hearsay exceptions and claiming that the evidence admitted under the Maryland procedure was at least as reliable as the evidence admitted under the hearsay exceptions. On the other hand, the Court maximized the direct cost associated with face-to-face confrontation (and thus the savings under the Maryland procedure) by emphasizing the trauma the witness would experience. The Court implicitly reasoned that just as the costs of face-to-face confrontation exceed the benefits in the case of the hearsay exceptions, any decrease in the reliability of the evidence under the Maryland procedure was more than offset by the benefit of not subjecting the witness to the trauma of testifying face-to-face against the defendant. Since the net benefit of the Maryland procedure exceeded the net benefit of the right to face-to-face confrontation, there is a compelling state interest (furthering Pareto optimality) which justifies denying the defendant the right to face-to-face con-

125. Craig, 497 U.S. at 842.
126. Id. at 850; see supra note 3.
127. Craig, 497 U.S. at 845-47.
128. Id. at 851 (concerning reliability, the Court claimed that the methods used by the Maryland statute to insure the reliability of the evidence were “far greater than those required for admission of hearsay testimony under the Confrontation Clause”) (citing Ohio v. Roberts, 448 U.S. 56, 66 (1980)).
129. Id. at 853-55.
130. Id. at 852-53.
frontation.\textsuperscript{131}

Despite the apparent logic of the Court's analysis and its apparent consistency with a law and economics analysis,\textsuperscript{132} the Court's analysis of the issue is too superficial and too conclusory. The Court never really performed a thorough economic analysis of the Maryland procedure. Instead, the Court focused too much on the trauma to the witness from face-to-face confrontation and simply presumed that the Maryland procedure is more efficient than face-to-face confrontation. A more thorough economic analysis of both the Maryland procedure and the Court's opinion reveals the flaws in the Court's analysis.

\textbf{A. An Economic Analysis of the Maryland Procedure}

An economic analysis of a procedural rule should focus on whether adopting the rule produces a net social benefit: whether the sum of the expected cost of error with the rule plus the expected direct cost of the rule is less than the expected cost of error without the rule.\textsuperscript{133} When this principle is applied to the Maryland procedure, the issue becomes whether the sum of the expected cost of error with the Maryland procedure versus the right to face-to-face confrontation.

\begin{itemize}
\item An economic analysis of a procedural rule should focus on whether adopting the rule produces a net social benefit: whether the sum of the expected cost of error with the rule plus the expected direct cost of the rule is less than the expected cost of error without the rule.\textsuperscript{133} When this principle is applied to the Maryland procedure, the issue becomes whether the sum of the expected cost of error with the Maryland procedure versus the right to face-to-face confrontation.
\end{itemize}
FACE-TO-FACE CONFRONTATION

error with the Maryland procedure ("CE w/ MP"), plus the expected
direct cost of the Maryland procedure ("C of MP"), is less than the
expected cost of error in the absence of the Maryland procedure ("CE
w/out MP"):

\[(CE \text{ w/ MP}) + (C \text{ of MP}) \text{ vs. } (CE \text{ w/out MP})\].

Inasmuch as the Maryland procedure is an alternative procedure to
face-to-face confrontation, the right side of the formula, the expected
cost of error without the Maryland procedure is the total expected
cost of face-to-face confrontation:

\[(CE \text{ w/ FTFC}) + (C \text{ of FTFC})\].

The question then is how the sum of the expected cost of error under
the Maryland procedure, plus the expected direct cost of the Maryland
procedure, compares to the sum of the expected cost of error under
face-to-face confrontation, plus the direct cost of face-to-face confron-
tation:\(^{134}\)

\[(CE \text{ w/ MP}) + (C \text{ of MP}) \text{ vs. } (CE \text{ w/ FTFC}) + (C \text{ of FTFC})\].

The problem with stating the issue in this way, however, is that
the comparison of the total cost of the Maryland procedure versus the
total cost of face-to-face confrontation requires a comparison of ap-
pies and oranges. Definitive numbers cannot be assigned to any of
the critical variables on either side of the formula. Any comparison of
the net benefit of the Maryland procedure versus the net benefit of
the right to face-to-face confrontation is difficult, if not impossible, to
perform. Accordingly, the law and economics analysis of a procedural
rule typically is an all or nothing analysis: what is the total cost with
the procedural rule versus the total cost without the procedural
rule.\(^ {135}\) The best way (and arguably the only valid way) to perform
the analysis is thus to compare the net benefit of the right to face-to-
face confrontation without the Maryland procedure versus the net

---

134. Since the Maryland procedure will be employed only after a hearing where the
court determines that the witness would experience undue emotional distress if required to
testify face-to-face, the direct cost of such confrontation is an individualized direct cost, not
an expected direct cost. See Craig, 497 U.S. at 855-56.

135. See supra notes 57-58 and accompanying text.
benefit of the right to face-to-face confrontation with the Maryland procedure. In essence, the question then becomes how the Maryland procedure affects the variables in the formula which calculates the total cost of error with the right to face-to-face confrontation:

\[
TC \text{ w/ FTFC} = \ (C \text{ of EC}) \times (P \text{ of EC}) + (C \text{ of EA}) \times (P \text{ of EA}) + C \text{ of FTFC.}
\]

\[
\text{vs.}
\]

\[
TC \text{ w/ FTFC-MP} = \ (C \text{ of EC}) \times (P \text{ of EC}) + (C \text{ of EA}) \times (P \text{ of EA}) + C \text{ of FTFC-MP.}
\]

While these formulas look daunting, the analysis simplifies itself rather quickly when each variable is compared to itself across the two possible scenarios. Since absolute values cannot be assigned to any of the variables, the key is how the magnitude of each variable under face-to-face confrontation is affected by the Maryland procedure.\(^{36}\)

1. How the Maryland Procedure Affects the Expected Costs of an Erroneous Judgment

The expected cost of error is the cost of an erroneous judgment times the probability of an erroneous judgment, which can be broken down further into the cost of an erroneous conviction times the probability of an erroneous conviction, plus the cost of an erroneous acquittal times the probability of an erroneous acquittal.\(^{37}\) Neither the cost of an erroneous conviction nor the cost of an erroneous acquittal is affected by the adoption of the Maryland procedure.\(^{38}\)

136. Inasmuch as the essence of the Maryland procedure is the absence of the right to face-to-face confrontation, much of the economic analysis of the Maryland procedure is the exact converse of the economic analysis of the right to face-to-face confrontation (and hence should be consistent with the economic analysis of the right to face-to-face confrontation). Just as face-to-face confrontation decreases the total cost of error by decreasing the probability of an erroneous conviction, under the Maryland procedure, with no face-to-face confrontation, one would expect the total cost of error to increase because of the increased probability of an erroneous conviction. In light of the well recognized potential for emotional distress costs to the witness under face-to-face confrontation, under the Maryland procedure, with no face-to-face confrontation, one would expect a savings in the direct costs to the witness. Thus, the key is whether the savings derived from eliminating face-to-face confrontation exceed the increased costs which stem from the increase in the probability of an erroneous conviction. This is the crux of the economic analysis of the Maryland procedure, and the Court's opinion in *Maryland v. Craig* can easily be recast along these economic lines.

137. See supra part III.B.1.

138. The cost of an erroneous conviction is the same under both the total cost of error with the right to face-to-face confrontation and under the Maryland procedure. Likewise, the
FACE-TO-FACE CONFRONTATION

\[(C \text{ of EC}) \text{ w/ FTFC} = (C \text{ of EC}) \text{ w/ FTFC-MP};\]
\[(C \text{ of EA}) \text{ w/ FTFC} = (C \text{ of EA}) \text{ w/ FTFC-MP}.\]

The respective costs of an erroneous decision depend upon factors which are not affected by the presence or absence of the Maryland procedure. In addition, the presence or absence of the Maryland procedure does not affect the principle established above that the cost of an erroneous conviction exceeds the cost of an erroneous acquittal:

\[(C \text{ of EC}) \text{ w/ FTFC} > (C \text{ of EA}) \text{ w/ FTFC};\]
\[(C \text{ of EC}) \text{ w/ FTFC-MP} > (C \text{ of EA}) \text{ w/ FTFC-MP}.\]

Although the Court’s opinion in Maryland v. Craig is devoid of any express mention of the costs of an erroneous conviction or the costs of an erroneous acquittal, since these variables are not affected by the adoption of the Maryland procedure, the Court’s failure to analyze these variables is not fatal to the Court’s economic analysis of the Maryland procedure. Moreover, the Court’s analysis focused in part on the reliability of the evidence (i.e., the risk of an erroneous conviction), no doubt in implicit recognition of the fact that the cost of an erroneous conviction is greater than the cost of an erroneous acquittal.

---

139. The impact of an erroneous decision upon the net punishment involves costs which are not affected by the absence or presence of the Maryland procedure. The additional costs inherent in an erroneous conviction (the social stigma, potential lost employment, loss of freedom and the costs society incurs in incarcerating the individual) are likewise not affected by the absence or presence of the procedure. See supra notes 60-65 and accompanying text.

140. See POSNER, supra note 13, at 553; see also supra notes 60-66 and accompanying text. Accordingly, the analysis of the net benefit of face-to-face confrontation versus the net benefit of the Maryland procedure will depend on the relative values assigned to: (1) the probability of an erroneous conviction in each formula; (2) the probability of an erroneous acquittal in each formula; and (3) the direct costs of the respective procedural rules. Although the Court focuses on these three variables, the Court’s analysis of each of the variables arguably is incomplete.

141. The omission does, however, facilitate the Court’s attempt to minimize the increase in expected cost of error under the Maryland procedure.

2. How the Maryland Procedure Affects the Probabilities of an Erroneous Judgment

In light of the fact that the Maryland procedure does not affect the respective costs of an erroneous conviction and an erroneous acquittal, the expected cost of error under the Maryland procedure will depend upon how the Maryland procedure affects the probability of an erroneous conviction and the probability of an erroneous acquittal.

The essence of the Maryland procedure is the absence of face-to-face confrontation. Face-to-face confrontation has repeatedly been trumpeted as one of the most important procedural rules in the battle to minimize the risk of an erroneous conviction. Face-to-face confrontation deters witnesses from lying and facilitates the trier of fact in detecting when a witness is lying. Arguably, it is self-evident that eliminating the right would produce an increase in the probability of an erroneous conviction and thus an increase in the total cost of error:

\[(P \text{ of EC}) \text{ w/ FTFC} < (P \text{ of EC}) \text{ w/ FTFC-MP} \]

Although the Supreme Court’s opinion in Maryland v. Craig never expressly acknowledges that the Maryland procedure will increase the probability of an erroneous conviction, the Court implicitly recognized this fact. The Court expressly acknowledged the important role face-to-face confrontation plays in minimizing the probability of an erroneous conviction:

[F]ace-to-face confrontation enhances the accuracy of factfinding by reducing the risk that a witness will wrongfully implicate an innocent person . . . . "[I]t may confound and undo the false accuser, or reveal the child coached by a malevolent adult."

. . . [F]ace-to-face confrontation forms "the core of the values furthered by the Confrontation Clause."

The Court’s opening comments concerning face-to-face confrontation implicitly reflect, and are consistent with, the traditional view that face-to-face confrontation reduces the risk of an erroneous conviction. Accordingly, despite the Court’s emphasis on the other ele-

143. See supra note 71 and accompanying text; see also supra note 53.
145. Id. at 845. ("The central concern of the Confrontation Clause is to ensure the reli-
ments of the Confrontation Clause which are present under the Maryland procedure, the absence of the right to face-to-face confrontation must be deemed to increase the probability of an erroneous conviction. Otherwise, there would be no point in requiring that there be an important state interest to be furthered. If the Maryland procedure truly had no effect upon the probability of an erroneous conviction, the procedure’s reduced direct cost to the witness in terms of anxiety and potential trauma would argue for its adoption across the board in all cases.

In addition, the Court noted that the principal function of the defendant’s right to face-to-face confrontation is to insure the reliability of the evidence. In analyzing the reliability of the evidence under the Maryland procedure, however, the Court never claimed that the evidence would be as reliable as with the right to face-to-face confrontation, but only that the evidence would be adequately reliable. The Court’s implicit recognition that the adoption of the Maryland procedure will increase the probability of an erroneous conviction, which in turn will increase the expected cost of error, is consistent with an economic analysis of the Maryland procedure.

While adopting the Maryland procedure will increase the probability of an erroneous conviction, adopting the Maryland procedure will decrease the probability of an erroneous acquittal:

\[(P \text{ of EA) } w/ \text{ FTFC} > (P \text{ of EA) } w/ \text{ FTFC-MP}.\]

As noted above, inherent in the right to face-to-face confrontation is the risk that the trier of fact may misinterpret a witness’s apparent reluctance to testify face-to-face against the defendant as evidence that the witness is lying. Eliminating the right to face-to-face confrontation and substituting the Maryland procedure will reduce this risk and thus lower the probability of an erroneous acquittal.149

146. Wendel: A Law and Economics Analysis of the Right to Face-to-Face Confrontation. Published by Scholarly Commons at Hofstra Law, 1993
Although the Court's opinion is completely devoid of any mention of the fact that eliminating face-to-face confrontation will reduce the probability of an erroneous acquittal, this omission is not fatal to the Court's economic analysis of the Maryland procedure. Since the cost of an erroneous conviction is greater than the cost of an erroneous acquittal, the critical variable is the change in the probability of an erroneous conviction. Even if the decrease in the probability of an erroneous acquittal matched the increase in the probability of an erroneous conviction, the total cost of error would still increase under the Maryland procedure due to the greater costs associated with an erroneous conviction.

Thus, the Court's analysis of the total cost of error under the Maryland procedure is generally consistent with the economic analysis. The Court implicitly recognizes that the Maryland procedure will increase the probability of an erroneous conviction, which in turn will increase the expected cost of error:

\[(\text{CE w/ MP}) > (\text{CE w/ FTFC}).\]

Thus, as the Court properly states: "The critical inquiry . . . is whether use of the procedure is necessary to further an important state interest." In other words, are there economic benefits to society which outweigh the acknowledged costs of the Maryland procedure and therefore justify its use despite the increase in the total cost of error?

---

150. The Court makes no reference, either directly or indirectly, to how the Maryland procedure affects the probability of an erroneous acquittal. Apparently the Court believed that either the probability of an erroneous acquittal was not relevant to the analysis or that the Maryland procedure had no significant affect upon the probability of an erroneous acquittal.

151. See supra note 74 and accompanying text. In addition, any benefit derived from the decrease in the probability of an erroneous acquittal would only reduce the increase in the expected cost of error from the increase in the probability of an erroneous conviction. Inasmuch as the Court underestimated the increase in the expected cost of error from the increase in the probability of an erroneous conviction, the Court's failure to include the savings from the decrease in the probability of an erroneous acquittal partially offsets the Court's underestimation.

152. See supra notes 144-45 and accompanying text.

3. How the Maryland Procedure Affects the Direct Costs of the Procedural System

As the Court implicitly noted, the principal economic benefit to society from the Maryland procedure is eliminating the emotional distress costs to witnesses from face-to-face confrontation. Both the Court and the traditional economic analysis of the right to face-to-face confrontation recognize that face-to-face confrontation may impose direct costs on the witness in terms of the emotional distress the witness may suffer. As the Court put it: "[F]ace-to-face presence may, unfortunately, upset the truthful rape victim or abused child . . . ." The Court also cited the "growing body of academic literature documenting the psychological trauma suffered by child abuse victims who must testify in court." The Court's discussion of how the Maryland procedure would protect the child from this emotional distress implicitly reflects the Court's recognition of the costs of face-to-face confrontation and the savings to be derived from the Maryland procedure as a result of the absence of face-to-face confrontation:

\[(C \text{ of FTFC}) > (C \text{ of MP}).\]

There is little doubt that there are savings associated with the Maryland procedure in terms of the emotional distress costs to the witness. The critical issue though is whether the magnitude of these expected savings is greater than the increase in the expected cost of error from the increase in the probability of an erroneous conviction plus the direct costs of the Maryland procedure:

\[(C \text{ of FTFC}) - (C \text{ of MP}) \text{ vs. } (CE \text{ of MP}) - (CE \text{ of FTFC}).\]

A procedural rule should be adopted only if it results in a net benefit to society. As applied to the Maryland procedure, it should be adopted only if the left side of the formula is greater than the right.

154. See cases cited supra note 3.
155. Craig, 497 U.S. at 846 (quoting Coy v. Iowa, 487 U.S. 1012, 1020 (1988)).
156. Id. at 855.
157. See id. at 851-57.
158. See supra notes 57-58 and accompanying text.
4. Comparing the Magnitude of the Increase in the Expected Cost of Error with the Magnitude of the Expected Savings from Eliminating the Emotional Distress Caused by Face-to-Face Confrontation

Up until this point, the Court's opinion in *Maryland v. Craig* has essentially been the converse of the traditional economic analysis of the right to face-to-face confrontation. As an economic analysis of the issue would predict, the analysis has narrowed itself to whether the savings derived from eliminating the trauma the witness would suffer from face-to-face confrontation exceed the increase in the expected cost of error incurred as a result of the increase in the probability of an erroneous conviction. The traditional economic analysis of the right to face-to-face confrontation reasons that the expected cost of an erroneous conviction is so great, that any increase in the probability of an erroneous conviction significantly increases the expected cost of error. More importantly, the traditional economic analysis presumes that the expected direct cost a witness may suffer from face-to-face confrontation has to be lower than the expected increase in the cost of error if face-to-face confrontation were eliminated. In contrast, in *Maryland v. Craig*, the Court concluded, at least in some cases, that the direct cost to the witness from face-to-face confrontation exceeded the increase in the expected cost of error and thus the adopted Maryland procedure would increase social wealth. Is the Court's conclusion defensible in light of the traditional economic analysis of face-to-face confrontation?

159. See supra note 137 (with the possible exception of the Court's arguably underestimating the magnitude of the increase in the probability of an erroneous conviction which results from the elimination of the right).

160. See supra notes 60-75 and accompanying text.

161. See supra text accompanying notes 76-83.

162. *Craig*, 497 U.S. at 853. Justice Scalia, writing in dissent, criticized the Court's abandonment of the traditional interpretation of the Confrontation Clause. Justice Scalia's argument implicitly reflects the traditional assumption underlying the right to face-to-face confrontation—that any cost imposed upon the witness is less than the expected cost associated with the increase in the probability of an erroneous conviction in the absence of face-to-face confrontation:

"That face-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult." To say that a defendant loses his right to confront a witness when that would cause the witness not to testify is rather like saying that the defendant loses his right to counsel when counsel would save him, or his right to subpoena witnesses when they would exculpate him, or his right not to give testimony against himself when that would prove him guilty. *Id.* at 866-67 (quoting *Coy v. Iowa*, 487 U.S. 1012, 1020 (1988)).
There are three differences between the Court’s analysis of the Maryland procedure and the traditional economic analysis of face-to-face confrontation that may explain the different conclusions reached. First, quantitatively, while the Court implicitly recognized that the Maryland procedure would increase the probability of an erroneous conviction, and thus the total cost of error, the Court went to great lengths to minimize the magnitude of the increase. The Court emphasized that face-to-face confrontation is only one of four elements that combine to ensure the reliability of evidence under the Confrontation Clause. Since the Maryland procedure retains three of the four elements of the Confrontation Clause, the Court concluded that the Maryland procedure “permit[s] a defendant to ‘confound and undo the false accuser, or reveal the child coached by a malevolent adult . . . ['"]” The Court went so far as to actually claim that the Maryland procedure might even “aid a defendant in eliciting favorable testimony from the child witness.” The Court is straining to minimize any increase in the probability of an erroneous conviction.

The second difference is that qualitatively the Court analogized the Maryland procedure to the hearsay exceptions. The Court reasoned that whatever the magnitude of the increase in the expected cost of error under the Maryland procedure, inasmuch as hearsay evidence is admissible, the assurances of evidence reliability are as great under the Maryland procedure as they are under the hearsay exceptions. The Court thus concluded that the magnitude of the increase in the expected cost of error under the Maryland procedure is no greater than under the hearsay exceptions. The Court appears to be arguing, somewhat incredulously, that the Maryland procedure may actually reduce the risk of an erroneous conviction. To the extent the Court’s comment can be construed this way, the comment is difficult to accept. If such were the case, why should there be even a preference for face-to-face confrontation? Why should the Maryland procedure not be adopted in all cases, not just in child abuse cases, but in all cases where the witness may be nervous about testifying face-to-face against the alleged perpetrator? While there may be isolated situations where the Court’s comment may make sense, it is difficult to accept that on average the Maryland procedure reduces the probability of an erroneous conviction in comparison to the probability of an erroneous conviction under the right to face-to-face confrontation.

163. Id. at 844-46.
164. Id. at 851 (quoting Coy, 487 U.S. at 1020 (1988)). The Court reasoned that inasmuch as the Maryland procedure preserves three out of the four elements of the confrontation right, the reliability of the testimony is adequately assured. In so finding, in essence the Court is stating that the risk of an erroneous decision, and thus the expected cost of error, is not that different under the Maryland procedure as opposed to the right to face-to-face confrontation.
165. Id. The Court appears to be arguing, somewhat incredulously, that the Maryland procedure may actually reduce the risk of an erroneous conviction. To the extent the Court’s comment can be construed this way, the comment is difficult to accept. If such were the case, why should there be even a preference for face-to-face confrontation? Why should the Maryland procedure not be adopted in all cases, not just in child abuse cases, but in all cases where the witness may be nervous about testifying face-to-face against the alleged perpetrator? While there may be isolated situations where the Court’s comment may make sense, it is difficult to accept that on average the Maryland procedure reduces the probability of an erroneous conviction in comparison to the probability of an erroneous conviction under the right to face-to-face confrontation.
166. Id. at 851-52. As the dissent points out, the Court’s reliance on previous decisions
formed no real analysis of the magnitude of the increase in the expected cost of error under the Maryland procedure, but instead presumed that the increase must not be that great. In addition, implicit in the Court's analogy to the hearsay exceptions is the conclusion that whatever the increase in the expected cost of error, the benefits from eliminating the trauma associated with face-to-face confrontation outweigh that increase.

The third and perhaps the most important difference between the Court's analysis of the Maryland procedure and the traditional economic analysis of face-to-face confrontation, is that the Maryland procedure employs an individualized approach to calculating the costs to the witness from face-to-face confrontation. The traditional economic analysis of the right to face-to-face confrontation is based upon a comparison of the expected costs and benefits of the right. The expected costs and benefits are calculated from a weighted average approach.

holding that the right to face-to-face confrontation does not apply to the hearsay exceptions is misplaced. From a law and economics perspective, those holdings only stand for the obvious: that there is no absolute right to face-to-face confrontation. But citing to those holdings only begs the question: whether the benefits of the right to face-to-face confrontation in this context exceed the costs? While the probability of an erroneous conviction may be the same in both contexts, the rest of the analysis will depend on the other relevant variables: the probability of an erroneous acquittal and the direct costs of the respective rules. The Court fails to examine the other variables and simply assumes that the costs and benefits are sufficiently similar so that the conclusion is the same in both contexts. Id. at 860-70.

167. See id. at 851. The Court spends the majority of the opinion establishing that the right to face-to-face confrontation is not absolute, but rather is a mere preference. It really does not scrutinize whether the savings of the Maryland procedure exceed the costs associated with the procedure so as to justify its adoption. Establishing that the right to face-to-face confrontation is subject to a cost-benefit analysis is different from performing the cost-benefit analysis. Having established that the right is subject to a cost benefit analysis, which an economic theory would support, the Court fails to follow through on the analysis. The Court spends a great deal of time discussing the cost of the trauma a child witness in a child abuse case may experience, but the Court never really examines the other side of the equation: the increased costs associated with the Maryland procedure. Instead the Court merely presumes the increased expected costs associated with the Maryland procedure at most equal the expected cost of error under the exceptions to the hearsay rule, and inasmuch as that total cost of error is acceptable in the hearsay context, it must be acceptable here. From an economic perspective, however, there are problems with the Court's presumption. The Court's blind acceptance of the hearsay exception cost-benefit analysis of the right as not only applicable to, but determinative of, the cost-benefit analysis of the right to face-to-face confrontation in the child abuse context is highly questionable. The Court should have performed a complete analysis of all of the relevant variables.

168. See supra notes 76-78 and accompanying text.

169. See supra note 78 and accompanying text.
Each possible amount is then multiplied by the probability of each occurring. The sums are then totalled to determine the weighted expected costs and benefits. As applied to the costs of face-to-face confrontation, because the majority of witnesses experience little or no emotional distress from face-to-face confrontation, the expected cost is relatively low despite the fact that a small number of witnesses may experience trauma from face-to-face confrontation.

In contrast, the Maryland procedure rejects the traditional, weighted average analysis of the expected costs of face-to-face confrontation and instead adopts an individualized approach to calculating the direct costs. The Maryland procedure does not presume a certain amount of emotional distress to the witness, but rather requires an individualized finding by the trial court that the witness would suffer trauma if required to testify face-to-face against the defendant. Thus, the magnitude of the cost of face-to-face confrontation is not the expected cost that a witness may suffer, but rather a potentially much higher cost—the cost of imposing psychological, and possibly even physical, trauma to a particular child witness. No doubt this cost is substantial, substantially higher than the expected cost of face-to-face confrontation.

Just as the Court went to great lengths to minimize the increase in total costs stemming from the increase in the probability of an erroneous conviction, the Court went to great lengths to maximize the costs to the witness from face-to-face confrontation (and thus the savings under the Maryland procedure). The Court emphasized the state's interest in protecting the alleged child abuse victim from the trauma of testifying face-to-face against the alleged perpetra-

170. See supra note 78 and accompanying text.
171. See supra note 78 and accompanying text.
172. See supra note 78 and accompanying text.
173. See supra notes 77-78 and accompanying text.
175. There is always the possibility that the child may not actually suffer the anticipated trauma if he or she was required to testify face-to-face. But this possibility is rather slim, so there is no need to discount the Court's finding that the child would experience trauma to reflect this possibility.
176. Craig, 497 U.S. at 852-54.
177. It is at this point that the significance of the Court's first error becomes more pronounced. See supra note 125. By misstating the central concern of the Confrontation Clause, the Court failed to perform the appropriate economic analysis of the right to face-to-face confrontation. Instead of analyzing each of the variables in the cost of error and the direct cost formula with and without the right to face-to-face confrontation, the Court focused in-
The Court noted that the savings derived from protecting the alleged child abuse victim from further embarrassment and trauma are so great that the savings have outweighed the benefits associated with stead on the direct cost of the right to face-to-face confrontation. The Court then conducted its own version of a cost-benefit analysis of the right to face-to-face confrontation, with the goal being to reduce the direct cost of the right to face-to-face confrontation instead of focusing on the right figure: the total cost to society. In so doing, the Court failed to examine the benefits of the right to face-to-face confrontation. Instead, the Court seems to reason that inasmuch as the right to face-to-face confrontation is not required in the hearsay context, the benefits must be de minimis. Craig, 497 U.S. at 847-50. As the dissent rightly points out, the State’s real interest is not the protection of child abuse victims from the trauma associated with testifying at trial, but rather the effective enforcement of the child abuse laws. Id. at 867-68 (Scalia, J., dissenting). If the benefits of requiring the victims to testify face-to-face against the defendants exceed the costs, the victims should be required to testify face-to-face regardless of the trauma inflicted upon the victims. Anything less would be inefficient. 178. Justice Scalia attacked the Court’s description of the State’s interest. Justice Scalia persuasively argues that if the State’s goal is to minimize the trauma to the child, the most effective way to achieve this goal is simply not to call the witness. The State’s interest here is in fact no more and no less than what the State’s interest always is when it seeks to get a class of evidence admitted in criminal proceedings: more convictions of guilty defendants. That is not an unworthy interest, but it should not be dressed up as a humanitarian one. Id. at 867. Justice Scalia then turned his attention to the principal economic concern in the implementation of the criminal laws: the costs and probabilities of an erroneous conviction. “And the interest on the other side is also what it usually is when the State seeks to get a new class of evidence admitted: fewer convictions of innocent defendants—specifically, in the present context, innocent defendants accused of particularly heinous crimes.” Id. at 867-68. Justice Scalia went on to point out that while the cost of the right to face-to-face confrontation may be unusually high in the context of child abuse cases, the probability of an erroneous conviction is unusually high, because of the susceptibility of children to the power of suggestion, as are the costs associated with an erroneous conviction. Id. at 868. In so arguing, Justice Scalia again is affirming the traditional assumption with respect to the right to face-to-face confrontation, that being that no matter the cost of the right, the costs associated with the risk of an erroneous conviction outweigh the cost. Justice Scalia’s treatment of the Court’s attempt to justify the distinction for child abuse victims is interesting because it rightly exposes the weakness of the Court’s opinion while at the same time exposing the weakness of its own analysis. What neither the Court nor the dissent addressed, or even raised, is whether there is something unique about the crime of child abuse which warrants distinguishing child abuse cases from other crimes for purposes of the right to face-to-face confrontation. If the State’s true interest is simply the effective enforcement of its criminal statutes, is there something about the State’s ability to effectively enforce its child abuse statutes which warrants distinguishing child abuse cases from other criminal cases for purposes of the right to face-to-face confrontation? Although the Court attempted to distinguish child abuse cases on the basis of the State’s interest in protecting the victim’s welfare from the trauma of having to testify face-to-face against the defendant, that argument is rife with weaknesses and problems. A more defensible basis for distinguishing child abuse cases is one that focuses on the real problem underlying Maryland v. Craig: the effective enforcement of child abuse statutes because of the problem of the reluctant complainants. See infra notes 239-60 and accompanying text.
other rights. The Court acknowledged the "growing body of academic literature documenting the psychological trauma suffered by child abuse victims who must testify in court . . . ." Accordingly, the Court stated that it "[would] not second-guess the considered judgment of the Maryland Legislature" that where the child would suffer trauma, the savings derived from eliminating face-to-face confrontation are substantial. In contrast to the traditional economic analysis of face-to-face confrontation, the Court minimized the increase in the total cost of error from eliminating face-to-face confrontation and maximized the savings associated with eliminating face-to-face confrontation.

 Returning then to the economic analysis of the Maryland procedure, the issue had narrowed itself to which figure was greater: the increase in the total cost of error, or the savings from eliminating face-to-face confrontation. In light of the fact that no absolute numbers are assigned to any of the variables, in the end the question of which is greater is both a quantitative and qualitative judgment call based on the best possible 'order of magnitude' analysis of the relevant variables. Quantitatively, the Court minimized the increase in the total cost of error and maximized the costs to the witness from face-to-face confrontation, requiring an individualized finding of trauma.

 But even then the question of which cost is greater is a close call. Qualitatively, the Court analogized the situation to the hearsay exceptions: the cost of face-to-face confrontation in such situations is exceedingly high, arguably higher than the increase in the total cost of error from the absence of face-to-face confrontation. In resolving the question, the Court cited the fact that a significant majority of states had enacted similar statutes to protect child abuse witnesses from the trauma of giving testimony in child abuse cases as evidence of the widespread belief that the costs of the trauma to the child must exceed the increase in the total cost of error. At first, this argument would appear to be consistent with an economic analysis of the question. An economic approach would assume that states are rational actors and would not adopt a statutory approach which would result

179. Craig, 497 U.S. at 855.
180. Id.
181. Id.
182. See supra note 177 and accompanying text.
183. Craig, 497 U.S. at 855.
184. Id. at 851-53.
185. Id. at 836, 854.
in a net loss to society, thereby decreasing social wealth. Accordingly, the Court’s conclusion that the net benefit of the Maryland procedure exceeds its net costs, and that the net gain justifies its adoption and the elimination of face-to-face confrontation (where there is an individualized finding that the witness would experience trauma and the reliability of the evidence is otherwise insured), appears defensible both theoretically and practically.

Upon closer scrutiny, however, there are problems with all three critical points in the Court’s economic analysis of the issue. Although the Court’s cost-benefit analysis parallels an economic analysis, the Court: (1) underestimated the magnitude of the increase in the total cost of error from the increase in the probability of an erroneous conviction; (2) mistakenly assumed that the reliability of the evidence under the Maryland procedure equalled or surpassed the reliability of the evidence under the hearsay exceptions; (3) miscalculated the magnitude of the savings under the Maryland procedure by overestimating the direct costs of face-to-face confrontation; and (4) failed to include the direct costs of the Maryland procedure in its analysis.

B. Criticisms of the Court’s Economic Analysis of the Maryland Procedure

1. The Court Underestimated the Increase in the Probability of an Erroneous Conviction

The Court’s strained attempt to minimize the importance of face-to-face confrontation and the magnitude of the increase in the probability of an erroneous conviction as a result of the elimination of face-to-face confrontation is highly questionable. The crux of the Court’s effort to minimize the importance of face-to-face confrontation was to portray face-to-face confrontation as simply one of four elements of the Confrontation Clause. As a purely statistical matter, however, eliminating one-fourth of the confrontation right arguably would significantly increase the probability of an erroneous conviction. Moreover, the element eliminated, face-to-face confronta-

186. Id. at 857.
187. There is no doubt that the elimination of the right to face-to-face confrontation increases the probability of an erroneous conviction, and there is no doubt that the cost of an erroneous conviction is a major cost warranting serious attention. Yet the Court’s cost-benefit analysis is surprisingly devoid of any serious examination of the increased costs from the increase in the probability of an erroneous conviction.
188. See supra notes 164-65 and accompanying text.
189. If there is no requirement of face-to-face confrontation in child abuse cases, the risk
tion, arguably plays a more important role than the other elements in minimizing the risk of an erroneous conviction. The Court itself had characterized the right to face-to-face confrontation as "the core" of the Confrontation Clause. How can the Court eliminate the core element and then imply that any increase in the probability of an erroneous conviction is minimal? There is ample reason to assume that eliminating face-to-face confrontation would significantly increase the probability of an erroneous conviction. The Court's failure to address the cost of an erroneous conviction, coupled with the Court's underestimating the magnitude of the increase in the probability of an erroneous conviction, results in the Court underestimating the magnitude of the increase in the total cost of error under the Maryland procedure.

2. The Evidence Admitted Under the Maryland Procedure is Not as Reliable as the Evidence Admitted Under the Hearsay Exceptions

The Court's claim that any increase in the probability of an erroneous conviction, and thus the expected cost of error, must be limited because the evidence admitted under the Maryland procedure is just as reliable as evidence admitted under the hearsay exceptions, does not hold up under closer scrutiny. Evidence is admitted un-

that an innocent defendant may be erroneously convicted increases. As the dissent points out, this increased risk is greater in child abuse cases than in other cases because of the nature of the offense. Craig, 497 U.S. at 868 (Scalia, J., dissenting). First, child abuse charges are highly factual investigations where the bulk of the testimony is usually circumstantial. Usually the only direct evidence against the defendant is the child's testimony. Moreover, "[s]ome studies show that children are substantially more vulnerable to suggestion than adults, and often unable to separate recollected fantasy (or suggestion) from reality." Id. In addition, despite the presumption of innocence, the heinous nature of the offense has led some to question whether defendants in child abuse cases really are presumed innocent. These studies support the argument that the probability of erroneous testimony, and hence an erroneous conviction, are higher from child abuse cases than for other types of crimes. Second, the cost of an erroneous conviction is high. In addition to the stigma which accompanies the conviction, the punishment for the crime of child abuse has been increased in most states. The increased risk of an erroneous conviction coupled with the high cost of an erroneous conviction would produce a substantial increase in the expected cost of error if face-to-face confrontation were eliminated.

190. "[T]he defendant's constitutional right 'to be confronted with the witnesses against him' means, always and everywhere, at least what it explicitly says: 'the right to meet face to face all those who appear and give evidence at trial.'" Id. at 862 (emphasis added) (Scalia, J., dissenting) (quoting Coy v. Iowa, 487 U.S. 1012, 1016 (1988)).


192. This miscalculation, however, is offset somewhat by the Court's failure to consider the decrease in the probability of an erroneous acquittal.

193. Instead of examining the benefits of the right to face-to-face confrontation, the Court
der the hearsay exceptions under the principles of reliability and necessity.\textsuperscript{194} The reliability principle, the primary justification for admitting hearsay evidence,\textsuperscript{195} postulates that the evidence is reliable because the special circumstances under which the hearsay statement was made guarantee its trustworthiness and thus vest it with inherent indicia of reliability.\textsuperscript{196} The inherent reliability of the statement moots the need for confrontation and cross-examination.\textsuperscript{197} There are, however, no such special circumstances surrounding a child’s statements regarding child abuse which would inherently insure its reliability. In fact, the trustworthiness of a child’s statements is inherently questionable.\textsuperscript{198} As Justice Scalia argued rather persuasively in

\begin{itemize}
  \item[196.] These “special circumstances” denote the “guarantees of trustworthiness” clearly called for by the Court in Ohio v. Roberts, 448 U.S. 56, 66 (1980). See Fed. R. Evid. 803(24) (“A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness . . . .”); Fed. R. Evid. 804(b)(5) (same); Vaughn C. Ball et al., McCormick’s Handbook of the Law of Evidence § 245, at 584 (E. Cleary, 2d ed. 1972); Weinstein & Berger, supra note 5 at § 800[01], at 800-11; Wigmore, supra note 194, at §§ 1420-22; see also Chambers v. Mississippi, 410 U.S. 284, 298-99 (1973); Dallas County v. Commercial Union Assurance Co., 285 F.2d 388, 397 (5th Cir. 1961); Lempert & Saltzburg, supra note 194, at 365 (pointing out that admissions are “the only exception[s] which admit[] statements that do not in theory carry some special guarantee of reliability”). See generally Bernard S. Jefferson, Declarations Against Interest: An Exception to the Hearsay Rule, 58 Harv. L. Rev. 1 (1944); Charles T. McCormick, The Borderland of Hearsay, 39 Yale L.J. 489 (1930); Edmund M. Morgan, Hearsay Dangers and the Application of the Hearsay Concept, 62 Harv. L. Rev. 179 (1948); Laurence H. Tribe, Triangulating Hearsay, Comment, 87 Harv. L. Rev. 957 (1974).
  \item[197.] See Wigmore, supra note 194, at § 1420; see also State v. Ryan, 691 P.2d 197, 206 (Wash. 1984) (finding that admission of hearsay statements by the lower court was erroneous because the “time, content, and circumstances of the statements offered . . . do not bear adequate indicia of reliability sufficient to make cross-examination and face-to-face confrontation superfluous”).
  \item[198.] See Lisa R. Askowitz, Restricting the Admissibility of Expert Testimony in Child Sexual Abuse Prosecutions: Pennsylvania Takes It to the Extreme, 47 U. Miami L. Rev. 201,
dissent:

The "special" reasons that exist for suspending one of the usual guarantees of reliability in the case of children's testimony are perhaps matched by "special" reasons for being particularly insistent upon it in the case of children's testimony. Some studies show that children are substantially more vulnerable to suggestion than adults, and often unable to separate recollected fantasy (or suggestion) from reality. 199

An examination of the Court's opinion in Maryland v. Craig reveals that the Court never claimed that a child's testimony is inherently reliable, thus implicitly acknowledging that the testimony fails to bear the traditionally required "indicia of reliability." 200

The Court's claim that the evidence admitted under the Maryland procedure is just as reliable as the testimony admitted under the hearsay exceptions is based upon the fact that the other elements of the Confrontation Clause are still present under the Maryland procedure, thereby insuring the reliability of the evidence through the confrontation elements which still remain:

---

202 n.9 (1993) ("[J]urors may interpret a child's apparent confusion, hesitancy, and inconsistency as indicative of unreliability."); Lucy Berliner & Mary K. Barbieri, The Testimony of the Child Victim of Sexual Assault, 40 J. SOCIAL ISSUES 125, 126-27 (1984) (describing the reluctance of prosecutors to call child witnesses who may not perform adequately as a witness); Nancy Thoennes & Jessica Pearson, Summary of Findings from the Sexual Abuse Allegation Project, in NATIONAL LEGAL RESOURCE CENTER FOR CHILD ADVOCACY AND PROTECTION, ASSOCIATION OF FAMILY AND CONCiliation COURTS, AMERICAN BAR ASSOCIATION, SEXUAL ABUSE ALLEGATIONS IN CUSTODY AND VISITATION CASES: A RESOURCE BOOK FOR JUDGES AND COURT PERSONNEL 8 (1988) ("Experts in the field believe that children's statements should be taken seriously, but they acknowledge . . . children fabricate stories of sexual abuse to please adults, to take revenge against one of their parents, or simply to get attention."); Judy Yun, Note, A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases, 83 COLUM. L. REV. 1745, 1751 (1983) (noting that "[e]ven when the child does appear in court and testifies, he or she is often met with skepticism and disbelief," and explaining that this reaction is due to society's belief that children tend to fantasize and tell stories which would undermine any inherent reliability); see also Wilson v. United States, 271 F.2d 492, 492-93 (D.C. Cir. 1959) ("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 . . . .") (quoting MANFRED S. GUTTMACHER & HENRI WEIHOFEN, PSYCHIATRY & THE LAW 374 (1952)). But see Gail S. Goodman & Alison Clarke-Stewart, Suggestibility in Children's Testimony: Implications for Sexual Abuse Investigations, in THE SUGGESTIBILITY OF CHILDREN'S RECOLLECTIONS 92, 103 (John Doris ed., 1991); Yun, supra, at 1751 (acknowledging schools of thought which contend child witnesses will not lie about incidents of sexual abuse).


Although we are mindful of the many subtle effects face-to-face confrontation may have on an adversary criminal proceeding, the presence of these other elements of confrontation—oath, cross-examination, and observation of the witness' demeanor—adequately ensures that the testimony is both reliable and subject to rigorous adversarial testing in the manner functionally equivalent to that accorded live, in-person testimony.\footnote{201}

The problem is that these "other elements of confrontation" are not well suited for insuring the reliability of the evidence in question. The reliability of a hearsay statement is said to depend upon the declarant's four testimonial capacities: sincerity, narration, memory and perception.\footnote{202} Of these four, most advocates of hearsay exceptions emphasize the sincerity capacity.\footnote{203} The different elements of confrontation test the different capacities which affect the reliability of the evidence.\footnote{204} Cross-examination effectively exposes defects in the declarant's narration, memory, and perception capacities, but it is not well suited to exposing defects in the declarant's sincerity:

\footnote{201} Craig, 497 U.S. at 851.

\footnote{202} See Kaplan, supra note 195, at 1796; Morgan, supra note 196, at 218; Tribe, supra note 196, at 958; see also Moss v. Ole South Real Estate, 933 F.2d 1300, 1308 (5th Cir. 1991); United States v. Renville, 779 F.2d 430, 441 (8th Cir. 1985); United States v. Friedman, 593 F.2d 109, 119 (9th Cir. 1979).


\footnote{204} See Normand M. Garland, An Overview of Relevance and Hearsay: A Nine Step Analytical Guide, 22 SW. U. L. REV. 1039, 1062-63 (1993) ("[T]he hearsay rule... [is] based on this rationale: Out-of-court statements are of suspect trustworthiness... because the declarant was not under oath at the time the statement was made, and the declarant's perception... [is] not subject to cross-examination."); Michael H. Graham, Application of the Rules of Evidence in Administrative Agency Formal Adversarial Adjudications: A New Approach, 1991 U. ILL. L. REV. 353, 375 ("[C]ross-examination enables the adverse party to... explore the perception... and narration of the witness."); Marilyn J. Maag, Case Note, 53 U. Cin. L. REV. 1155, 1156 (1984) ("[E]xclusion of hearsay evidence stems from the belief that cross-examination is the best way to detect inaccuracies in the witness's perception, memory and narration of an event. Furthermore, when the witness appears in court, the testimony is given under oath and the witness's demeanor is observable.").
Few would doubt that cross-examination effectively remedies defects in the other three capacities: it exposes and resolves ambiguity, it tests or refreshes memory, and it brings into question possible defects in perception. By contrast, cross-examination may be less well suited to exposing insincerity.  

The other elements of the Confrontation Clause—oath, observation of demeanor by the trier of fact, and face-to-face physical presence—are better suited to testing and insuring the sincerity of the witness.  

Of these three elements, however, face-to-face physical presence, is best suited to testing and insuring the sincerity of the declarant. Although the jury’s opportunity to observe the demeanor of the witness is important, it is the declarant’s demeanor when required to testify face-to-face against the defendant that is critical to testing and insuring the truthfulness of the testimony: “[F]ace-to-face confrontation enhances the accuracy of factfinding by reducing the risk that a witness will wrongfully implicate an innocent person . . . ‘It is always more difficult to tell a lie about a person “to his face” than “behind his back.”’” The particular risk with a child’s testimony is its truthfulness. The particular element of confrontation best suited to test and insure the reliability of this capacity is face-to-face physical presence. The absence of face-to-face confrontation greatly reduces the reliability of the evidence.

The Court’s argument appears to be that since face-to-face physi-
cal presence is expendable in the hearsay exceptions, as are all the other confrontation elements, the evidence admitted under the Maryland procedure must be more reliable by definition since at least some of the elements of confrontation are present. The problem with the Court's argument is that the Court assumes that the evidence must be more reliable without really analyzing the reliability of the evidence. First, evidence admitted under the hearsay exceptions is evidence which has external guarantees of trustworthiness which give it inherent indicia of reliability. There is no evidence that the child's testimony of abuse has such inherent indicia of reliability, and the Court never claims that it does.

But more importantly, the real concern underlying the hearsay doctrine is not the absolute reliability of the evidence in a vacuum, but rather the risk that a jury might incorrectly assess the reliability, that is, the credibility, of the evidence in question. If the evidence is of low reliability, but the jury would properly assess the low credibility of the evidence and properly discount it, admitting the evidence in question would not increase the risk of an erroneous conviction and actually would increase the probability of a correct decision. On the other hand, if the jury were to overassess the credibility of the evidence, admitting the evidence would greatly increase the risk of an erroneous decision. If there is a risk that the jury may overassess the credibility of the evidence, the evidence should be excluded. Accordingly, the key is not the absolute reliability of the evidence, but rather the jury's ability to assess accurately the credibility of the evidence. With the hearsay exceptions, common sense and experience establish the inherent indicia of reliability which provide adequate guidance to the jury so that the jury can properly assess the weight to accord the evidence. In addition, the obvious fact that the declarant is not before the jury will mean that the jury will automatically discount the credibility of the hearsay statement to some degree. It is this combination of factors which insures that the jury's assessment of the hearsay evidence is "reliable" in the sense that the jury will accord it the proper weight.

211. See Kaplan, supra note 195, at 1788 ("When the jury cannot accurately assess the credibility of a piece of evidence, the error results in a gap between the jury's perception of the evidence and the absolute reliability of the evidence.").
212. See Kaplan, supra note 195, at 1788.
213. See id.
In contrast, under the Maryland procedure, there is a much greater risk that the jury will overassess the credibility of the child’s testimony.\textsuperscript{214} The nature of the testimony is potentially very prejudicial.\textsuperscript{215} The effect of the child’s testimony is apt to be very powerful. The potential for overassessment is great. There are no external guarantees of reliability and thus no inherent indicia of reliability to support this effect upon the jury. The jury will not be as cognizant of the missing element of confrontation, the lack of face-to-face confrontation, as the jury is of the complete lack of confrontation in the hearsay exceptions. The appearance of confrontation under the Maryland procedure, without the underlying evidence possessing any indicia of reliability, creates a much greater risk that the jury will improperly overassess the credibility of the evidence in question. Accordingly, the evidence admitted under the Maryland procedure is not
as reliable as the evidence admitted under the hearsay exceptions.\footnote{216} The second principle supporting the hearsay exceptions is necessity.\footnote{217} If the evidence is not admitted despite the absence of face-to-face confrontation, its potentially beneficial value is lost completely.\footnote{218} Although this arguably applies to the child's testimony in child abuse cases, the key is that the more necessary the evidence, the greater the potential that the jury may overassess it and thereby erroneously convict an innocent defendant.\footnote{219} The principle of necessity would support the admission of untested evidence in any given case only if there were assurances that the evidence is more probative than prejudicial. As applied to the traditional hearsay exceptions, these assurances are provided by the external guarantees of trustworthiness which give it inherent indicia of reliability. Again, there are no such external guarantees of trustworthiness or inherent indicia of reliability with respect to child abuse testimony. Even though child abuse testimony is subject to some of the elements of confrontation, since the greatest risk to its reliability is the sincerity of the witness, and the most effective test to insure the sincerity of the witness (face-to-face confrontation) is not available under the Maryland procedure, the evidence admitted under the Maryland procedure is not as reliable as the evidence admitted under the hearsay exceptions. The evidence admitted under the Maryland procedure meets neither the reliability nor the necessity principles which justify the traditional hearsay exceptions.\footnote{220}

\footnote{216} Inasmuch as the Court relies upon the hearsay rule to justify its conclusion that the benefits of the Maryland procedure exceed the costs associated with the increase in the probability of an erroneous conviction, the analysis appears to be back to square one. The issue appears to be whether the costs to the witness from face-to-face confrontation may be so high as to justify withholding the right to face-to-face confrontation in certain cases. So viewed, the Court's opinion appears to reason that at least where the witness may be subject to undue trauma, and the increased probability of an erroneous conviction is kept to a minimum, the reduced trauma to the witness may exceed the costs associated with increased risk of an erroneous conviction. So stated, the Court's opinion in \textit{Maryland v. Craig} constitutes a repudiation of the long standing constitutional presumption that the costs associated with eliminating face-to-face confrontation exceed the costs to the witness.\footnote{217} See \textit{supra} note 195.\footnote{218} See Wigmore, \textit{supra} note 194, \S 1421.\footnote{219} See Kaplan, \textit{supra} note 195, at 1801-02.\footnote{220} If the necessity principle is looked at from the macro point of view, then there is validity to the analogy to the hearsay exceptions. See \textit{infra} notes 236-41 and accompanying text.
3. The Court Overestimated the Savings that Would Derive from the Elimination of Face-to-Face Confrontation

In comparing the Maryland procedure to the right to face-to-face confrontation, the Court presumed that these were the only two available options and that the dispositive issue was which approach more efficiently insured the reliability of the evidence. In light of the individualized findings of trauma in such cases, the savings from employing the Maryland procedure appear to be substantial. The Court failed, however, to include a third option: in certain cases it is more efficient if the witness simply does not testify. Witnesses who do not testify are spared from confronting the defendant face-to-face, and there is no increase in the probability of an erroneous conviction; there is, however, an increase in the probability of an erroneous acquittal. Still, the cost of an erroneous acquittal is relatively low. The cost of an erroneous acquittal is the net social loss suffered from decreasing the probability that those who actually engage in criminal activity will be apprehended and convicted. An erroneous acquittal in any given case will affect the probability of apprehension and conviction by much less than 1 percent, producing a negligible increase in the total social costs of crime.

While the expected cost to a witness from face-to-face confrontation is less than the expected cost of an erroneous acquittal, it is conceivable that where there is an individualized finding that the witness would experience trauma from face-to-face confrontation, the cost of the trauma may exceed the expected cost of an erroneous acquittal. In such cases, the witness simply would not come forward and press charges or participate in the prosecution in the offense. Nevertheless, this behavior may be efficient from a societal point of view. If the cost to the witness exceeds the net social loss which follows from the negligible increase in the probability of an erroneous acquittal as a result of the witness not coming forward and testifying, from an economic perspective, it would be better for the witness simply not to testify and run the risk of an erroneous acquittal. The increased cost associated with the increased risk of an erroneous acquittal in such a case is less than both the cost to the witness and the increased cost associated with the increased risk of an erroneous acquittal.

221. POSNER, supra note 13, at 553.

222. The net social loss is "limited to the increase in the total social costs of crime resulting from having thus reduced the probability of punishing criminal activity." POSNER, supra note 33, at 521.
conviction if there is no right to face-to-face confrontation.\textsuperscript{223} As

\begin{quote}
223. The cost of an erroneous acquittal is the highest possible cost of the witness’s refusal to testify. If there is other admissible evidence, the witness’s refusal to testify may have little impact upon the probability of an erroneous acquittal. Where, however, the witness is the victim and the bulk of the evidence against the defendant is the witness’s testimony, the witness’s refusal to testify may increase the probability of an erroneous acquittal to 100 percent. See Pennsylvania v. Ritchie, 480 U.S. 39, 60 (1987) ("Child abuse is one of the most difficult problems to detect and prosecute, in large part because there often are no witnesses except the victim.").

The first point to note is that the cost of the emotional distress experienced by the witness is less than the cost of an erroneous conviction. The cost of an erroneous conviction imposes similar psychological damages upon the wrongly convicted defendant, and there are the additional costs incurred by the defendant and society in punishing the defendant. See supra notes 63-68 and accompanying text. While the cost of the anxiety, and in some cases even trauma, to the witness no doubt may be great, the cost is secondary and incidental in nature. The primary emotional distress is the product of the underlying criminal conduct. While having to confront the alleged perpetrator face-to-face no doubt imposes significant costs upon the witness, the aggregate costs to the individual defendant and to society of an erroneous conviction are greater.

The comparison of the cost of the emotional distress experienced by the witness to the cost of an erroneous acquittal, however, is not as clear-cut. The cost of an erroneous acquittal is tied to the level of criminal activity for that crime. An erroneous acquittal decreases the probability that a criminal will be apprehended and convicted, which decreases the net punishment for a crime, which increases the total social costs of crime. Posner, supra note 13, at 553. Considering, however, the total number of crimes and the total social costs of crime, the effect of a single erroneous acquittal in any given case is not that costly. Posner, supra note 13, at 553. The negative effect a single erroneous acquittal has on the probability that a criminal will be apprehended and convicted arguably is less than 1 percent, which in turn would have minimal impact upon the net punishment associated with the crime, which in turn would have a \textit{de minimis} effect upon the total social costs of crime. Accordingly, the cost of an erroneous acquittal, while significant, is not anywhere near as great as the cost of an erroneous conviction. Posner, supra note 13, at 553. In comparing the cost of an erroneous acquittal to the cost of the emotional distress a witness may experience from face-to-face confrontation, the conclusion must be bifurcated. On one hand, for the vast majority of witnesses the cost of face-to-face confrontation is negligible, an amount less than the cost of an erroneous acquittal. On the other hand, no doubt there are some extraordinary cases where face-to-face confrontation can be traumatizing and very costly to the witness, so costly that the costs to the witness arguably exceed the costs of an erroneous acquittal.

Accordingly, from a law and economics perspective, the Supreme Court’s traditional analysis and rule that the defendant is entitled to a right to face-to-face confrontation is defensible. The right to face-to-face confrontation produces a net benefit in that it reduces the risk of an erroneous conviction more than it increases the risk of an erroneous acquittal. Moreover, in the vast majority of cases, this net benefit from the reduction in the total cost of error exceeds the cost of the rule in terms of the emotional distress to the witness. Although there may be a few extraordinary cases, \textit{arguendo}, in which the cost of the trauma to the witness arguably would exceed the net benefit to society from the right to face-to-face confrontation, however, before the cost to the witness would exceed the net benefit from face-to-face confrontation, the cost to the witness would exceed the cost of an erroneous conviction. Accordingly, it makes more sense in such cases for the state simply not to call the witness and run the increased risk of an erroneous acquittal than to call the witness but

\end{quote}
long as a sufficient number of complainants and witnesses are coming forward to ensure that society can achieve the necessary level of net punishment to ensure the effective enforcement of the statute in question, it would be more efficient for some witnesses simply not to testify and thus to increase the probability of an erroneous acquittal than to endure the costs of trauma they would suffer if forced to testify.\textsuperscript{24}

Again, Justice Scalia persuasively argued this point, though not in economic terms \textit{per se}, in his dissent:

The Court characterizes the State's interest which "outweigh[s]" the explicit text of the Constitution as an "interest in the physical and psychological well-being of child abuse victims," \textit{ante}, at 853, an "interest in protecting" such victims "from the emotional trauma of testifying," \textit{ante}, at 855. That is not so. A child who meets the Maryland statute's requirement of suffering such "serious emotional distress" from confrontation that he "cannot reasonably communicate" would seem entirely safe. Why would a prosecutor want to call a witness who cannot reasonably communicate? And if he did, it would be the State's own fault. Protection of the child's interest—as far as the Confrontation Clause is concerned—is entirely within Maryland's control. The State's interest here is in fact no more and no less than what the State's interest always is when it seeks to get a class of evidence admitted in criminal proceedings: more convictions of guilty defendants. That is not an unworthy interest, but it should not be dressed up as a humanitarian one.

And the interest on the other side is also what it usually is when the State seeks to get a new class of evidence admitted: fewer convictions of innocent defendants—specifically, in the present context, innocent defendants accused of particularly heinous crimes. The 'special' reasons that exist for suspending one of the usual guarantees of reliability in the case of children's testimony are perhaps matched by 'special' reasons for being particularly insistent upon it in the case of children's testimony. Some studies show that children are substantially more vulnerable to suggestion than adults, and often unable to separate recollected fantasy (or suggestion) from reality.\textsuperscript{25}

\textit{See Craig, 497 U.S. at 867 (Scalia, J., dissenting) ("Why would a prosecutor want to call a witness who cannot reasonably communicate?").\textsuperscript{24}}

\textit{See supra notes 222-25.\textsuperscript{224}}

\textit{Craig, 497 U.S. at 867-68.\textsuperscript{225}}
In *Maryland v. Craig*, the Court found that in certain cases there may be individualized findings that the trauma to the witness may be so great that it exceeds the net benefits of face-to-face confrontation. The problem with that statement is that before the cost to the witness could exceed the net benefit of face-to-face confrontation, the cost would exceed the expected costs associated with an increase in the probability of an erroneous acquittal if the witness did not testify. Not to call the witness makes more economic sense than it does to call the witness and not subject the witness to face-to-face confrontation. The key is not the cost of the trauma the witness would experience if forced to testify face-to-face, but the expected costs to society from an increase in the probability of an erroneous acquittal. The Court’s focus on the trauma to the witness if called to testify is misplaced.

4. The Court Failed to Include the Direct Costs of the Maryland Procedure in Its Analysis

The Court exacerbates its overestimation of the direct savings of elimination of face-to-face confrontation by its failure to include the direct costs of the Maryland procedure as a cost to be deducted from such savings. In analyzing the costs and benefits of the right to face-to-face confrontation and the Maryland procedure, economic analysis requires the Court to consider the direct costs of each of the respective rules. Although the Court went to great lengths to emphasize the high direct costs associated with the right to face-to-face confrontation in some cases (the trauma to the witness), the Court failed to even mention the direct costs associated with the Maryland procedure.

Inasmuch as the Court expressly held that the Maryland proce-

---

226. *Id.* at 853.
227. The criticisms listed above attack the Court’s assessment of the costs and benefits of eliminating face-to-face confrontation. Assuming the criticisms are valid, the bottom line is that the Court should have increased the cost of eliminating face-to-face confrontation and decreased the benefits of eliminating it. The problem, however, is that since no absolute values can be assigned to either the cost or the benefit of eliminating face-to-face confrontation, the ultimate comparison is as much qualitative as quantitative. To the extent that the Court’s analysis depends upon its assessment of the relative costs and benefits of eliminating face-to-face confrontation, the Court’s opinion gives little guidance as to the scope of the Court’s opinion and hence what is left of the defendant’s right to face-to-face confrontation.
228. *See supra* notes 57-58 and accompanying text.
229. *See supra* note 177 and accompanying text.
FACE-TO-FACE CONFRONTATION

do may be employed only where there is an individualized finding that the witness will suffer undue costs from having to testify face-to-face, the direct costs incurred to make such a finding will be significant. Such a finding can be made only after a hearing on the issue, a hearing which will impose administrative costs on the witness, on the attorneys in the case, the court system, and on the expert witnesses who will no doubt have to examine the witness and testify pro and con. The expected direct costs of the judicial hearing under the Maryland procedure are much greater than the expected direct costs under the hearsay exceptions. Moreover, these high direct costs will be incurred not only in those cases where the Maryland procedure is actually employed, but in other cases where the witness unsuccessfully attempts to invoke the procedure. And if the witness is successful in invoking the Maryland procedure, there will be additional direct costs associated with the actual mechanical operations of the procedure. In the aggregate, the expected direct costs of the Maryland procedure are much greater than the expected direct costs of the hearsay exceptions. The difference in the magnitude of the expected direct costs further undermines the validity of the Court’s analogy to the hearsay exceptions as support for eliminating the right to face-to-face confrontation in child abuse cases.

Although the Court’s cost-benefit analysis originally appeared to be consistent with a law and economics analysis, upon closer examination the Court’s analysis is highly questionable. In analyzing the Maryland procedure, the Court: (1) underestimated the increase in the probability of an erroneous conviction, and thus the increase in the expected cost of error; (2) incorrectly assumed that the evidence admitted under the Maryland procedure is just as reliable as the evidence admitted under the hearsay exceptions; (3) overestimated the benefits to be derived from the Maryland procedure’s elimination of face-to-face confrontation; and (4) failed to include the high direct costs associated with the Maryland procedure. The problem with saying that the Court’s opinion is indefensible from a law and economics perspective, however, is that the law and economics theory

230. “The requisite finding of necessity must of course be a case-specific one.” Craig, 497 U.S. at 855.

231. Although the purpose of the hearing is to minimize the aggregate amount of trauma inflicted upon the witness, having to discuss the incident and to think and talk about confronting the alleged perpetrator will inflict some emotional distress upon the witness.

232. Craig, 497 U.S. at 840-42.
purports to be both normative and descriptive. The theory is normative in that it predicts how rational beings should act, and descriptive in that it helps to explain why rational beings act the way they do. If the Supreme Court’s opinion is inconsistent with a normative analysis of the issue, why, as the Court pointed out, have a significant majority of the states adopted some type of procedure to protect the child witness from the trauma of testifying face-to-face against the defendant in child abuse cases? The reason is because the costs of face-to-face confrontation do exceed the benefits in child abuse cases, it is just that the Court missed the reason why this is so. The reason why the costs exceed the benefits lies in the Court’s analogy to the hearsay exceptions.

VI. THE COURT’S ANALOGY TO THE HEARSAY EXCEPTIONS: TAKING A MACRO VIEW

Although the Court’s analogy of the Maryland procedure to the hearsay exceptions is appealing, the Court’s analogy is incomplete. As is true with any procedural rule, the economic analysis of the hearsay exceptions turns on a comparison of the total costs of the hearsay exceptions versus the total costs of the alternative: the requirement of face-to-face confrontation:

\[
\text{TC W/ FTFC} = (P \text{ of EC})(C \text{ of EC}) \\
+ (P \text{ of EA})(C \text{ of EA}) + \text{DIRECT COSTS OF FTFC} \\
\text{vs.} \\
\text{TC W/ HEARSAY EXCPTNS} = (P \text{ of EC})(C \text{ of EC}) \\
+ (P \text{ of EA})(C \text{ of EA}) + \text{DIRECT COST OF HEARSAY EXCPTNS}.
\]

The cost of an erroneous conviction and the cost of an erroneous acquittal will be the same for both scenarios, and the cost of an erroneous conviction is greater than the cost of an erroneous acquittal. The critical variables are: the probability of an erroneous conviction, the probability of an erroneous acquittal, and the expected direct costs of each rule.

The driving variables behind the hearsay exceptions are the expected direct costs and probability of an erroneous acquittal if face-to-

233. See Posner supra note 13, at 23.
234. See id.
235. Craig, 497 U.S. at 853-54.
236. See supra notes 60-69 and accompanying text.
face confrontation was required. If there were no hearsay exceptions to the right of face-to-face confrontation, the cost of obtaining direct evidence in a hearsay situation would be either prohibitively high or simply impossible. For each case where it is impossible to obtain the evidence, the effect would be to increase the probability of an erroneous judgment, and more likely than not, the probability of an erroneous acquittal. The key, however, is the how often obtaining direct evidence would actually be prohibitively expensive or simply impossible. If the number of such cases were relatively small, the resulting costs (be they increased direct costs or, where it is impossible to obtain the evidence, increased indirect costs as a result of the increase in the probability of an erroneous acquittal) would still be less than the increased costs which would result from eliminating face-to-face confrontation (as a result of the increased risk of an erroneous conviction).

If, however, the number of cases in which obtaining direct evidence would be prohibitively expensive or impossible is great enough, then the direct and/or indirect costs inherent in requiring face-to-face confrontation would exceed the increased costs which would result from eliminating face-to-face confrontation and it would make sense to eliminate face-to-face confrontation. While the probability of an erroneous conviction is usually of greater concern because of the greater cost of an erroneous conviction, if (1) the increase in the direct costs (the prohibitively high costs of obtaining the direct evidence) and/or the increase in the probability of an erroneous acquittal (in those cases where obtaining the direct evidence is impossible) if face-to-face confrontation were retained, is substantially greater than (2) the increase in the probability of an erroneous conviction if face-to-face confrontation were eliminated, then (3) the magnitude of the direct costs and costs associated with the increase in the probability of an erroneous acquittal will more than offset the greater costs associated with the increase in the probability of an erroneous conviction.

While admitting testimony under the hearsay exceptions without subjecting it to face-to-face confrontation no doubt will increase the risk of an erroneous conviction, the requirement that the evidence bear inherent indicia of reliability minimizes the risk. As noted above, evidence is admitted under the hearsay exceptions only if its

238. See supra notes 222-28.
239. See supra notes 194-216.
probative value outweighs its prejudicial effect, i.e., only if there are external guarantees of trustworthiness which vest it with inherent indicia of reliability. The effect of this requirement is to minimize the increase in the probability of an erroneous conviction, and thus the expected cost of error under the hearsay exceptions. In addition, the expected direct costs of the hearsay exceptions procedure are low.

Where there are a disproportionately high number of cases in which the cost of obtaining direct evidence is prohibitively high or impossible, if there were no hearsay exceptions to the right to face-to-face confrontation there would be: (1) a low probability of an erroneous conviction, but (2) an extraordinarily high probability of an erroneous acquittal and/or high direct costs. In contrast, where there is a disproportionately high number of cases in which the cost of obtaining direct evidence is prohibitively high or impossible, but there are hearsay exceptions to the right to face-to-face confrontation, there would be: (1) a higher probability of an erroneous conviction, but not much higher in light of the judicial hearing on the reliability of the evidence; and (2) a much lower probability of an erroneous acquittal and/or direct costs:

TC w/ FTFC: LOW P of EC + HIGH P of EA + HIGH DC

vs.

TC w/ HEARSAY EXCEPTIONS: SLIGHTLY HIGHER P of EC + MUCH LOWER P of EA + MUCH LOWER DC.

The adoption of the hearsay exceptions implicitly reflects the qualitative conclusion that the savings from the decrease in the high direct costs/probability of an erroneous acquittal outweighs the costs inherent in the slight increase in the probability of an erroneous conviction.

Without the hearsay exceptions, society would not be able to enforce effectively its criminal laws. Accordingly, the hearsay exceptions exist because of the frequency of situations in which direct

---

240. The court must first determine that the witness is unavailable, but even then the evidence must have external guarantees of trustworthiness which give it inherent indicia of reliability. See supra notes 194-200.

241. See United States v. Gomez-Rojas, 507 F.2d 1213, 1218-19 (5th Cir. 1975) (describing the purpose of one of the hearsay exceptions, the informers privilege, as the "furtherance and protection of the public interest in effective law enforcement" (emphasis added)); see also Ohio v. Roberts, 448 U.S. 56, 64-65 (1980) (explaining that in determining the validity of any hearsay exception the Court recognizes the significance of every jurisdiction's "strong interest in effective law enforcement, and in the development and precise formulation of the rules of evidence applicable in criminal proceedings" (emphasis added)).
evidence would be either prohibitively expensive or impossible to obtain and not because in any given case the direct cost of obtaining the evidence would be either prohibitively expensive or impossible to obtain.

Understanding the economic justification for the hearsay exceptions is critical because it clarifies the perspective from which the right to face-to-face confrontation should be analyzed. The issue is not the micro level amount of trauma which any one child abuse witness may experience from face-to-face confrontation, but rather the macro level issue of whether a disproportionately high number of witnesses would experience the trauma such that the expected direct cost of obtaining such evidence would be prohibitively expensive or simply impossible. This macro level emphasis on the frequency with which the problem occurs and its effect upon the effective enforcement of the criminal laws is important because it matches the problem underlying the issue in *Maryland v. Craig.*

VII. THE REAL PROBLEM UNDERLYING *MARYLAND v. CRAIG* IS NOT THE TRAUMA TO THE WITNESS BUT RATHER THE EFFECTIVE ENFORCEMENT OF CHILD ABUSE LAWS

As Justice Scalia argued in dissent, the real problem underlying the issue in *Maryland v. Craig* is the effective enforcement of child abuse laws against guilty defendants. Pursuant to the law and eco-

---

243. Id. at 867. If the only problem was the amount of trauma a child abuse victim may suffer as a result of having to testify face-to-face against the defendant, the obvious solution would simply be not to call the victim if he or she would suffer undue trauma if called as a witness. See *id.* (Scalia, J., dissenting) ("Why would a prosecutor want to call a witness who cannot reasonably communicate?"). The problem with this solution, however, is that in a number of child abuse cases, the victim's testimony is essential to the prosecutor's case. Without the testimony there would be little chance of successfully prosecuting the charge against the defendant. See Pennsylvania v. Ritchie, 480 U.S. 39, 60 (1987) ("Child abuse is one of the most difficult crimes to detect and prosecute, in large part because there often are no witnesses except the victim."). Not calling the child abuse victims, so as to avoid the trauma caused by face-to-face confrontation, is tantamount to dropping the charges against the defendant. While not calling the child abuse victim who would suffer undue trauma from face-to-face confrontation would clearly eliminate the potential trauma to the victim, this approach impairs the state's ability to effectively enforce its child abuse laws. Accordingly, the state's real concern in *Maryland v. Craig* is not the trauma face-to-face confrontation inflicts upon any given child abuse witness in any given case, but rather the state's ability to effectively enforce its child abuse laws. Thus, the real issue at stake in *Maryland v. Craig* is whether the defendant's right to face-to-face confrontation furthers the effective enforcement of a state's child abuse laws.
nomics view of criminal law, the effective enforcement of criminal laws means that society achieves the level of deterrence it desires. For society to achieve the level of deterrence it desires, the net punishment associated with the undesirable conduct must be high enough that a sufficient number of individuals who contemplate engaging in the criminal conduct are deterred.

In the event society is not achieving effective enforcement of a given criminal law, that is, in the event the rate of crime for a given activity is unacceptably high, the logical response is simply to adjust the combination of (1) the severity of punishment, and (2) the probability of apprehension and conviction, so as to increase the net punishment and thereby decrease the rate of crime. As between the variables, the more efficient (and common) response is to increase the severity of the punishment.

Assuming the rate of apprehension

---

244. See supra notes 47-48 and accompanying text.
245. See supra notes 47-48 and accompanying text.
246. See Becker, supra note 23, at 177-78, see also Dau-Schmidt, supra note 23, at 12 (describing the common response of more severe punishment for repeat as opposed to first-time offenders). See generally, POSNER, supra note 13, at 223-31 (acknowledging society's heavy reliance upon imprisonment, but then offering the possible alternative of a far-reaching fine system).
247. See Becker supra note 23, at 176, 178; Dau-Schmidt, supra note 23, at 10 n.48; Posner, supra note 23, at 1204, 1206. When criminalizing conduct, society must set the level of punishment associated with a particular activity, so that when the severity of punishment is discounted by the probability of apprehension and conviction, the net punishment is still greater than the benefits the actor anticipates receiving from engaging in the criminal activity. See POSNER, supra note 13, at 220-21. In the event the level of punishment does not achieve the level of deterrence society desires, society has two options: (1) it can increase the degree of punishment for the conduct in question, or (2) it can increase the probability that the defendant will be apprehended and convicted. The literature agrees that the former is the preferred response. Increasing the punishment is more efficient than increasing the probability that the defendant will be apprehended and convicted. The latter costs more because not only must society incur the costs associated with increasing the probability that the actor will be apprehended and convicted but for each additional defendant apprehended and convicted, society must incur the costs associated with punishing the person. In contrast, simply increasing the punishment for the conduct in question results in no additional costs associated with apprehension and conviction, and only marginal costs associated with the increased term of the punishment. Accordingly, in the event society determines that the degree of deterrence associated with a crime is not acceptable, the norm is to increase the severity of the punishment for the crime. There is, however, a limitation to this principle. As the punishment for the crime increases, the punishment has a cost in terms of deterring people from engaging in related legal activity. There is always the risk that a person may accidentally commit the crime or that the person may be falsely accused of the crime. The greater the punishment associated with the crime, the less willing people are going to be to engage in socially useful activities which may expose them to the risk of accidentally committing the crime or of facilitating false accusations of having committed the crime. Accordingly, there is a limit on how high the punishment can be raised before the externality costs of the increase associated
and conviction remains the same, increasing the severity of the punishment increases the net punishment. The cost of increasing the net punishment by increasing the severity of the punishment is simply the marginal cost involved in increasing the severity of the punishment. In contrast, increasing the net punishment by increasing the rate of apprehension and conviction is much costlier from a societal perspective. The cost of increasing the rate of apprehension and conviction is greater than the cost of increasing the severity of the punishment because the former includes the latter. Increasing the rate of apprehension and conviction involves not only the costs inherent in increasing the rate, but also the increased rate of apprehension and conviction will lead to at least the same if not greater costs for the punishment phase than are involved in a corresponding increase in the severity of the punishment. The preferred response to an unac-

with the punishment exceed the benefits of increasing the punishment. In light of the limitation to the principle that it is always more efficient to raise the punishment than it is to increase the probability of apprehension and conviction, in certain cases the appropriate response to a lower level of deterrence than desired is to increase the probability of apprehension and conviction. See infra notes 252-54 and accompanying text.

A review of the history of the crime of child sexual abuse shows that many states followed this exact pattern. As the states realized that the rate of child sexual abuse was unacceptable, the legislatures responded first by increasing the punishment for the conduct in question. Even after increasing the punishment as high as the legislatures thought possible, however, the rate of child sexual abuse continued to be unacceptably high. The states responded by increasing the resources allocated towards apprehending and convicting those engaging in child sexual abuse. However, the rate of child sexual abuse continued at an unacceptably high level. Further research showed that the problem was not that the punishment was not severe enough, nor that the apprehension and conviction rate was too low, but rather that too few complainants were coming forward.

248. If the apprehension and conviction rate is .10 and the severity of the punishment is 10 years, the net punishment is 1 year. If the severity of the punishment is increased to 20 years, the net punishment is increased to 2 years. The only increase in the net social cost is the cost incurred in keeping the same number of defendants incarcerated for the additional year. POSNER, supra note 13, at 230.

249. Assuming the rate of apprehension and conviction is .10 and the severity of the punishment is 10 years, to increase the net punishment from 1 year to 2 years will require an increase in the rate of apprehension and conviction from .10 to .20. The immediate costs are obviously those costs involved in increasing the apprehension and conviction rate. In addition, there will be the costs involved in incarcerating the additional defendants convicted as a result of the increase in the apprehension and conviction rate. Although the net number of years is the same as under increasing the severity of the punishment, because more defendants are involved in the increase in the rate of apprehension and conviction, the net social cost for the punishment alone is at least as great, if not greater, than under the increase in the rate of apprehension and conviction, and that does not even include the additional costs incurred in increasing the rate of apprehension and conviction itself.

250. Instead of one defendant being imprisoned for two years, there will be two defendants imprisoned for one year.
ceptable rate of crime for a particular offense is to increase the punish-
ishment.

There are, however, limits to how high the punishment for a crime can be increased. First, the higher the punishment, the less willing individuals will be to engage in related but legal activities. There are always the risks of accidental commission of the crime or a wrongful conviction of an innocent defendant. Thus, the higher the punishment, the more likely people will be to decline to engage in socially productive and legal related activities. In addition, the higher the punishment for a particular crime, the less incentive a criminal has for not engaging in additional crimes during the course of his conduct. For example, if the punishment for child sexual abuse was raised to fifty years to life, and the punishment for murder was fifty years to life, then a criminal willing to commit child sexual abuse would have little incentive not to kill his or her victim.

There is a cap on how severely society can punish a crime.

Once society has raised the level of punishment to its most efficient level, if the rate of crime for the activity remains unacceptably high, then society must turn to increasing the rate of apprehension and conviction. Increasing the rate of apprehension and conviction involves increasing the resources devoted towards apprehending suspects and processing charges against defendants: increasing the number of police officers or investigators assigned to an area; improving the technology the officers and investigators have available to them; increasing the number of prosecutors assigned to an area to give each one greater time to devote to each case; increasing the support given to each such prosecutor (administrative support, expert support, etc.); and increasing the number of judges.

253. Dau-Schmidt, supra note 23, at 14. For that matter, one could even argue that the higher the punishment for child sexual abuse and the closer the punishment gets to the punishment for murder, the more incentive the criminal may have for killing his or her victim. He or she may think that killing the victim would further reduce the probability that the defendant would be apprehended and convicted.
254. See supra note 25.
A. An Economic Analysis of the Legislative History of Child Abuse Statutes

The economic description of how states should seek to achieve effective enforcement of their criminal laws matches to a large extent the legislative history of the crime of child sexual abuse. Having established that child sexual abuse is wrongful and should be criminalized, the more difficult questions are what is the appropriate level of net punishment society seeks to achieve and how should it be achieved. An historical examination of the crime of child sexual abuse reveals the general pattern which one would expect under the law and economics theory. After criminalizing child sexual abuse, each state settled upon a combination of the severity of punishment and the probability of apprehension and conviction which the state believed would produce the desired net punishment and level of deterrence. Once the states realized that the initial level of punishment was not achieving the desired net punishment and level of deterrence, the states responded by increasing the severity of the punishment for the crime. When this increase still did not achieve the desired net punishment and level of deterrence, the states responded by increasing the resources related to the rate of apprehension and conviction of individuals engaging in child sexual abuse (such as mandatory reporting statutes). The rate of child sexual abuse, however, remained

255. See Ark. Code Ann. §§ 5-14-104, 5-14-108 (Michie 1993) (Sentence for carnal abuse has a maximum sentence of twenty years as of 1985, which is an increase from the 1975 maximum sentence of ten years. Sentences for sexual abuse in the first degree also rose during the same time period from five to ten years.); Del. Code Ann. tit. 11, §§ 768, 773 (1987 & Supp. 1992) (Sentence for sexual assault (contact) rose from two years in 1975 to seven years in 1985. Sentence for sexual assault (intercourse) during the same time period rose from seven to a maximum of thirty years.); Fla. Stat. Ann. § 800.04 (West 1992) (Sentence for lewd and lascivious conduct rose from its 1951 level of ten years to fifteen years starting in 1971.); Ga. Code Ann. § 16-6-4 (1992) (In 1950, indecent molestation held a maximum sentence of five years. By 1969, the present day sentence of twenty years was set for child molestation.); La. Rev. Stat. Ann. §§ 14:81, 14:81.2 (West Supp. 1993) (In 1974, indecent behavior with juveniles held a maximum sentence of two years. In 1986, the maximum sentence was raised to five years, and in 1984, a law prohibiting molestation was established with a maximum sentence of fifteen years.).

256. See Mark A. Small, Policy Review of Child Abuse and Neglect Reporting Statutes, 14 Law & Pol'y 129 (1992); see also Jessica E. Mindlin, Comment, Child Sexual Abuse and Criminal Statutes of Limitations: A Model for Reform, 65 Wash. L. Rev. 189, 197-98 (1990) ("[L]egislatures recognize that child sexual abuse is an offense serious enough to warrant laws which facilitate prosecution of offenders."); id. at 195 n.33 (quoting various reasons given by states to explain their enactment of laws designed to increase apprehension and conviction).

One of the most active areas for this type of legislation is in the realm of mandatory
unacceptably high. The problem was that one of the basic assumptions which the law and economics theory makes about human behavior as it affects criminal enforcement did not hold true for the crime of child sexual abuse. See Terese L. Fitzpatrick, *Innocent Until Proven Guilty: Shallow Words for the Falsely Accused in a Criminal Prosecution for Child Sexual Abuse*, 12 U. BRIDGEPORT L. REV. 175, 180 (1991) ("As part of the detection process . . . most states enacted mandatory reporting laws . . . . The rationale was that early reporting would prevent further abuses from occurring."); see also CAL. PENAL CODE § 11166 (West Supp. 1994); MINN. STAT. ANN. § 626.556 (3) (West Supp. 1990); N.Y. SOC. SERV. LAW § 413 (McKinney 1990); VA. CODE ANN. §§ 63.1, -248.3, -248.4 (Michie 1991). See generally Seth C. Kalichman & Cheryl L. Brosig, *Mandatory Child Abuse Reporting Laws: Issues and Implications for Policy*, 14 LAW & POL’Y 153 (1992) (discussing the intent of mandatory reporting statutes and providing reasons for low and high rates of reporting). Beyond the basic mandatory reporting laws there have been refinements. See ARK. CODE ANN. § 12-12-517 (Michie Supp. 1993) (granting immunity to any good-faith reporter of child maltreatment); CONN. GEN. STAT. ANN. § 17a-101(b) (West 1990) (requiring that various professionals (such as school teachers, clergyman, optometrists, chiropractors, licensed family therapists, social workers, dentists, etc.) all have an equal responsibility to report abuse to the same degree as doctors and surgeons); Douglas J. Besharov, *Child Abuse: Arrest and Prosecution Decision-Making*, 24 AM. CRIM. L. REV. 315, 325-26 (1987) (explaining the public policy interests which allow for a report to be based upon less than total certainty).

The second area of legislative activism involves the tolling of statutes of limitations. A problem in child sexual abuse cases will arise either when a particular state has no provision for tolling its statute of limitations when the victim is either too young to report within the prescribed time period, or when the abuser, through coercion, keeps the abused from being able to report before the statute runs out. See generally Mindlin, supra. While not all of the states have addressed this problem, there are examples of legislatures and the courts taking the initiative to preserve the rights of the abused. See, e.g., ALA. CODE § 15-3-5(a)(4) (Supp. 1992) (one of seven states which does not have a statute of limitations for sexual abuse crimes involving a victim under the age of sixteen); ARIZ. REV. STAT. ANN. § 13-107 (Supp. 1988) (statute of limitation in Arizona will not begin to run until after actual discovery by the state, or from the time discovery should have occurred with exercise of reasonable diligence); ARK. CODE ANN. § 5-1-109(h) (Michie Supp. 1987) (the statute will not start until the abused reaches the age of 18); FLA. STAT. ANN. § 775.15(b)(7) (West 1989) (the statute will not begin to run until the abused reaches the age of 16); State v. Danielski, 348 N.W.2d 352, 356-57 (Minn. Ct. App. 1984) (tolling the statute until the abused is no longer subject to the abuser's authority, where the abused and the abuser shared the same living quarters and the abuser used authority to both coerce the actual incidents of abuse and then to keep the abused from reporting the crime until the standard time period for reporting had legally passed).

257. That, in a nutshell, is the problem the states are having with the crime of child sexual abuse. As the states realized that the rate of child sexual abuse was unacceptably high, the states initially responded by increasing the severity of punishment for child sexual abuse. When the states realized that the rate of child sexual abuse remained unacceptably high even after increasing the severity of the punishment, the states responded by increasing the rate of apprehension and conviction. The problem, however, is that these factors apply only to those victims who come forward, report the crime, and effectively participate in the prosecution of the cases. The states ultimately realized that the reason the rate of child sexual abuse remained unacceptably high was that a disproportionate number of child abuse victims were not
As noted above, the law and economics theory of criminal law postulates that society can achieve effective enforcement of its criminal laws by adjusting the net punishment associated with an offense until society achieves the desired level of deterrence. Net punishment is the severity of the punishment for an offense discounted by the rate of apprehension and conviction. The rate of apprehension and conviction is based upon the number of victims who come forward and report the crime. If a disproportionate percentage of victims refuse to come forward and report the crime, the state will not be able to obtain a sufficiently high rate of apprehension and conviction that is necessary to achieve effective enforcement of the criminal law in question (even with an increase in the severity of the punishment). Accordingly, the opportunity-shaping theory of criminal law implicitly assumes that an adequate number of victims come forward and participate in the prosecution process, so that the net punishment imposed upon those apprehended and convicted is sufficient to achieve the socially acceptable net punishment and level of deterrence.

True to the principles underlying the law and economics theory of human behavior, no doubt the assumption that victims will come forward and pressing charges. See John E.B. Myers, The Legal Response to Child Abuse: In the Best Interest of Children?, 24 J. FAM. L. 149, 182-83 (1985-86); Doris Stevens & Lucy Berliner, Special Techniques for Child Witnesses, in THE SEXUAL VICTIMOLOGY OF YOUTH 246, 248 (Leroy G. Schultz ed., 1980) (detailing the lack of victims and other witnesses who are willing to testify at trial); James A. Napoli, Comment, Closed Circuit Television Testimony for the Sexually Abused Child: The Right to Confrontation, 27 SANTA CLARA L. REV. 117, 118 (1987) (stating that children "are reluctant witnesses and sometimes retract prior testimony to absolve an assailant who is a family member [or] because they are frightened of the defendants"); Note, The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations, 98 HARV. L. REV. 806, 807 (1985) ("They are reluctant witnesses . . . [and] parents sometimes decline to press charges rather than subject their abused child to the ordeal of extended litigation."). If a disproportionate percentage of victims either fail to come forward and report the crime or are unable to effectively participate in the prosecution of the crime, then society will be greatly impaired in its efforts to effectively discourage the criminal conduct in question. The natural question then is to ask why these victims are either unwilling to come forward or unable to participate effectively in the prosecution process. The states determined that a disproportionate number of child abuse victims were not coming forward or were unable to participate effectively in the prosecution process principally because of the trauma associated with prosecuting the crime, and in particular the trauma associated with having to testify face to face against the perpetrator of the crime. Having identified the cause of the ineffective enforcement of the child sexual abuse laws, the logical response is to strive to eliminate, or at least minimize, the trauma. The problem with eliminating the trauma, however, is that the only way to eliminate the trauma is to eliminate the face to face confrontation, and eliminating face to face confrontation raises the issue of the scope of the Sixth Amendment's confrontation clause.

258. See supra notes 44-48 and accompanying text.
forward and report crimes is based on the assumption that the benefits of coming forward exceed the costs. In theory, and for the most part in practice, the benefits to victims of crime who come forward, report the crimes, and participate in the prosecution process generally do exceed the costs. Among the principal benefits are feelings of fulfilling one’s civic duty and revenge. Although these benefits are intangible, that does not make them any less real or valuable. On the other side of the equation, the criminal justice system is structured so as to minimize the costs to the victim. The state prosecutes the matter at its expense. For many crimes, the only costs imposed on the victim are the opportunity costs associated with prosecuting the matter, and the emotional distress, if any, of the prosecution process. Accordingly, the law and economics theory assumes that for the vast majority of crimes, both at the micro level (any particular case) and at the macro level (the nature of the crime generally), the benefits to the victim of coming forward and prosecuting charges outweigh the costs to the victim.  

The problem is that the assumption does not hold true for a disproportionately high percentage of victims of child sexual abuse.

The problem with the effective enforcement of child abuse laws was that not enough victims were coming forward and prosecuting charges to enable society to achieve the desired net punishment and corresponding level of deterrence. The states concluded that one of the reasons, if not the principal reason, the reluctant complainants were not coming forward was the trauma to the complainant from participating in the prosecution process, and in particular, the trauma.

259. For the most part, the crimes where this does not hold true are relatively minor crimes where the social costs involved are relatively minor, and society is less concerned about the problem of the reluctant victims in that setting.

260. For most crimes the benefits to the victim of coming forward and testifying against the defendant will outweigh the costs associated with testifying face-to-face, and society can reap the benefits of face-to-face confrontation (minimizing the conviction of innocent defendants) at little cost. In contrast, in the case of child sexual abuse, the age of the victim and the facts surrounding the typical crime will mean that in many cases, the victim will not sense any anger or seek any revenge against the defendant, but only sense fear at best. In addition, the age of the victim will usually mean that the victim will not appreciate his or her civic duty to come forward and prosecute the matter to protect others from this individual. The net result is that the victim of child sexual abuse realizes no real benefit from coming forward and testifying. At the same time the victim will realize a whole host of social costs associated with being stigmatized as the victim of child sexual abuse. Interestingly, the older the victim, the greater the possibility that the victim may appreciate the benefits of coming forward and prosecuting, and the greater the social costs associated with coming forward and prosecuting.
associated with having to confront, face-to-face, the alleged perpetrator.\textsuperscript{261} The literature is replete with evidence that victims of child abuse who come forward, report the offense, and participate in the prosecution process suffer a great deal of trauma.\textsuperscript{262} The amount and severity of trauma arguably is greater than almost any other crime. The percentage of victims who will suffer this trauma arguably is also greater than almost any other crime.\textsuperscript{263} The literature also establishes that one of the principal causes, if not the main cause, of the trauma is the trauma associated with having to face and testify against, face-to-face, the perpetrator.\textsuperscript{264}

Having identified the problem hindering the effective enforcement of child sexual abuse laws, namely, that not enough victims are coming forward, and having identified one of the principal causes of the problem, specifically, the trauma inflicted upon the victim from having to testify face-to-face against the defendant, the solution is obvious: develop a narrowly tailored special procedure\textsuperscript{265} by which the

\textsuperscript{261} See supra note 50.

\textsuperscript{262} See supra notes 49-51.

\textsuperscript{263} The only other crimes which come close are different crimes of sexual assault, especially rape, and possibly the crime of spousal abuse. But the physical and psychological age of the victim of child sexual abuse may distinguish child sexual abuse from these other crimes.

\textsuperscript{264} "[T]he fear and trauma associated with a child's testimony in front of the defendant . . . may so overwhelm the child as to prevent the possibility of effective testimony, thereby undermining the truth-finding function of the trial itself." Coy v. Iowa, 487 U.S. 1012, 1032 (1988) (Blackmun, J., dissenting); see Gail S. Goodman & Vicki S. Helgeson, Child Sexual Assault: Children's Memory and the Law, 40 U. MIAMI L. REV. 181, 203-04 (1985); Paula E. Hill & Samuel M. Hill, Note, Videotaping Children's Testimony: An Empirical View, 85 Mich. L. Rev. 809, 813-20 (1987); see also supra note 70.

\textsuperscript{265} An examination of child abuse statutes demonstrates the variety of ways in which the states have attempted to define, administer, and hopefully solve the problem facing the witness in a "narrowly-tailored" fashion.


The states have also set different standards for the level of harm that would qualify a child witness for protection. Some states require that the possible harm would be severe. N.J. STAT. ANN. § 2A:84A-32.4(b) (West 1994); N.Y. CRIM. PROC. LAW § 65.10(1) (McKinney
complainant can testify against the defendant without having to confront the defendant face-to-face. As is often the case, however, the states have further shaped their individual statutes. Five states require the judge to apply a "clear and convincing" evidence statute. CAL. PENAL CODE § 1347(b)(2) (West 1994); CONN. GEN. STAT. ANN. § 54-86g(a) (West 1994); IDAHO CODE § 19-3024A(2)(b) (1993); KAN. STAT. ANN. § 22-3434(b) (1992); N.Y. CRIM. PROC. LAW § 65.10(1) (McKinney 1994). Two states call for a "preponderance" of the evidence standard. MASS. GEN. LAWS ANN. ch. 278, § 16D(b)(I) (West 1993); N.H. REV. STAT. ANN. § 517:13-a(I) (1992). While the other statutes do not require an explicit standard of proof, most do require at least a "substantial likelihood" of harm. FLA. STAT. ANN. § 92.53(1) (West 1993); IND. CODE ANN. § 35-37-4-8(d) (West 1994); IOWA CODE ANN. § 910A.14 (West 1994); KAN. STAT. ANN. § 38-1558 (1993); KY. REV. STAT. ANN. § 421.350(4) (Michie/Bobbs-Merrill 1993); MASS. GEN. LAWS ANN. ch. 278, § 16D(2) (West 1993); MICH. COMP. LAWS ANN. § 600.2163a(5) (West 1993); MINN. STAT. ANN. § 595.02(4) (Michie/Bobbs-Merrill 1993); MISS. CODE ANN. §§ 13-1-405 to -407 (1991); MO. STAT. ANN. § 591.680 (Vernon 1993); NEB. REV. STAT. § 29-1926 (1993); N.H. REV. STAT. ANN. § 517:13-a (1992); N.M. STAT. ANN. § 30-9-17 (Michie 1993); OHIO REV. CODE ANN. § 2907.41(A) (Anderson 1993); OKLA. STAT. tit. 22, § 753(C) (1994); OR. REV. STAT. § 40.460(24) (1994); 42 PA. CONS. STAT. § 5984 (1994); RI. GEN. LAWS § 11-37-13.2 (1993); S.C. CODE ANN. § 16-3-1530(G) (Law 1993). The procedures at issue in Craig and Coy (one-way closed circuit television and a sight-blocking screen respectively) are but two alternatives offered as answers to the problem of trauma. See Maryland v. Craig, 497 U.S. 836, 853-54 (1990) (O'Connor, J., concurring) (listing the numerous States which have authorized either videotaped testimony or the use of one-way or two-way television procedures). At the time Craig was decided thirty-seven states had adopted the use of videotaped testimony for sexually abused children, twenty-four states had authorized the use of one-way closed circuit television in the same situations, and eight states allowed the use of a two-way system in which the child witness is still able to view the courtroom and the defendant.

FACE-TO-FACE CONFRONTATION

the obvious solution only creates new problems. While these procedure undoubtedly reduce the trauma to the witness, any procedure which permits the complainant to testify without testifying face-to-face against the defendant arguably conflicts with the spirit, if not the letter, of the Sixth Amendment’s Confrontation Clause.

Having set forth the problem the states were having in achieving effective enforcement of their child sexual abuse laws, and with conflict between the obvious solution and the principle underlying the right to face-to-face confrontation, the issue at stake in Maryland v. Craig clarifies itself. As Justice Scalia pointed out in dissent, the right to face-to-face confrontation is intended to minimize the costs of a wrongful conviction. On the other hand, the assumption underlying the right to face-to-face confrontation is that the social costs associated with the right are de minimis. In the case of child sexual abuse victims, however, the social costs associated with the right are not de minimis. At the micro level, assuming the defendant is guilty, the amount of trauma the witness may suffer from having to face his or her abuser arguably is greater than for any other
crime.\textsuperscript{269} Despite the potential for extreme trauma, however, this alone would not justify in any given case the repudiation of face-to-face confrontation. No matter how high the trauma to the individual witness, intuitively the cost of that trauma would not match the social costs associated with an erroneous conviction.\textsuperscript{270} Thus, to the extent the Supreme Court’s opinion appears to focus on the micro level costs and benefits of the right to face-to-face confrontation, it is indefensible.

On the other hand, analyzing the issue of the effective enforcement of child sexual abuse laws from the macro level, assuming that the costs associated with having to testify face-to-face against the alleged abuser are high enough that a significant number of complainants do not come forward, then the formula has to be recomputed. The effect of each witness who fails to come forward and participate in the prosecution process is to increase the probability of an erroneous acquittal. At some point the benefits from face-to-face confrontation in terms of the reduced probability of an erroneous conviction will be overcome by the high costs associated with the extraordinarily high direct costs to those witnesses who participate in the prosecution process and the disproportionately high probability of an erroneous acquittal as a result of those witnesses who refuse to participate in the prosecution process because of the anticipated trauma of face-to-face confrontation.\textsuperscript{271} Just as is the case with the hearsay exceptions, if there are a disproportionately high percentage of cases where the costs of obtaining the evidence is prohibitively expensive or simply impossible because of the trauma associated with face-to-face confrontation, then the costs of face-to-face confrontation will exceed the benefits.\textsuperscript{272} Although the issue could be stated in terms of at what point are there enough cases in which the cost of obtaining the evidence is prohibitively expensive or simply impossible such that the costs of face-to-face confrontation exceed the benefits, the Court apparently deferred to legislative determination with respect to this point.\textsuperscript{273} As long as the reliability of the evidence is otherwise assured, any increased probability of an erroneous conviction is more

\textsuperscript{269} This is due to both the nature of the crime and the age of the witness.
\textsuperscript{270} See supra notes 222-25.
\textsuperscript{271} See supra notes 239-42 and accompanying text.
\textsuperscript{272} See supra notes 239-42 and accompanying text.
\textsuperscript{273} Craig, 497 U.S. at 855 ("[W]e will not second-guess the considered judgment of the Maryland Legislature regarding the importance of its interest in protecting child abuse victims from the emotional trauma of testifying.").
than offset by the social benefit of decreased direct costs and increased number of witnesses willing and able to come forward and participate in the prosecution of child sexual abuse cases.\textsuperscript{274}

Just as the problem underlying \textit{Maryland v. Craig}, the ineffective enforcement of the child sexual abuse statute, can be evaluated from a macro point of view, so too can the problem at issue in \textit{Maryland v. Craig}: the conflict between the Maryland procedure and the right to face-to-face confrontation under the Confrontation Clause. It has long been recognized that the right to face-to-face confrontation involved micro level costs (the potential trauma to the witness) and benefits (the reduced risk of an erroneous conviction).\textsuperscript{275} The Confrontation Clause arguably represents the constitutional presumption that in any given case the benefits of face-to-face confrontation exceed the costs. This presumption assumes, however, that the right to face-to-face confrontation either does not affect, or has a \textit{de minimis}
effect upon, the number of complainants who come forward and participate in the prosecution process. While this assumption is true for most crimes, there is evidence that for a significant number of victims of child abuse, the trauma associated with the prosecution process in general, and face-to-face confrontation in particular, is so high, that the costs of coming forward and participating in the prosecution process exceed the benefits. For each victim of child abuse who fails to come forward and participate in the prosecution process, there is a cost to society in terms of the reduced net punishment for the crime of child abuse.

At the macro level, while the failure of a few victims to come forward and prosecute charges will not affect the constitutional presumption that the benefits of face-to-face confrontation exceed the costs, if enough victims fail to come forward and participate in the prosecution process (because of the right to face-to-face confrontation) the macro level costs to society will exceed the acknowledged benefits of face-to-face confrontation. In this sense, the Court's reference to the hearsay rule is an appropriate analogy.

Although the Court wants to adopt procedural and evidentiary rules to minimize the total cost of error, and in minimizing the total cost of error the primary concern in most instances will be to minimize the probability of an erroneous conviction, there will be situations where the primary concern will be the probability of an erroneous acquittal. If the procedural or evidentiary rule results in an inordinately high percentage of victims not coming forward and participating in the prosecution process, as a practical matter each such case must be counted in calculating the probability of an erroneous acquittal.

276. For most crimes, there is no evidence of a statistically significant rate of erroneous acquittals, therefore there is no reason to question the assumption underlying the right to face-to-face confrontation. In contrast, however, there is strong evidence of a statistically significant rate of erroneous acquittals with respect to the crime of child abuse, erroneous acquittals in the form of victims who refuse to come forward and prosecute charges or who are unable to participate in the prosecution process because of the trauma associated with the right to face-to-face confrontation. See supra notes 50-51. Accordingly, if the rate of erroneous acquittals due to face-to-face confrontation is high enough, i.e., if the number of victims of child abuse refuse to come forward and prosecute is high enough, the net social costs of face-to-face confrontation will exceed the net social benefits of face-to-face confrontation. If the net social costs exceed the net social benefits, then from a law and economics perspective it makes sense to deny defendants the right to face-to-face confrontation.

277. See supra notes 50-53.
278. Craig, 497 U.S. at 848-49.
279. The combined expected cost of error and the expected direct cost of the rule in question.
acquittal. If the probability of an erroneous acquittal gets high enough, society cannot effectively enforce its criminal laws. The net social costs associated with society not being able to enforce effectively its criminal laws must be included in the total costs of the rule in determining whether the rule increases or decreases the total cost of error. 280 If the total cost of face-to-face confrontation exceeds the total benefit, then the right to face-to-face confrontation no longer furthers the effective enforcement of child abuse laws. Accordingly, the Court’s conclusion that the cost of face-to-face confrontation in the child abuse cases exceeds the benefit, and its holding that defendants in child abuse cases may be denied their right to face-to-face confrontation, are defensible if (1) the macro level cost of the reluctant complainants result in the cost of face-to-face confrontation exceeding the benefit, and (2) the macro level cost of the reluctant complainants can be attributed to the right to face-to-face confrontation.

VIII. AN ECONOMIC ANALYSIS OF MARYLAND V. CRAIG FROM A MACRO PERSPECTIVE

While the Court’s holding in Maryland v. Craig may be defensible from a macro level point of view, the Court’s opinion attempts to rationalize the holding solely from a micro level point of view. From a law and economics perspective, the outcome is a highly questionable result-oriented opinion which provides little guidance as to what is left of the right to face-to-face confrontation. 281 Because the Court failed to include the macro level reluctant complainant costs in its analysis, the Court’s conclusion that the costs of face-to-face confrontation exceed the benefits in child abuse cases arguably constitutes an across the board repudiation of the longstanding presumption that the

280. “There is some increase in the social cost of crime as a result of reducing . . . the probability of punishing criminal activity . . . .” POSNER, supra note 13, at 553.

281. The flaws in the Court’s analysis produce a result-oriented opinion which lacks a persuasive rationale. More importantly, the Court’s analysis constitutes open season on the right to face-to-face confrontation. The state's interest in minimizing the trauma to witnesses cannot logically be limited to witnesses in child abuse cases. While the trauma to such witnesses may be more documented and more readily understandable, it is easy to conceive of other scenarios where the victims, regardless of age, of other crimes may likewise be subjected to extraordinary trauma if required to testify face-to-face against the defendant. The opinion in Maryland v. Craig arguably constitutes a broad attack on the right to face-to-face confrontation; one which subjects the right to a case by case cost-benefit analysis regardless of the nature of the offense, the age of the victim, or how the state interest is raised.
micro benefits inherent in face-to-face confrontation (the reduced risk of an erroneous conviction of an innocent defendant) exceed the costs (the uneasiness and trauma it may cause the witness).282

Because the Court failed to focus on the macro level reluctant complainant costs present in child abuse cases, the Court's opinion lacks a defensible explanation for why child abuse witnesses should be treated any differently than witnesses in other cases. The only explanation the Court puts forth for why child abuse witnesses should be treated differently is the state's interest in protecting the physical and psychological well-being of child abuse victims.283 It is difficult to see, however, how the state's interest in protecting the well-being of children who are the victims of child abuse differs that much from (1) the state's interest in the well-being of children who are the victims of other personal crimes of a heinous nature; and (2) the state's interest in the well-being of victims of heinous crimes, regardless of the age of the victim.284 Once the state shows an important state

282. The reason the Court's opinion appears to be such a broad attack on the traditional interpretation of the Confrontation Clause is that the Court's opinion improperly focused on the trauma a particular child sexual abuse witness may experience. Craig, 497 U.S. at 851-57. In contrast, if the Court had viewed the problem at the macro level, the Court would have realized that the underlying problem in Craig is not the amount of trauma any given witness may suffer, but rather the net social cost of enforcing the right of face-to-face confrontation against child abuse victims in general.


284. The problem with the Court's focus on the trauma to the witness becomes apparent when one tries to assess the scope of the Court's opinion. From an economic perspective, if the key to eliminating the right to face-to-face confrontation is the individualized finding of trauma, the Court's opinion fails to provide a defensible justification for why child abuse victims should be treated differently than other witnesses who would suffer undue emotional distress from face-to-face confrontation. The Court stated that the right to face-to-face confrontation may be dispensed with "where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured." Id. at 830. Inasmuch as the Court found that the Maryland procedure adequately insures the reliability of the evidence, is there any reason to limit the procedure to child abuse victims who would suffer trauma? In Maryland v. Craig, the Court ruled that as long as there is an individual finding of trauma, the denial of the right to face-to-face confrontation was justified because: (1) a State has a legitimate and important interest in the physical and psychological well-being of child abuse victims; (2) a State has a legitimate and important interest in protecting child abuse victims from the emotional trauma produced by testifying face-to-face in the presence of the defendant; and (3) the victim in the case in question would have suffered more than de minimis trauma by having to testify face-to-face against the defendant. See id. at 851-57. But does not a State have a legitimate and important interest in the physical and psychological well-being of the victims of all crimes? Does not a State have a legitimate and important interest in protecting the victims of all crimes who would suffer emotional distress from face-to-face confrontation from the emotional trauma? If the victim of any crime, regardless of his or her age, can show that he or she would suffer
FACE-TO-FACE CONFRONTATION

interest, all the state has to prove is that the trauma to be experienced by the witness as a result of face-to-face confrontation is "more than de minimis, i.e., more than 'mere nervousness or excitement or some reluctance to testify.'" The Court's opinion arguably ends up subjecting the right to face-to-face confrontation to a case by case cost-benefit analysis regardless of the nature of the crime, the age of the victim, or how the state interest is raised. The result is an opinion which arguably permits the denial of face-to-face confrontation anytime the witness is "psychologically unavailable." Such a result would seriously undercut the long-standing right to face-to-face confrontation. The Court's opinion hints that the Court realized the potentially far-reaching effect of the opinion, that the Court was uncomfortable with this potential effect, but the Court was unable to develop a defensible limit to the scope of its opinion because of the opinion's micro level perspective.

285. Id. at 856 (citing Wildermuth v. State, 530 A.2d 275, 289 (Md. 1987)).
286. See Myers, supra note 257, at 224-25 ("There is little doubt that the trauma of testifying renders some individuals psychologically unavailable. In the context of child abuse litigation . . . the temptation to declare a child unavailable is very real, and a finding of psychological unavailability is a relatively simple way to reach the desired goal.").

To claim that a child witness is psychologically unavailable might seem a natural extension of the unavailability exception in the hearsay context. See FED. R. EVID. 804(a). Given that each state with a Maryland-type procedure offers its own interpretation of what constitutes trauma debilitating enough to make a witness psychologically unavailable, however, indicates this standard is far too nebulous to be considered on the same constitutional ground as the clearer hearsay exception of unavailability.

287. After going to great pains to establish that the Confrontation Clause reflects only a "preference" for face-to-face confrontation which "must occasionally give way to considerations of public policy and the necessities of the case," the Court then attempted to limit the exception it was creating to face-to-face confrontation:

That the face-to-face confrontation requirement is not absolute does not, of course, mean that it may easily be dispensed with. As we suggested in Coy, our precedents confirm that a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured.
On the other hand, if the Court had viewed the problem present in *Maryland v. Craig* from the macro level perspective, the Court's holding would have been more defensible, the Court's opinion would have provided greater guidance as to its scope and the opinion would have preserved more of the defendant's right to face-to-face confrontation. Viewed from the macro level perspective, the problem underlying *Maryland v. Craig* is not the amount of trauma any individual victim or witness may suffer as a result of face-to-face confrontation, but rather whether face-to-face confrontation contributes to the efficient and effective enforcement of criminal laws. Defendants in child abuse cases may be denied their right to face-to-face confrontation only if such denial contributes to the efficient and effective enforcement of the child abuse laws, i.e., only if: (1) the aggregate (micro level and macro level) costs of face-to-face confrontation for child abuse cases exceed the benefits of face-to-face confrontation; and (2) denying a defendant his or her right to face-to-face confrontation will in fact reduce the macro level reluctant complainant costs.

Assuming the state could show that the reason victims were not coming forward and participating in the prosecution process is because of the costs involved in the right to face-to-face confrontation, the Supreme Court's holding would be more defensible. Basing the Court's holding on the macro view of the problem underlying *Maryland v. Craig* also limits the scope of the opinion and preserves much of the

---

288. Viewing the problem and the Court's holding in this perspective, the patent and latent questions left unanswered by the Court's opinion become easier to answer. First, the Court expressly stated that it was not addressing the issue of how much trauma the victim must suffer before the procedure can constitutionally be invoked. *Id.* at 856. The law and economics analysis of the problem indicates that the procedure should not be invoked unless the complainant is one who would not otherwise participate in the prosecution process. Second, the Court left open the issue of what other state interests would warrant depriving the defendant of his or her right to face-to-face confrontation. *Id.* at 850. The law and economics analysis indicates that this issue should not be addressed on the micro level, despite the tone and nature of the Supreme Court's opinion. The issue is not whether in any given case, the costs to the complainant are so great that the defendant should be deprived of the right to face-to-face confrontation. Rather, the issue needs to be addressed at the macro level: when are the net social costs associated with the confrontation clause greater than the net social costs associated with depriving the defendant of his or her right to face-to-face confrontation. The only other crimes which may fit within this category would appear to be crimes of sexual assault and possibly spousal abuse. But as the Supreme Court noted, the principal reason the complainants fail to come forward must be from the trauma associated with having to confront the alleged perpetrator, not from the prosecution process generally. *Id.* at 856. Absent evidence that this is the case, the holding in *Maryland v. Craig* should be narrowly limited to the unique nature of the crime involved.
defendant’s right to face-to-face confrontation by preserving the basic presumption that in any given case the benefits of face-to-face confrontation exceed the costs.

Although analyzing the problem at issue in *Maryland v. Craig* from the macro level perspective does not necessarily limit the opinion in *Maryland v. Craig* to child abuse cases alone, it does require that before a court engages in a case by case evaluation of the right to face-to-face confrontation, the court has to show: (1) that the state cannot achieve the desired level of deterrence for a particular crime; (2) that the state cannot achieve the desired level of deterrence because in an extraordinarily high number of cases face-to-face confrontation would make obtaining the evidence either prohibitively expensive or impossible (i.e., not enough victims are coming forward and participating in the prosecution process); and (3) that the reason obtaining the evidence is prohibitively expensive or impossible is because of face-to-face confrontation. Then, and only then, should the right to face-to-face prosecution be subject to evaluation on a case by case basis.289

The macro level analysis of the issue in *Maryland v. Craig* also answers the perplexing question of how much trauma must be endured by the witness before the right to face-to-face confrontation is withheld from the defendant. Inasmuch as the underlying problem is that not enough victims are coming forward to permit society to reach the net punishment necessary to achieve the desired deterrence level, the overriding concern must be to bring the reluctant complainants into the prosecution process. The right to face-to-face confrontation should be sacrificed in any given case only when the state can demonstrate that the victim would not or could not otherwise come forward and effectively participate in the prosecution process.

IX. CONCLUSION

In the end, *Maryland v. Craig* should not be construed as a full scale attack on the right to face-to-face confrontation (i.e., not a new exception to the Confrontation Clause anytime a witness claims to be psychologically unavailable), but rather only a very narrow intrusion on the right to face-to-face confrontation necessary to achieve the

289. These elements may apply to the crimes of rape, spousal abuse, and similar crimes where: (1) there is little direct evidence of the crime other than the complainant’s testimony; and (2) the nature of the crime increases the probability that a complainant would experience trauma if required to testify face-to-face against the defendant.
efficient and effective enforcement of the child abuse laws.