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# THE RIGHT OF CONFRONTATION, JUSTICE SCALIA, AND THE POWER AND LIMITS OF TEXTUALISM

BRYAN H. WILDENTHAL\*

## I. INTRODUCTION

In the most compelling scene of the highest-rated television movie of the 1988-89 season, the protagonist, a victim of child sexual abuse, is required to testify about his ordeal at a public trial. As he faces hundreds of strangers, his family, his girlfriend, and the accused abuser himself, the prosecutor coaxes him to describe the most degrading and personal aspects of his ordeal. Haltingly, agonizingly, barely able to speak, he tries.<sup>1</sup> It is

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I would like to thank two great criminal procedure teachers, Professors Barbara Babcock and Bob Weisberg, for their inspiring classes which never hesitate to tackle the big questions. I am also grateful to Professor Babcock for her helpful comments on this article. I owe a special note of thanks to the late Professor John Kaplan, the greatest evidence teacher ever; two years before his tragic and untimely death, I had the extraordinary privilege of being a student in the last evidence class he taught. For a small sense of the impact he had on so many others, see *Tribute: In Memory of John Kaplan*, 42 STAN. L. REV. 847 (1990). I would also like to thank my classmates in Professor Babcock's Spring 1989 seminar on criminal procedure, for which I wrote a paper that evolved, in part, into this article. Their comments and ideas were invaluable in developing my thinking on this subject. I also thank Dr. Gail S. Goodman of the State University of New York at Buffalo, Psychology Department, for kindly sending me copies of some of her studies. Finally, for the opportunity to learn about criminal procedure not as an abstract theory but as a living body of law affecting the outcome of real cases and the lives of real people, I would like to acknowledge my debt to Judge Johnson and Chief Justice Cavanagh, each of whose fundamental commitment to procedural fairness in the criminal justice system has been both an example and an inspiration to me.

It cannot be emphasized too strongly, of course, that all views expressed in this article are strictly my own, as are all errors and shortcomings. In particular, the views expressed herein do not, and should not be taken to, reflect in any way the views of either Judge Johnson or Chief Justice Cavanagh, and do not, and should not be taken to, reflect any view even on my own part with regard to any particular case which may come before either of them.

1. The scene described occurs toward the end of *I Know My First Name Is Steven* (NBC television broadcast, May 22-23, 1989). See TV Guide, May 20, 1989, at 10-11, 115-16, 137. The film is based on the widely reported true story of Steven Stayner, who was kidnapped at age seven in Merced, California, by a child molester, Kenneth Parnell, who kept him for the next seven years and subjected him to repeated sexual abuse. Parnell held Stayner out as his own son, made the boy call him "Dad," and brainwashed him into thinking that he had been legally adopted. Stayner went to police at age fourteen when Parnell kidnapped another boy, and Parnell was later convicted on the basis of Stayner's testimony. See, e.g., N.Y. Times, Mar. 3, 1980, at A14, col. 2; *id.*, Mar. 6, 1980, at A16, col. 3; *id.*, Mar. 9, 1980, §

difficult, if not impossible, to fully empathize with the feelings the child victim-witness must experience during such trials. Mental health professionals, however, have begun to research and document the effects of the adversary trial process on such children.<sup>2</sup> Concern about the psychological trauma related to giving trial testimony, and the damage it may do to the truth-seeking function of the trial itself, have motivated the vast majority of the states to establish special procedures for accommodating child witnesses in such cases.<sup>3</sup> States have also shown great interest in expanding the

1, at 26, col. 1; *id.*, Mar. 25, 1980, at A17, col. 1; *id.*, May 20, 1980, at A16, col. 6; *id.*, June 18, 1981, at A21, col. 1; *id.*, June 27, 1981, § 1, at 6, col. 1; *id.*, June 30, 1981, at A12, col. 5; *id.*, Jan. 7, 1982, at A24, col. 5 (reporting Stayner's testimony and Parnell's conviction); *id.*, Feb. 4, 1982, at A20, col. 1; *id.*, Apr. 6, 1985, § 1, at 20, col. 5. The conclusion of the film, according to the Nielsen ratings, was viewed by the largest audience of any TV-movie of the season. TV Guide, July 8, 1989, at 13. In a final, tragic twist to the story, Stayner was killed in a hit-and-run accident only four months after the film aired. See N.Y. Times, Sept. 18, 1989, at A15, col. 1; *id.*, Sept. 23, 1989, § 1, at 30, col. 5. Despite the inherent potential for sensationalism, the film takes a restrained, compassionate, and grimly honest approach to the subject matter, and is written and acted with intelligence and sensitivity. In terms of evoking empathy for the victim-witness in this kind of case, it is difficult to see how reading any number of scholarly studies of the problem could substitute for watching those few agonizing moments in which Stayner (as portrayed by actor Corin Nemec) literally struggles to speak.

2. See, e.g., D. EVERSTINE & L. EVERSTINE, *SEXUAL TRAUMA IN CHILDREN AND ADOLESCENTS: DYNAMICS AND TREATMENT* 179-80 (1989); R. KEMPE & C. KEMPE, *THE COMMON SECRET: SEXUAL ABUSE OF CHILDREN AND ADOLESCENTS* 85 (1984); Tedesco & Schnell, *Children's Reactions to Sex Abuse Investigation and Litigation*, 11 *CHILD ABUSE & NEGLECT* 267 (1987); Goodman & Helgeson, *Child Sexual Assault: Children's Memory and the Law*, 40 U. MIAAMI L. REV. 181, 201-05 (1985); Berliner & Barbieri, *The Testimony of the Child Victim of Sexual Assault*, 40 J. SOC. ISSUES, No. 2, at 125 (1984); Goodman, *The Child Witness: Conclusions and Future Directions for Research and Legal Practice*, 40 J. SOC. ISSUES, No. 2, at 157, 166-69 (1984); Weiss & Berg, *Child Victims of Sexual Assault: Impact of Court Procedures*, 21 J. AM. ACAD. CHILD PSYCHIATRY 513 (1982); see also *Maryland v. Craig*, 110 S. Ct. 3157, 3168-69 (1990) (citing Brief for American Psychological Association as *Amicus Curiae* and Goodman, *et al.*, *Emotional Effects of Criminal Court Testimony on Child Sexual Assault Victims*, Final Report to the National Institute of Justice (Aug. 1989) (paper presented to American Psychological Association)). Two pioneering studies in this area by legal scholars are Libai, *The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System*, 15 WAYNE L. REV. 977, 1003-32 (1969) (proposing use of "Child-Courtroom"), and Avery, *The Child Abuse Witness: Potential for Secondary Victimization*, 7 *CRIM. JUST. J.* 1, 25-45 (1983) (suggesting, e.g., use of two-way, closed-circuit television and videotaping). See also Note, *Videotaping Children's Testimony: An Empirical View*, 85 *MICH. L. REV.* 809 (1987) [hereinafter Note, *Videotaping Children's Testimony*] (urging use of videotaped testimony). Even the most recent scholarly article noted above, however, states that "there is very little research on the issue." Tedesco & Schnell, *supra*, at 268. Caution is therefore still required in advancing anything more than tentative empirical conclusions in this area. Cf. *infra* note 219 (noting some sources cited above suggesting possibility, in some contexts, that trial process may actually have therapeutic impact on some child victim-witnesses).

3. See *Maryland v. Craig*, 110 S. Ct. 3157, 3167-68 & nn.2-4 (1990) (listing 37 states providing for videotaped testimony by child witnesses, 24 states providing for testimony via one-way, closed-circuit television, and 8 states providing for testimony via two-way, closed-circuit television).

traditional scope of admissible hearsay in order to use out-of-court statements by victims in child sexual abuse trials.<sup>4</sup> The typical effect of the procedures employed at trial has been to limit, or eliminate outright, the defendant's ability to visually confront the complaining witness.<sup>5</sup> The inevitable collision between such innovations and the Sixth Amendment, which provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him,"<sup>6</sup> has produced four important, and deeply divided, Supreme Court decisions in the past few years: *Kentucky v. Stincer*,<sup>7</sup> *Coy v. Iowa*,<sup>8</sup> *Idaho v. Wright*,<sup>9</sup> and *Maryland v. Craig*.<sup>10</sup>

This article examines and critiques the Supreme Court's response to these issues by focusing in particular on the interpretive approach of Justice

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4. See, e.g., *State v. Giles*, 115 Idaho 984, 772 P.2d 191 (1989) (applying catch-all hearsay exception of Idaho Rule of Evidence 803(24) to admit hearsay statements identifying sexual abuser made by two-and-a-half-year-old child, later judged incompetent to testify at trial, during highly suggestive interview by pediatrician); *infra* note 258 (discussing *Giles*); *Smart v. State*, 297 Ark. 324, 761 S.W.2d 915 (1988) (applying Arkansas Rule of Evidence 803(25)(A) to admit hearsay statements by eight-year-old girl to mother and other persons describing sexual abuse and identifying assailant); *Miller v. State*, 517 N.E.2d 64 (Ind. 1987) (upholding facial constitutionality of IND. CODE § 35-37-4-6 (1985 & Supp. 1991), which provides for admissibility of any hearsay statement concerning sexual or other abuse by child under ten, where statement is determined, at nonjury hearing providing defendant full opportunity to confront and cross-examine child, to have "sufficient indications of reliability"); see also, e.g., 437 Mich. xxxiv (1991) (adopting new Michigan Rule of Evidence 803A, reviving common-law "tender years" hearsay exception for spontaneous statements made by child under ten regarding instance of sexual abuse, where statement was made immediately or soon after abuse occurred, and is admissible only to corroborate child's trial testimony, under strict procedural safeguards).

5. There are important differences between the various procedures that have been adopted in different states. In two-way, closed-circuit television systems, for example, the child typically testifies in a room separate from the courtroom, with the judge, attorneys, and sometimes a parent or counselor present, and both the defendant and the jury in the courtroom, and the child, can see each other on television. In one-way, closed-circuit systems, the layout is the same except that the child, while observable by the defendant and the jury on television, cannot see them or the courtroom on television. Under either one-way or two-way systems, the defendant may, under some statutes, be present in the room with the child. While this may well obviate any confrontation clause problems, see *infra* text accompanying note 97; *infra* note 221, it also may fail to fully protect the child from the feared trauma of visual confrontation. Videotaping the child's testimony at some time before trial, and then playing it at trial, is essentially indistinguishable for purposes of analysis from one-way, live, televised testimony. (Again, it is highly significant whether or not the defendant is present in the room with the child during the testimony.) The time delay is obviously undetectable simply from watching the testimony, and it would seem analytically irrelevant as long as the procedures followed during videotaping otherwise conform to trial requirements. A typical approach is to authorize several alternative procedures along these lines. See, e.g., MINN. STAT. § 595.02(4) (1988).

6. U.S. CONST. amend. VI.

7. 482 U.S. 730 (1987) (6-3 decision).

8. 487 U.S. 1012 (1988) (6-2 decision).

9. 110 S. Ct. 3139 (1990) (5-4 decision).

10. 110 S. Ct. 3157 (1990) (5-4 decision).

Antonin Scalia.<sup>11</sup> Justice Scalia has not only been a pivotal actor in the Court's resolution of the four cases noted above, he has articulated—both in *Coy*, where he wrote the opinion of the Court, and in *Craig*, where he delivered a powerful dissent joined by three other Justices<sup>12</sup>—a starkly textualist<sup>13</sup> vision of the Constitution, the like of which has not been seen since the heyday of Justice Hugo Black. The tensions and contradictions of *Stincer*, *Coy*, and *Craig*, each of which dealt with restrictions on confrontation with witnesses testifying at trial or trial-related proceedings, provide the primary grist for my discussion in Parts II and III. While I also address *Wright*, the lone hearsay case, in Part IV, it is in the former area that

11. I am indebted to Professor George Kannar for his recent and brilliant exploration of the roots and implications of Justice Scalia's interpretive commitments. See Kannar, *The Constitutional Catechism of Antonin Scalia*, 99 YALE L.J. 1297 (1990). Professor Kannar notes that analyses of a particular Justice's constitutional philosophy "enroll within a well-established tradition," *id.* at 1299, and that analyses of Justice Scalia in particular have already become something of a cottage industry, *see id.* at 1298 n.5 (citing seven notes and articles). However, somewhat along the lines of my previous study of Justice Blackmun and Tenth Amendment federalism doctrine, *see Wildenthal, Judicial Philosophies in Collision: Justice Blackmun, Garcia, and the Tenth Amendment*, 32 ARIZ. L. REV. 749 (1990), I seek in this article to focus on a particular Justice's approach to a particular constitutional guarantee, and then to draw lessons from that study along broader lines, both institutionally and philosophically.

I do not attempt to advance the debate over which types of procedures or innovations are best suited to protect child witnesses from specific types of psychological harm. Nor do I undertake the task of analyzing in detail the various state standards and procedures that exist in this area and the impact upon them of the Supreme Court's recent decisions. The first issue is basically beyond my expertise, and, I would hazard to say, that of most *legal* scholars in the strict sense. (One does not have to be an expert in child psychology, however, to form an intelligent opinion about the implications that the various innovations in this field have for the fairness and integrity of criminal trials in light of constitutional guarantees.) The second task has been taken up by an impressive array of student scholarship. *See, e.g.,* Note, *Balancing the Defendant's Confrontation Clause Rights with the State's Public Policy Goal of Protecting Child Witnesses from Undue Traumatization: Arizona Law in Light of Maryland v. Craig and Coy v. Iowa*, 32 ARIZ. L. REV. 1029 (1990); Comment, *Child Sexual Abuse: A New Decade for the Protection of Our Children?*, 39 EMORY L.J. 581 (1990); Note, *To Keep the Balance True: The Case of Coy v. Iowa*, 40 HASTINGS L.J. 437 (1989); Note, *Protecting the Child Sexual Abuse Victim From Courtroom Trauma After Coy v. Iowa*, 67 N.C.L. REV. 711 (1989); Comment, *Coy v. Iowa: Should Children Be Heard and Not Seen?*, 50 U. PITT. L. REV. 1187 (1989); Comment, *Balancing the Right to Confrontation and the Need to Protect Child Sexual Abuse Victims: Are Statutes Authorizing Televised Testimony Serving Their Purpose?*, 12 U. PUGET SOUND L. REV. 109 (1988).

12. *See* *Maryland v. Craig*, 110 S. Ct. 3157, 3171-76 (1990) (Scalia, J., joined by Brennan, Marshall, and Stevens, JJ., dissenting).

13. Terminology is a tiresome and unavoidable problem in this area. As I have previously noted, I find "interpretivism" rather awkward and jargonesque as a catch-all term for that approach to constitutional adjudication which emphasizes reliance on the text of the document and evinces a high degree of confidence that determinate meaning can be derived therefrom. *See* Wildenthal, *supra* note 11, at 750 n.5. While "strict constructionism" has a distinguished pedigree, sadly debased by Richard Nixon, *see id.*; *see also* J. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 1 n.\* (1980), it also does not trip lightly off the tongue. I think, therefore, that I will settle on "textualism." *See, e.g.,* P. BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 27 (1982).

Justice Scalia's distinctive interpretive vision has been most prominently displayed and has driven (though not always controlled the outcome of) the debate. My ultimate goal, in Part V, is to explore the implications of Justice Scalia's and the Court's interpretive approaches in this difficult area for constitutional criminal procedure in general.

## II. THE QUESTION POSED: *COY* AND *STINCER*

### A. *The Doctrinal Background*

Prior to 1987, the Supreme Court's case law concerning the confrontation clause revolved almost entirely around two complex issues: The admissibility of hearsay statements and the scope and effectiveness of cross-examination at trial. The hearsay rule in particular is a dauntingly convoluted doctrine, "riddled with exceptions developed over three centuries,"<sup>14</sup> and both the Court and commentators have been troubled and confused about the extent to which it embodies, or is embodied in, the constitutional right of confrontation.<sup>15</sup> Perhaps the best starting point in analyzing the Court's grapplings with the problem is the 1965 case of *Pointer v. Texas*,<sup>16</sup> which extended the federal Sixth Amendment right of confrontation, in its full force, to the states. The Court's opinion, written by Justice Black in his characteristically bold, sweeping terms, was preoccupied mainly with the Fourteenth Amendment "incorporation" issue.<sup>17</sup> Indeed, *Pointer* can be seen as simply one in a series of cases by which the Warren Court extended most criminal procedure protections of the Bill of Rights to state trials.<sup>18</sup>

Because the denial of confrontation in *Pointer* was complete and did not fall under any traditionally accepted hearsay exception,<sup>19</sup> Justice Black

14. *Ohio v. Roberts*, 448 U.S. 56, 62 (1980). The *Roberts* Court observed that the rule resembles "an old-fashioned crazy quilt made of patches cut from a group of paintings by cubists, futurists and surrealists." *Id.* (quoting Morgan & Maguire, *Looking Backward and Forward at Evidence*, 50 HARV. L. REV. 909, 921 (1937)).

15. See generally J. KAPLAN & J. WALTZ, *CASES AND MATERIALS ON EVIDENCE* 81-337 (6th ed. 1987).

16. 380 U.S. 400 (1965).

17. *Pointer v. Texas*, 380 U.S. 400, 403-06 (1965); see also *infra* note 116 (discussing incorporation doctrine). The concurrences of Justices Harlan, Stewart, and Goldberg were also addressed entirely to the incorporation issue. Justices Harlan and Stewart objected strongly to the whole doctrine of incorporating the Bill of Rights, whether piecemeal or in toto, into the Fourteenth Amendment, although they agreed that the procedure at issue in *Pointer* denied the defendant the fundamentals of due process. *Pointer*, 380 U.S. at 408-09 (Harlan, J., concurring), 409-10 (Stewart, J., concurring). Justice Goldberg, on the other hand, expressed support for the process of "selective incorporation." *Id.* at 410-14 (Goldberg, J., concurring).

18. See, e.g., *Mapp v. Ohio*, 367 U.S. 643 (1961) (Fourth Amendment exclusionary rule); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to court-appointed counsel); *Malloy v. Hogan*, 378 U.S. 1 (1964) (privilege against self-incrimination); *Duncan v. Louisiana*, 391 U.S. 145 (1968) (right to jury trial); *Benton v. Maryland*, 395 U.S. 784 (1969) (rule against double jeopardy).

19. The state had sought to introduce the preliminary hearing testimony of a declarant who had moved out of state (but was not shown to be unavailable) at the time of trial; the defendant had been unrepresented by counsel at the preliminary hearing and there had been no realistic chance for any cross-examination. *Pointer*, 380 U.S. at 401-03.

was not compelled to define the precise contours of the newly nationalized right of confrontation. He simply noted that the Court, in construing the Sixth Amendment in federal trials, had "recognized the admissibility against an accused of dying declarations and of testimony of a deceased witness who has testified at a former trial,"<sup>20</sup> and observed, rather cryptically, that "[t]here are other analogous situations which might not fall within the scope of the constitutional rule requiring confrontation of witnesses."<sup>21</sup> It was left to later cases to explore those situations. In *Ohio v. Roberts*,<sup>22</sup> for example, the Court outlined its general approach to hearsay admissibility: "[T]he prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant,"<sup>23</sup> and even when the declarant is unavailable, the statement must bear "indicia of reliability" sufficient to serve the purposes of the hearsay rule, reliability being "inferred without more" when the out-of-court statement "falls within a firmly rooted hearsay exception."<sup>24</sup>

Often intertwined with the hearsay problem has been the issue of the scope of cross-examination. In *California v. Green*,<sup>25</sup> for example, the Court held both that preliminary hearing testimony elicited with full opportunity for cross-examination bore sufficient indicia of reliability and that the right of effective cross-examination at trial was not denied by the declarant's claimed memory lapse on the stand. More generally, *Green* suggested that an opportunity for cross-examination at trial would always suffice to answer any confrontation clause objection to the introduction of *any* prior out-of-court statement, no matter how inherently unreliable, on the theory that the ultimate confrontation *at trial* is an adequate substitute for the lack of cross-examination of the original statement. This suggestion was confirmed in *United States v. Owens*,<sup>26</sup> which held that such an "opportunity" existed even when the declarant had suffered such a profound memory loss by the time of trial that, although he could remember having made the out-of-court statement at issue, he could no longer recall the basis for the statement or the underlying events.<sup>27</sup> The Court has found that the right of effective

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20. *Id.* at 407 (citations omitted).

21. *Id.*

22. 448 U.S. 56 (1980).

23. *Ohio v. Roberts*, 448 U.S. 56, 65 (1980).

24. *Id.* at 65-66. The Court's application of this approach has sometimes wavered. In *Dutton v. Evans*, 400 U.S. 74 (1970), for example, a 5-4 majority upheld the admission of an ambiguous out-of-court statement made by a coconspirator while in custody, even though it did not fall within the traditionally recognized coconspirator hearsay exception, and the declarant was available but not produced at trial by the state.

25. 399 U.S. 149 (1970).

26. 484 U.S. 554 (1988).

27. See *United States v. Owens*, 484 U.S. 554, 559 (1988) (holding that confrontation clause "guarantees only an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish" and noting that one of "the prime objective[s] of cross-examination" is precisely to demonstrate "the very fact that [the witness] has a bad memory") (emphasis in original; citations and internal

cross-examination at trial is impaired, however, when, for example, an out-of-court declarant invokes the Fifth Amendment right of silence when called to the stand<sup>28</sup> and when the confidentiality of juvenile records prevents the defense from probing a witness's past history.<sup>29</sup>

The Court's 1986 Term yielded two confrontation clause cases that neatly exemplified these strands of doctrine. *Bourjaily v. United States*<sup>30</sup> resolved several important questions regarding the coconspirator hearsay

quotation marks omitted). While *Owens* involved an out-of-court statement which the Court ultimately found to be nonhearsay under Federal Rule of Evidence 801(d)(1)(C) (defining as nonhearsay out-of-court statements of identification where declarant is "subject to cross-examination concerning the statement" at trial), the Court's confrontation clause analysis clearly applied to *any* hearsay statements, even those not falling within any hearsay exception. See *id.* at 560. *Owens* considered and rejected a separate challenge based on Rule 801(d)(1)(C) itself, ruling, not surprisingly in view of the constitutional holding, that the witness, despite his memory loss, was "subject to cross-examination." *Id.* at 561-64.

Interestingly, Justice Scalia was the author of the Court's opinion in *Owens*. Justice Brennan's dissent, joined by Justice Marshall, objected to the Court's reasoning and result primarily on the ground that the Court's historic emphasis on the right to an opportunity for *effective* cross-examination required more than the "futile" and "formalis[tic]" opportunity "to ask questions of a live witness, no matter how dead that witness' memory proves to be." *Id.* at 567, 572. Scalia's opinion relied heavily not only on *Green*, but also on *Delaware v. Fensterer*, 474 U.S. 15 (1985), which held that an expert witness could constitutionally testify as to an opinion he held, even though he could no longer recall the basis for the opinion. See *Owens*, 484 U.S. at 558-59. Scalia's logic was curiously inverted, however, when he described two hypothetical statements, (1) "I believe this to be the man who assaulted me, but can't remember why" (a *Fensterer*-type statement), and (2) "I don't know whether this is the man who assaulted me, but I told the police I believed so earlier" (an *Owens*-type statement), and concluded that "the former would seem, if anything, more damaging," and hence more suspect under the confrontation clause. *Id.* at 559. The former statement, however, is not more "damaging"; it is more inherently incredible and thus *less* likely to sway the jury. The *latter* kind of statement is more likely to be "damaging" precisely because it is more plausible and believable, at least on facts like those in *Owens*, where it was undisputed that the witness's memory loss was caused by brain trauma arising from the violent criminal assault for which the defendant was on trial. See *id.* at 570 (Brennan, J., joined by Marshall, J., dissenting). While Scalia's analysis is troubling as applied to the unusual facts of *Owens*, however, its more typical application may not be cause for much concern. As even Justice Brennan acknowledged, a witness's claimed partial or total memory loss will so often occur "under circumstances that suggest bias or ulterior motive," *id.* at 571, that the witness's testimony will often be, in effect, "self-impeaching," *id.* at 570, thus "afford[ing] the factfinder an adequate basis upon which to evaluate the reliability of the out-of-court statement," *id.* at 571.

The very reluctance of Justice Scalia in *Owens* to bend his general analysis to accommodate a particular factual scenario—even to the point of drawing a conclusion perhaps logical in the generality but plainly illogical on the facts presented—is, of course, consistent with his textualist philosophy in that it reflects his affinity for predictable, bright-line, rule-bound approaches. See Kannar, *supra* note 11, at 1324-42 (discussing Scalia's rule-bound approach in several contexts); *infra* text accompanying notes 284-86.

28. *Douglas v. Alabama*, 380 U.S. 415 (1965).

29. *Davis v. Alaska*, 415 U.S. 308 (1974); see also *Delaware v. Van Arsdall*, 475 U.S. 673 (1986) (violation of confrontation clause to prevent defense counsel from questioning declarant as to public drunkenness charge pending against him).

30. 483 U.S. 171 (1987).



exception,<sup>31</sup> and *Pennsylvania v. Ritchie*<sup>32</sup> held that failure to disclose a declarant's confidential child-protective services file to the defendant before trial did not impair effective cross-examination as long as no restrictions were placed on questions *at* trial.<sup>33</sup>

Given this doctrinal background, it is perfectly understandable that Justice Blackmun's six-to-three majority opinion in *Kentucky v. Stincer*,<sup>34</sup> also decided during the 1986 Term, began its analysis of the right of confrontation by observing:

The right to cross-examination, protected by the Confrontation Clause, thus is essentially a "*functional*" right designed to promote reliability in the truth-finding functions of a criminal trial. The cases that have arisen under the Confrontation Clause reflect the application of this *functional* right. These cases fall into two broad, albeit not exclusive, categories: "cases involving the admission of out-of-court statements and cases involving restrictions imposed by law or by the trial court on the scope of cross-examination."<sup>35</sup>

31. See FED. R. EVID. 801(d)(2)(E). The principle issues in *Bourjaily* were the burden of proof required to show the existence of the conspiracy (preponderance of the evidence, the Court unanimously held) and the question of "bootstrapping," that is, whether the evidence establishing the existence of the conspiracy could include the very hearsay statement whose admission was at issue. *Bourjaily v. United States*, 483 U.S. 171, 173 (1987). The Court, relying on Federal Rule of Evidence 104(a), said yes. *Id.* at 176-81. The Court had previously held, in *United States v. Inadi*, 475 U.S. 387 (1986), that a showing of the declarant's unavailability was not a prerequisite for admission of a coconspirator's hearsay statement. Justice Blackmun, joined by Justices Brennan and Marshall, dissented in *Bourjaily* on the "bootstrapping" issue. 483 U.S. at 186-202.

32. 480 U.S. 39 (1987).

33. *Pennsylvania v. Ritchie*, 480 U.S. 39, 54 (1987). *Ritchie* involved a father accused of sexually molesting his daughter, who was the principal prosecution witness at trial. The defense sought before trial to subpoena the child-protective services agency's records of its investigation of this and an earlier related incident because of the possibility they might contain exculpatory evidence or the names of potentially favorable witnesses. The Court ruled five to four that defense counsel did not have the right to personally review the files but that inspection by the judge in camera to determine whether material evidence existed therein was sufficient. Justice Powell, joined by Chief Justice Rehnquist, Justice White, and Justice O'Connor, went further and argued that the confrontation clause as such had no applicability to pretrial discovery, even where arguably necessary to enable effective cross-examination, but was merely a *trial* right ensuring an *opportunity* for cross-examination; they analyzed the case solely under general due process principles. *Id.* at 51-54. Justice Blackmun, while concurring with the plurality's holding in the instant case, held that limitations on pretrial discovery could, if severe enough, impair the right of effective cross-examination at trial and thus implicate the confrontation clause. *Id.* at 61-66. Justice Brennan, joined by Justice Marshall, dissented on the merits, *id.* at 66-72, while Justice Stevens, joined by Justices Brennan, Marshall, and Scalia, dissented on the ground that the state court ruling below was not a "final judgment," *id.* at 72-78. Although two of the four dissenters thus did not reach the confrontation clause issue, it is interesting to note that they were the same four Justices who, as we shall see, took the strongest position in favor of the right of confrontation in *Coy*, and dissented in *Craig*.

34. 482 U.S. 730 (1987).

35. *Kentucky v. Stincer*, 482 U.S. 730, 737 (1987) (quoting *Delaware v. Fensterer*, 474 U.S. 15, 18 (1985)) (my emphasis).

Before discussing *Stincer* further, however, it is necessary first to describe the holding in *Coy v. Iowa*.<sup>36</sup>

*B. Through a Glass Darkly: Justice Scalia's Opinion in Coy*

In *Coy*, the defendant was accused of sexually assaulting two thirteen-year-old girls while they were camping out in the yard behind the home of one of the girls. The victims never gained a clear look at the assailant's face, so facial identification was not an issue at trial.<sup>37</sup> Pursuant to a recently enacted Iowa law,<sup>38</sup> a large, one-way glass screen was placed between Coy and the witness stand throughout the girls' testimony against him. "After certain lighting adjustments in the courtroom, the screen would enable [Coy] dimly to perceive the witnesses, but the witnesses to see him not at all."<sup>39</sup> Coy was convicted, and a five-Justice panel of the Iowa Supreme Court unanimously upheld the procedure<sup>40</sup> over his confrontation clause and other objections.<sup>41</sup> The United States Supreme Court reversed,

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36. 487 U.S. 1012 (1988).

37. *Coy v. Iowa*, 487 U.S. 1012, 1014 (1988).

38. Act of May 23, 1985, § 6, 1985 Iowa Acts 338 (codified at IOWA CODE § 910A.14 (1987)), quoted in *Coy*, 487 U.S. at 1014 n.1.

39. *Coy*, 487 U.S. at 1014-15. The operation of the screen, which was mounted on a six-foot-tall, four-foot-wide structure said to resemble a gallows, actually required that the lights in the courtroom be completely turned off, the windowshades drawn, and a bank of bright lights shined on the screen from the direction of the witness stand, with the witnesses entering the courtroom from a special doorway near the stand. See Brief for Appellant at 5-7, 15-16, *Coy* (No. 86-6757); Reply Brief for Appellant at 1, *Coy* (No. 86-6757). The "dramatic," even "eery" effect of the screen and its attendant arrangements was acknowledged on the record by the trial judge. See Brief for Appellant at 6, 16, *Coy* (No. 86-6757).

40. *State v. Coy*, 397 N.W.2d 730 (Iowa 1986).

41. Coy also objected to the screen on the basis of the due process clause, arguing that "[t]he placement of a specially lit frame structure in front of appellant at trial, no less than trying [a defendant] in prison clothes or shackles, eroded the presumption of innocence so basic to our adversary system, and branded him in the minds of the jury 'with an unmistakable mark of guilt.'" Brief for Appellant at 15, *Coy* (No. 86-6757). Coy's counsel clearly regarded the due process claim as the more substantial of the two issues reviewed by the Supreme Court. The due process argument was presented under heading I of Coy's brief, and took up 20 pages, while the confrontation clause argument, under heading II, required only 10 pages. This approach was understandable given the potentially overwhelming and prejudicial effect of the highly unusual and striking procedure used, see *supra* note 39, which necessarily implied that the defendant's face held such potential terror and trauma for the victims that extraordinary steps were necessary to shield them from seeing him, and thus, in turn, necessarily suggested the foregone conclusion that he was guilty. Cf. *Holbrook v. Flynn*, 475 U.S. 560 (1986) (finding no unconstitutional prejudice from presence of four armed and uniformed state troopers in courtroom during trial); *Estelle v. Williams*, 425 U.S. 501 (1976) (finding requirement that defendant stand trial in prison clothing unconstitutional, although claim waived in instant case). The need for such shielding would seem highly questionable under the particular facts of *Coy*, given that the victims said they never saw the assailant's face and, thus, presumably would not have recognized him on sight. Simply knowing that Coy (whom they doubtless assumed was the faceless assailant simply because he was the defendant on trial) could see *them* as they testified may have involved some trauma, of course, but the screen did not rectify that problem. The Supreme Court majority, however, given its disposition of

with Justices Brennan, White, Marshall, Stevens, and O'Connor joining Justice Scalia's majority opinion, and Justice Blackmun, joined by Chief Justice Rehnquist, dissenting.<sup>42</sup>

Justice Scalia's opinion in *Coy* reads very differently from the hedged, confusing opinions in most previous confrontation clause cases. He seemed to revel in what he saw as the simplicity of the claimed right, and he marshaled an eclectic array of authorities to analyze the constitutionality of the direct, physical obstruction placed on Coy's face-to-face visual contact with the witnesses against him. Justice Blackmun could hardly be blamed for complaining in dissent, with evident exasperation, about the Court's "reliance on literature, anecdote, and dicta from opinions that a majority of this Court did not join."<sup>43</sup> Justice Blackmun must have been especially perturbed to see the majority approvingly cite Justice Marshall's dissent from his own majority opinion in *Stincer*.<sup>44</sup> Indeed, it seems far from coincidental, as we shall see, that the only Justices to join unreservedly in Scalia's *Coy* opinion were the three dissenters in *Stincer*, while Justice Blackmun, the author of *Stincer*, dissented in *Coy*.

Justice Scalia began his excursion through literary history by noting that the right of confrontation has "a lineage that traces back to the beginnings of Western legal culture."<sup>45</sup> He quoted Acts 25:16:

The Roman Governor Festus, discussing the proper treatment of his prisoner, Paul, stated: "It is not the manner of the Romans to

the confrontation clause issue, found it unnecessary to reach the due process claim. *Coy*, 487 U.S. at 1022; *cf. id.* at 1034-35 (Blackmun, J., joined by Rehnquist, C.J., dissenting) (cursorily rejecting due process claim).

The Supreme Court did not grant review on a third, very interesting claim based on the Fourth Amendment, which was addressed and rejected by the Iowa Supreme Court. Key evidence implicating Coy was obtained when one victim's father, along with another neighbor, unlawfully entered and searched Coy's house. After being fingered by the victim's father as a suspect, Coy had been arrested on a traffic bench warrant and thereby conveniently removed from the scene. The search took place while a police officer was questioning the victim in her house next door. The neighbor who assisted the victim's father was a lawyer and had earlier been enlisted by the police to help in searching the neighborhood yards for evidence. *State v. Coy*, 397 N.W.2d 730, 731-33 (Iowa 1986). The officer who was questioning the victim next door testified that he was "pleasantly surprised" when the two men reported the incriminating evidence they had found, on the basis of which a search warrant was obtained, which yielded still more evidence. *Id.* at 732. The Iowa court studiously found "no impermissible agency relationship" between the police and the "private" searchers. *Id.*; *cf. United States v. Walther*, 652 F.2d 788 (9th Cir. 1981) (treating airline employee as government agent under facts presented). The Supreme Court, curiously, does not seem to have plenary addressed the "private searcher" problem since *Burdeau v. McDowell*, 256 U.S. 465 (1921), which occasioned a dissent by Justice Brandeis, joined by Justice Holmes, *id.* at 476-77. This may be an issue ripe for reexamination. See generally S. SALTZBURG, *AMERICAN CRIMINAL PROCEDURE: CASES AND COMMENTARY* 297-98 (2d ed. 1984). Of course, criminal defense lawyers may be just as happy *not* to have the Rehnquist Court take it up.

42. *Coy v. Iowa*, 487 U.S. 1012 (1988). Justice Kennedy did not participate, having joined the Court a month after oral argument took place.

43. *Id.* at 1028 (Blackmun, J., dissenting).

44. See *id.* at 1016.

45. *Id.* at 1015.

deliver any man up to die before the accused has met his accusers face to face, and has been given a chance to defend himself against the charges."<sup>46</sup>

After expatiating on the Latin roots of the word "confront,"<sup>47</sup> he noted that "Shakespeare was thus describing the root meaning of confrontation when he had Richard the Second say: 'Then call them to our presence—face to face, and frowning brow to brow, ourselves will hear the accuser and the accused freely speak.'"<sup>48</sup>

Justice Scalia explained that "[t]his opinion is embellished with references to and quotations from antiquity in part to convey that there is something deep in human nature that regards face-to-face confrontation between accused and accuser as 'essential to a fair trial in a criminal prosecution.'"<sup>49</sup> He outdid himself, however, in recalling President Eisenhower's description of "the code of his home town of Abilene, Kansas":<sup>50</sup>

In Abilene, [President Eisenhower] said, it was necessary to "[m]eet anyone face to face with whom you disagree. You could not sneak up on him from behind, or do any damage to him, without suffering the penalty of an outraged citizenry . . . . In this country, if someone

46. *Id.*

47. Justice Scalia noted that "the word 'confront' ultimately derives from the prefix 'con-' (from 'contra' meaning 'against' or 'opposed') and the noun 'frons' (forehead)." *Id.*

48. *Id.* (quoting W. SHAKESPEARE, RICHARD II act I, sc. 1). Justice Blackmun acidly observed that he found Dean Wigmore "infinitely more persuasive" than either King Richard or President Eisenhower. *Id.* at 1029 (Blackmun, J., dissenting); see also *infra* text accompanying notes 50-51 (discussing Scalia's reference to President Eisenhower's remarks). Justice Blackmun noted that Wigmore had dismissed precisely the same quotation from *Richard II* as an "earlier conception" of confrontation already outdated by the time the Bill of Rights was ratified. *Id.* at 1029 n.3 (citing 5 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1395, at 153 n.2 (J. Chadbourn rev. 1974)); see also *infra* notes 77-78 and accompanying text.

Justice Scalia, for his part, followed a time-honored tradition on the Court by invoking the Bard and was not the first Justice to suffer criticism from a colleague on that account. See, for example, the memorable clash of Justices Douglas and Harlan in *Levy v. Louisiana*, 391 U.S. 68 (1968), a case involving a law denying illegitimate children the right to recover for the wrongful death of their mother. Justice Douglas, writing for the majority in striking down the law, declaimed: "We can say with Shakespeare: 'Why bastard, wherefore base? When my dimensions are as well compact, My mind as generous, and my shape as true, As honest madam's issue? Why brand they us With base? with baseness? bastardy? base, base?'" *Id.* at 72 n.6 (quoting KING LEAR act I, sc. 2 (Edmund)). To which Justice Harlan tartly responded: "Supposing that the Bard had any views on the law of legitimacy, they might more easily be discerned from Edmund's character than from the words he utters in defense of the only thing he cares for, himself." *Id.* at 77 n.3 (Harlan, J., dissenting). Justice Harlan overlooked, however, that this was hardly the only occasion on which Shakespeare ennobled a more or less unsympathetic character with lines of great moral force. See, for example, Shylock's speech in *THE MERCHANT OF VENICE* act III, scene 1, justifying his obsessive desire for revenge and remarkably similar in tone and argument to Edmund's soliloquy (despite the profound differences between their characters): "Hath not a Jew eyes? Hath not a Jew hands, organs, dimensions, senses, affections, passions? . . . If you prick us, do we not bleed?"

49. *Coy*, 487 U.S. at 1017 (quoting *Pointer v. Texas*, 380 U.S. 400, 404 (1965)).

50. *Id.*

dislikes you, or accuses you, he must come up in front. He cannot hide behind the shadow."<sup>51</sup>

The conclusion Justice Scalia drew from this cultural heritage, and from his own intuitive perceptions, was that "[i]t is always more difficult to tell a lie about a person 'to his face' than 'behind his back.'"<sup>52</sup> He conceded the potential for trauma to child witnesses which Iowa relied upon to justify the screen, but he held that it was that "very phenomenon"<sup>53</sup> which "may confound and undo the false accuser, or reveal the child coached by a malevolent adult."<sup>54</sup>

While Justice Scalia assumed an eruditely professorial manner in exploring the historical roots of the right of confrontation, his analysis of the right itself was squarely based on literal textualism. He suggested at one point that the right to confront, face to face, adverse witnesses appearing at trial follows from the confrontation clause "simply as a matter of English."<sup>55</sup> Even more strikingly, he observed that while the Court had previously "indicated that rights conferred by the Confrontation Clause are not absolute, and may give way to other important interests," such an analysis only applied to rights that were merely "reasonably implicit" in the clause, as opposed to "the right narrowly and explicitly set forth in the Clause."<sup>56</sup> That right, Justice Scalia held—the "right to *meet face to face* all those who appear and give evidence *at trial*"<sup>57</sup>—constituted "the irreducible literal meaning of the clause."<sup>58</sup> He expressed considerable doubt whether any exceptions to this "absolute" right could be justified, but

51. *Id.* at 1017-18 (quoting Press Release of Remarks Given to B'nai B'rith Anti-Defamation League (Nov. 23, 1953), quoted in Pollitt, *The Right of Confrontation: Its History and Modern Dress*, 8 J. PUB. L. 381, 381 (1959)). Scalia noted that "[t]he phrase still persists, 'Look me in the eye and say that.'" *Id.* at 1018. As Professor Kannar quips, this "uncited" statement was apparently first uttered by "someone like Gary Cooper or John Wayne," thus adding "Hollywood Westerns" to the Romans and the Elizabethan English among Scalia's cultural sources. Kannar, *supra* note 11, at 1331 & n.165.

52. *Coy*, 487 U.S. at 1019. "In the former context," Scalia observed, "even if the lie is told, it will often be told less convincingly. The Confrontation Clause does not, of course, compel the witness to fix his eyes upon the defendant; he may studiously look elsewhere, but the trier of fact will draw its own conclusions." *Id.*

53. *Id.* at 1020.

54. *Id.* One of the aspects of Justice Scalia's opinion perhaps most vulnerable to criticism is its seeming insensitivity to the trauma undergone by the child witness in such cases. Scalia's sole comment on the issue was to concede that "face-to-face presence may, unfortunately, upset the truthful rape victim or abused child." *Id.* But, he concluded bluntly, "[i]t is a truism that constitutional protections have costs." *Id.*

55. *Id.* at 1016 (quoting *California v. Green*, 399 U.S. 149, 175 (1970) (Harlan, J., concurring)). "Simply as a matter of Latin as well," Scalia continued, proceeding to analyze the Latin derivation of the word "confront." *Id.*; see also *supra* note 47.

56. *Coy*, 487 U.S. at 1020.

57. *Id.* at 1021 (emphasis added by Justice Scalia) (quoting *California v. Green*, 399 U.S. 149, 175 (1970) (Harlan, J., concurring)).

58. *Id.* A few sentences later, Justice Scalia referred to this meaning of the clause as "its most literal application." *Id.*

ultimately left the issue for another day. Because the Iowa procedure did not resemble any traditional exception to the right of confrontation, it would, at the very least, require more justification than the categorical legislative finding said to support it.<sup>59</sup> In the most prophetic sentence of the opinion, in terms of the Court's ultimate views if not his own, Justice Scalia concluded: "Since there have been no individualized findings that these particular witnesses needed special protection, the judgment here could not be sustained by any conceivable exception."<sup>60</sup>

A number of problems are immediately apparent in Justice Scalia's approach in *Coy*. First, there is something inherently implausible about describing the right to confront a testifying witness face to face, without any visual obstructions, as being closer to the "core"<sup>61</sup> of the right of confrontation than the right to have the witness show up for trial in the first place. Justice Scalia seemed to suggest a peculiar "bootstrap" quality of the confrontation clause. He conceded, as he had to given two centuries of precedent, that there is no absolute right to be confronted with an adverse *hearsay declarant* at trial—indeed, he maintained that "there is at least some room for doubt (and hence litigation) as to the extent to which the Clause includes th[at] element[]." <sup>62</sup> Yet, under Scalia's approach, once a witness *does* appear and ascends the stand, the right blossoms into an absolute privilege to face the witness free of any visual obstructions.<sup>63</sup>

In fact, as the Court noted in *Ohio v. Roberts*,<sup>64</sup> it has long been obvious that

[i]f one were to read th[e] language [of the clause] *literally*, it would require, on objection, the exclusion of any statement made by a declarant not present at trial. But, if thus applied, the Clause would abrogate virtually every hearsay exception, a result long rejected as unintended and too extreme.<sup>65</sup>

And if exceptions can be justified as to whether a witness must show up at all, it is not immediately obvious why exceptions to unimpeded visual confrontation could not similarly be justified. Indeed, the right simply to have the witness show up at all would seem at first glance much *more* important for most purposes than having unimpeded visual contact with the witness while testifying.

Justice Blackmun made this point quite well in his dissent in *Coy*. In response to the majority's contention that the Iowa procedure was not

59. *See id.*

60. *Id.*

61. *Id.* at 1017 (quoting *California v. Green*, 399 U.S. 149, 157 (1970)).

62. *Id.* at 1016.

63. As we shall see in discussing *Maryland v. Craig*, 110 S. Ct. 3157 (1990), Justice Scalia later attempted to wriggle out of this difficulty by the alarmingly simple expedient of denying that a hearsay declarant is a "witness" for confrontation clause purposes. *See infra* text accompanying notes 146-161.

64. 448 U.S. 56 (1980).

65. *Id.* at 63 (citation omitted; emphasis added).

“firmly rooted in our jurisprudence,” he argued plausibly that “[r]eliance on the cases employing that rationale is misplaced.”<sup>66</sup> The principal concern with hearsay, he noted, is its presumptive unreliability. The significance of the historically “firmly rooted” hearsay exceptions is that only hearsay falling within them can be assumed, without more, to possess the requisite “indicia of reliability.” All other hearsay must, at the very least, be shown to have “particularized guarantees of trustworthiness.”<sup>67</sup> The testimony at issue in *Coy*, however, was not hearsay at all: “Because the girls testified under oath, in full view of the jury, and were subjected to unrestricted cross-examination, there can be no argument that their testimony lacked sufficient indicia of reliability.”<sup>68</sup> Indeed, Justice Blackmun’s conclusion in *Coy* might seem to follow naturally from a fusion of the holdings in *California v. Green*,<sup>69</sup> which established that preliminary hearing testimony bears indicia of reliability for the very reasons cited by Justice Blackmun, and *Kentucky v. Stincer*,<sup>70</sup> which held that a defendant could be entirely excluded from a preliminary hearing into the competency of a child victim-witness.<sup>71</sup>

Indeed, the most striking aspect of *Coy* is its complete doctrinal and philosophical dissonance with *Stincer*, decided just one year earlier. An assessment of that clash follows.

### C. *Coy v. Stincer*

As previously noted, Justice Blackmun’s majority opinion in *Stincer* (silently joined, it should be noted, by Justice Scalia) began the heart of its analysis by describing confrontation clause doctrine as revolving around the reliability of out-of-court statements and the effectiveness of cross-examination.<sup>72</sup> Justice Blackmun concluded that although confrontation clause claims “may not always fall neatly into one of these two categories, these cases reflect the . . . Clause’s *functional* purpose in ensuring a defendant an opportunity for cross-examination.”<sup>73</sup> He reiterated that “the right to confrontation is a *functional* one for the purpose of promoting reliability

66. *Coy*, 487 U.S. at 1033 (Blackmun, J., dissenting).

67. *Id.* (quoting *Ohio v. Roberts*, 448 U.S. 56, 66 (1980)).

68. *Id.* at 1033-34.

69. 399 U.S. 149 (1970).

70. 482 U.S. 730 (1987).

71. *Id.* at 744. *Stincer* involved a defendant convicted of sexually abusing two young girls aged seven and eight. After a jury had been sworn, the judge held an in-chambers hearing to determine if the two victim-witnesses were competent to testify. The girls did not testify on the substance of the charges during the hearing but were only examined as to their ability to relate facts and tell the truth. While the defendant was completely excluded from the hearing, his lawyer was present and questioned the girls, as did the judge and prosecutor. At trial, both girls testified in the defendant’s presence without any protective screen or device, and defense counsel had unrestricted opportunity for cross-examination, including repeating any of the questions asked during the competency hearing. The defense never objected to the court’s finding of competence. See *id.* at 732-34.

72. See *id.* at 737-39.

73. *Id.* at 739 (emphasis added).

in a criminal trial."<sup>74</sup> Justice Marshall's dissent in *Stincer*, joined by Justices Brennan and Stevens, took square aim at this mode of analysis, and his arguments were echoed in the most explicit way by Justice Scalia's opinion in *Coy* a year later.

Justice Marshall, like Justice Scalia, launched his argument from an avowedly literalist perspective: "The text [of the confrontation clause] plainly envisions that witnesses against the accused shall, as a rule, testify *in his presence*. I can only marvel at the manner in which the Court avoids this manifest import of the [clause]."<sup>75</sup> Justice Marshall complained that the Court unjustifiably "narrows its analysis to address *exclusively* what is accurately identified as simply *a* primary interest the Clause was intended to secure: the right of cross-examination."<sup>76</sup> In other words, Justice Marshall was protesting the majority's use of the familiar but often troublesome interpretive device of substituting for the plain language of a guarantee the functional or underlying purpose motivating it. Justice Scalia responded negatively in *Coy* to exactly such a "functional" interpretation of the right of confrontation. In a lengthy footnote devoted to rebutting several points made by Justice Blackmun's dissent in *Coy*, Scalia criticized a passage in Wigmore's *Evidence* relied upon by Blackmun:<sup>77</sup>

[Dean Wigmore] was saying . . . not that the right of confrontation . . . did not exist [at common law], but that its purpose was to enable cross-examination. He then continued: "It follows that, if the accused has had the benefit of cross-examination, he has had the very privilege secured to him by the Constitution."

Of course that does not follow at all, any more than it follows that the right to a jury trial can be dispensed with so long as the accused is justly convicted and publicly known to be justly convicted—the purposes of the right to jury trial.<sup>78</sup>

In another striking parallel between the Marshall-*Stincer* and Scalia-*Coy* texts, Justice Marshall in *Stincer* asserted that

[i]t is true that we have addressed in some detail the Confrontation Clause as it pertains to the admission of out-of-court statements and restrictions on the scope of cross-examination. But these cases

74. *Id.* (emphasis added).

75. *Id.* at 748 (Marshall, J., dissenting) (emphasis in original).

76. *Id.* (emphasis in original).

77. Justice Blackmun had quoted Wigmore for the propositions that "[t]here never was at common law any recognized right to an indispensable thing called confrontation *as distinguished from cross-examination*," *Coy v. Iowa*, 487 U.S. 1012, 1029 (1988) (Blackmun, J., dissenting) (quoting 5 J. WIGMORE, *supra* note 48, § 1397, at 158) (emphasis in original), and that "the right of confrontation is provided 'not for the idle purpose of gazing upon the witness, or of *being gazed upon by him*,' but, rather, to allow for cross-examination," *id.* (quoting 5 J. WIGMORE, *supra* note 48, § 1395, at 150) (emphasis added by Justice Blackmun).

78. *Coy*, 487 U.S. at 1018 n.2 (quoting 5 J. WIGMORE, *supra* note 48, § 1397, at 158) (citation omitted).



have arisen in contexts in which the defendants' right to be present during the testimony was never doubted, thus making the Court's categorical analysis largely beside the point.<sup>79</sup>

Justice Scalia made a closely related point in *Coy*, arguing that the admissibility of hearsay and the scope of cross-examination dominated the subject matter of the Court's prior decisions *precisely because, unlike the right of sheer visual confrontation*, "there is at least some room for doubt (and hence litigation)" as to whether the confrontation clause protects the former elements.<sup>80</sup> Underlining the uncanny similarity in tone of the *Stincer* dissent and the majority opinion in *Coy* is the fact that both opinions prominently feature the very same quotations from Justice Harlan's concurrence in *California v. Green*<sup>81</sup> and from *Kirby v. United States*.<sup>82</sup>

There are plausible grounds, of course, for distinguishing and reconciling the results in *Stincer* and *Coy*. *Stincer* in no way purported to justify excluding a defendant during substantive testimony at the heart of the trial. Indeed, the majority in *Stincer* placed heavy reliance on the fact that during the victim-witnesses' substantive testimony, *Stincer* was present with unrestricted visual confrontation and full freedom to assist his lawyer in cross-examination.<sup>83</sup> The competency hearing from which *Stincer* was excluded did not, after all, deal with the witnesses' substantive accusations against him. The concerns enumerated in *Coy* relating to the truth-finding value of forcing an adverse witness to squirm under eye-to-eye contact with the defendant obviously have little applicability to a competency hearing. The purpose of such a hearing is not to scrutinize the demeanor of the witness for signs of falsehood—the jury is typically not even present—but simply to determine if she is morally and intellectually *capable* of testifying.

The most obvious basis for reconciling Justice Scalia's votes in *Stincer* and *Coy* is to presume that he simply didn't regard the competency hearing in *Stincer* as an integral part of the "trial."<sup>84</sup> Such a definitional solution,

79. *Stincer*, 482 U.S. at 749 (Marshall, J., dissenting) (citations omitted).

80. *Coy*, 487 U.S. at 1016; *see also infra* text accompanying notes 140-41.

81. 399 U.S. 149, 157 (1970) (Harlan, J., concurring), *quoted in Stincer*, 482 U.S. at 749-50 (Marshall, J., dissenting) ("it is this literal right to "confront" the witness at the time of trial that forms the core of the values furthered by the Confrontation Clause"), and in *Coy*, 487 U.S. at 1017 ("we have described the 'literal right to "confront" the witness at the time of trial' as forming 'the core of the values furthered by the Confrontation Clause'").

82. 174 U.S. 47 (1899). The following passage from *Kirby* was quoted verbatim, right down to the brackets and ellipsis, in both the *Stincer* dissent, 482 U.S. at 750-51, and in *Coy*, 487 U.S. at 1016-17:

[A] fact which can be primarily established only by witnesses cannot be proved against an accused . . . except by witnesses who confront him at the trial, upon whom he can look while being tried, whom he is entitled to cross-examine, and whose testimony he may impeach in every mode authorized by the established rules governing the trial or conduct of criminal cases.

*Kirby v. United States*, 174 U.S. 47, 55 (1899).

83. *See Stincer*, 482 U.S. at 740; *see also supra* note 71.

84. Justice Scalia suggested such reasoning in *Coy* by referring to "the . . . right to

however, while perhaps consistent with certain tendencies of Scalia's textualist approach in *Coy*, simply underscores *Coy*'s divergence from *Stincer*, because *Stincer* emphatically declined to accept the simplistic, and inherently dubious, argument that a competency hearing is not part of the trial for purposes of the right of confrontation. In the first place, the Constitution does not use the word "trial," but rather the more inclusive term "prosecution," in defining the circumstances where the right attaches.<sup>85</sup> Furthermore, as the *Stincer* majority admitted, the competency hearing can be a crucial phase of the trial "because it determines whether a key witness will testify,"<sup>86</sup> which in turn will often decide the outcome.

The Court in *Stincer* not only came very close to conceding that the competency hearing *was* in fact part of the trial,<sup>87</sup> it maintained that "[i]nstead of attempting to characterize a competency hearing as a trial or pretrial proceeding, it is more useful to consider whether excluding the defendant from the hearing interferes with his opportunity for effective cross-examination."<sup>88</sup> This reiterated the functional, pragmatic nature of the *Stincer* majority's analysis. In the *Stincer* Court's view, searching for a formalistic textual boundary between "trial" and "pretrial" proceedings

face-to-face confrontation *at some point in the proceedings other than the trial itself*, [asserted in] *Kentucky v. Stincer*," *Coy*, 487 U.S. at 1020 (emphasis added), after having placed the asserted right in the category of those that were "not the right narrowly and explicitly set forth in the [Confrontation] Clause, but rather rights that are, or were asserted to be, *reasonably implicit*," *id.* (emphasis added).

85. See *Counselman v. Hitchcock*, 142 U.S. 547, 563 (1892) (construing "criminal prosecution" under Sixth Amendment more narrowly than "criminal case" under Fifth Amendment but still broadly enough to protect "person who is accused and who is *to be tried* by a petit jury") (emphasis added); see also *Lewis v. United States*, 146 U.S. 370, 373-74 (1892) (holding that right of confrontation extends to jury selection stage of trial). *Counselman* and *Lewis* strongly suggest that the right of confrontation should apply during any formal, adversary legal proceedings related to the criminal prosecution of the person claiming the right, even though in advance of the trial proper. A crucial point of *Counselman*'s distinction between the Sixth Amendment and Fifth Amendment language was to explain why the Fifth Amendment privilege against self-incrimination, unlike Sixth Amendment rights, can be claimed even during a proceeding not specifically directed toward prosecuting the person claiming the privilege. See 142 U.S. at 563-65.

86. *Stincer*, 482 U.S. at 740.

87. The *Stincer* Court stated:

[Kentucky] argues that respondent's exclusion from the competency hearing . . . did not violate the Confrontation Clause because a competency hearing is not "a stage of trial where evidence or witnesses are being presented to the trier of fact." Distinguishing between a "trial" and a "pretrial proceeding" is not particularly helpful here, however, because *a competency hearing may well be a "stage of trial."* In this case, for instance, the competency hearing was held after the jury was sworn, in the judge's chambers, and in the presence of opposing counsel who asked questions of the witnesses. . . . Further, although the preliminary determination of a witness' competency to testify is made at this hearing, the determination of competency is an ongoing one for the judge to make based on the witness' actual testimony at trial.

*Id.* at 739-40 (citations omitted; emphasis added).

88. *Id.* at 740.

simply amounted to asking the wrong question. But given Justice Scalia's literal formulation of the right of confrontation in *Coy*, it is difficult to understand how the total denial of visual confrontation—and even physical presence—in *Stincer* can be justified. It is difficult to see how the competency hearing—undeniably a key phase of the “prosecution”—can be surgically excised from the textual scope of the confrontation clause. The *Stincer* Court bypassed the problem by eschewing the textualist approach altogether, asking instead what ultimate functional purpose would be served by the defendant's presence. Such an approach is simply incommensurable, however, with the basic interpretive philosophy of *Coy*.

In the end, *Coy* and *Stincer* seem less directly inconsistent than simply to be speaking on different wavelengths. Thus, while it is possible to explain *Coy*'s result in terms of *Stincer*'s analysis, it does not seem possible to explain *Stincer*'s result in terms of *Coy*'s analysis. That is to say, *Coy* could plausibly have been decided the way it was consistently with the philosophy of *Stincer*: It can be argued that while the functional purposes of cross-examination were not impaired by the defendant's exclusion in *Stincer*, the impediment to visual confrontation throughout the key substantive testimony in *Coy* was simply too excessive, on balance, to tolerate. But the converse is not true: It really seems impossible to decide *Stincer* the way it was consistently with *Coy*'s philosophy, because *Coy* articulated a near-absolute textual right to visual confrontation at trial, not limited by functional considerations (although Justice Scalia did invoke some of the intuitions underlying the text), and *Stincer* had already effectively conceded that the competency hearing was an integral part of the trial (albeit serving a distinct functional purpose).

It is thus no mystery at all that the liberal absolutists who dissented in *Stincer*, Justices Brennan, Marshall, and Stevens, joined wholeheartedly in *Coy*;<sup>89</sup> nor is it the least bit odd that the author of the *Stincer* majority opinion, Justice Blackmun, found himself in basic disagreement with the *Coy* majority's approach. The only real mystery concerns Justice Scalia, who joined silently with Justice Blackmun in *Stincer*, but wrote the opinion in *Coy*. The solution that disturbingly presents itself to this mystery, as noted above, is that Justice Scalia's textualist vision leads him to read the confrontation clause so as to exclude the competency hearing from its scope altogether.<sup>90</sup> That result, taken seriously, would mean that the opportunity for functionally effective cross-examination on which *Stincer* relied so heavily was, for Justice Scalia, mere surplusage. For, as we shall see in discussing *Maryland v. Craig*,<sup>91</sup> Justice Scalia has made it clear that he regards cross-examination as no more than an implicit corollary, at best,

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89. Justices O'Connor and White, while joining Justice Scalia's opinion in *Coy*, also joined in a separate concurrence, written by Justice O'Connor, which hedged significantly on Scalia's analysis. See *Coy*, 487 U.S. at 1022-25; see also *infra* text accompanying notes 94-106.

90. See *supra* text accompanying notes 84-88.

91. 110 S. Ct. 3157 (1990).

of what he views as the core value of sheer visual confrontation.<sup>92</sup>

The broader but less mysterious question, in the wake of *Coy*, was how the Court as a whole would resolve the clash between *Coy* and *Stincer* and the very distinct visions of the confrontation clause they represented. Again, it is *Craig*, decided almost two years to the day after *Coy*,<sup>93</sup> that has provided the answer.

### III. THE QUESTION ANSWERED: *MARYLAND V. CRAIG*

#### A. Introduction

The starting point for understanding the Court's decision in *Craig* is Justice O'Connor's concurrence in *Coy*, joined by Justice White, which foreshadowed *Craig* with remarkable predictability. While O'Connor and White purported to join fully in Justice Scalia's "opinion of the Court," the concurrence quickly made clear that what they had given with one hand they took with the other. Justice O'Connor began by pointedly noting that while she agreed with the Court that the defendant's "rights under the Confrontation Clause were violated *in this case*,"<sup>94</sup> she wrote separately

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92. See *infra* text accompanying notes 119-130. Justice Scalia's opinion in *Coy* did not, of course, wholly reject the fundamental focus of prior confrontation cases on functional reliability concerns. Rather, he approached the issue in a fundamentally different way. Rather than saying, in effect, that whatever satisfied concerns of functional reliability satisfied the right of confrontation, he said, in effect, that those who adopted the Sixth Amendment intended to satisfy those concerns, and regardless of how well or rationally they achieved that goal, we are bound by the precise contours of the textual guarantee by which they sought to achieve it—a guarantee which he believes plainly includes, at least, a core right of visual confrontation.

Justice Scalia made it clear in *Coy*, of course, that he fully agrees with the intuitions that he believes inspired the confrontation clause. "The perception that confrontation is essential to fairness has persisted over the centuries because there is much truth to it." *Coy*, 487 U.S. at 1019. Professor Toni Massaro, however, has perceptively explored the overtones in Scalia's *Coy* opinion suggesting something more than a merely functional, reliability-oriented conception of the right of confrontation. See Massaro, *The Dignity Value of Face-to-Face Confrontations*, 40 U. FLA. L. REV. 863, 895 (1988) (quoting Scalia's statements in *Coy*, 487 U.S. at 1017, "that confrontation 'serves ends related both to appearances and to reality' and that 'there is something deep in human nature that regards face-to-face confrontation between accused and accuser as 'essential to fair trial in a criminal prosecution''"). Massaro relates these suggestions in *Coy* to her own articulation of "a theory of the confrontation clause that rests on principles of human dignity." *Id.* at 866. Massaro argues for both the historical and cultural reality, and the normative desirability, of a conception of the right of confrontation as promot[ing] not only the instrumental reliability of the trial as a truth-seeking mechanism, but also as "promot[ing] an intrinsic, nonfunctional interest: to preserve the dignity of the criminal defendant." *Id.*; see also *id.* at 897-917. While I do not fully agree with Massaro's criticisms of confrontation doctrine's present focus on reliability concerns, *cf. id.* at 917-18, she offers a very useful insight into the "cultural assumptions," *id.* at 918, which appear to have informed the thinking of both the Framers and Justice Scalia, among others.

93. *Craig* and its companion case, *Idaho v. Wright*, 110 S. Ct. 3139 (1990), were decided on June 27, 1990, *Coy* on June 29, 1988. See *infra* Part IV (discussing *Wright*).

94. *Coy v. Iowa*, 487 U.S. 1012, 1022 (1988) (O'Connor, J., joined by White, J., concurring) (emphasis added).

“only” to indicate her “view that those rights are not absolute but rather may give way in an appropriate case to other competing interests so as to permit the use of certain procedural devices designed to shield a child witness from the trauma of courtroom testimony.”<sup>95</sup> This strongly suggested a *Stincer*-style functional balancing test, and, indeed, Justice O’Connor went on to reiterate that “a defendant’s ‘right physically to face those who testify against him,’ even if located at the ‘core’ of the Confrontation Clause, is not absolute, and *I reject any suggestion to the contrary in the Court’s opinion.*”<sup>96</sup> In so doing, of course, she and Justice White were effectively “rejecting” most of the textualist analysis of the opinion they had just signed.

Justice O’Connor sketched out two routes by which states might save child-witness protective procedures from invalidation under *Coy*. First, she noted that closed-circuit television systems, either one-way systems in which the defendant and the victim-witness are present together in a separate room, or two-way systems in which the defendant and the accuser can see each other on television, “may raise no substantial Confrontation Clause problem since they involve testimony in the presence of the defendant.”<sup>97</sup> Second, with far broader implications, she stated that she would recognize an “exception”<sup>98</sup> to the constitutional “‘preference for face-to-face confrontation at trial,’”<sup>99</sup> based on “a case-specific finding of necessity,”<sup>100</sup> in order to serve “the compelling state interest of protecting child witnesses.”<sup>101</sup> She concluded by asserting that “nothing in the Court’s opinion conflicts with this approach,”<sup>102</sup> even though the concern “that a child victim may suffer trauma from exposure to the harsh atmosphere of the typical courtroom”<sup>103</sup> was not only dismissed by the Court’s opinion as reflecting merely the “truism that constitutional protections have costs,”<sup>104</sup> but was suggested to be the “very phenomenon”<sup>105</sup> by which the right of confrontation serves, in part, to “confound and undo the false accuser, or reveal the child coached by a malevolent adult.”<sup>106</sup>

*Craig* presented one of the hardest hypotheticals among those described by Justice O’Connor’s concurrence in *Coy*. The Maryland statute challenged in *Craig* permitted the child witness’s testimony in that case<sup>107</sup> to be received

95. *Id.*

96. *Id.* at 1024 (O’Connor, J., concurring) (emphasis added; citation omitted).

97. *Id.* at 1023 (O’Connor, J., concurring).

98. *Id.* at 1024 (O’Connor, J., concurring).

99. *Id.* (quoting *Ohio v. Roberts*, 448 U.S. 56, 63 (1980)) (emphasis added by Justice O’Connor).

100. *Id.* at 1025 (O’Connor, J., concurring).

101. *Id.*

102. *Id.*

103. *Id.* at 1022 (O’Connor, J., concurring).

104. *Id.* at 1020.

105. *Id.*

106. *Id.*

107. The defendant in *Craig*, Sandra Ann Craig, was the owner and operator of a

by one-way, closed-circuit television, under a system in which only the prosecutor, defense counsel, and other essential personnel were present in a separate room with the witness—who could not see the courtroom or the defendant, even on television—while defendant, judge, and jury, in the courtroom, watched and heard the witness on television.<sup>108</sup> The Maryland law provides that the trial court “may order”<sup>109</sup> such a procedure only if it “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.”<sup>110</sup> Thus, the procedure used in *Craig*, unlike two-way, closed-circuit television procedures or videotaping procedures with the defendant present, involved the complete elimination of the defendant’s right to visually confront the accusing witness. Even more than in *Coy* (although, unlike *Coy*, on the basis of “individualized findings”<sup>111</sup>), the witness in *Craig* was completely shielded from having to face the accused and completely isolated and removed from her presence.<sup>112</sup>

Nevertheless, given the O’Connor-White concurrence and the Blackmun-Rehnquist dissent in *Coy*, the fact that only four Justices joined fully in the reasoning of Scalia’s “opinion of the Court,” and the non-participation in *Coy* of the newly appointed Justice Kennedy, it was not particularly surprising that *Craig* upheld the challenged procedure, five to four, with

kindergarten and prekindergarten child care center and was convicted of sexually abusing four kindergarten-age children altogether. Only her conviction for abusing one of the victims—a six-year-old girl—was directly at issue in *Craig*. See *Maryland v. Craig*, 110 S. Ct. 3157, 3160-62 (1990); *Craig v. State*, 316 Md. 551, 555, 560 A.2d 1120, 1122 (1989), *vacated and remanded*, 110 S. Ct. 3157 (1990).

108. The Maryland statute, which refers simply to “testimony . . . by means of a closed circuit television,” MD. CTS. & JUD. PROC. CODE ANN. § 9-102(a)(1) (1989), *quoted in Craig*, 110 S. Ct. at 3161 n.1, apparently also permits use of a two-way, closed-circuit system. The Maryland Court of Appeals held in *Craig* that the trial judge was required to explore the possible efficacy of a two-way system as a prerequisite to determining whether a one-way system was necessary on the facts of the particular case. See *Craig*, 316 Md. at 568, 560 A.2d at 1128. The Supreme Court rejected any constitutional requirement for such an inquiry, however. *Craig*, 110 S. Ct. at 3171. This is one of the most troubling issues raised by the majority’s analysis in *Craig*. See *infra* text accompanying notes 236-43.

109. MD. CTS. & JUD. PROC. CODE ANN. § 9-102(a)(1) (1989), *quoted in Craig*, 110 S. Ct. at 3161 n.1.

110. *Id.* § 9-102(a)(1)(ii), *quoted in Craig*, 110 S. Ct. at 3161 n.1. The Maryland Court of Appeals in *Craig* interpreted this provision to require that the trial court find, as a prerequisite to removing the defendant from the presence of the testifying child, that the defendant’s presence *specifically*, not simply the intimidating atmosphere of the courtroom generally, would create the requisite “serious emotional distress” on the part of the child, see *Craig*, 316 Md. at 566, 560 A.2d at 1127, *cited in Craig*, 110 S. Ct. at 3170, and the Supreme Court held that it is indeed necessary under the confrontation clause to show at least “that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant,” *Craig*, 110 S. Ct. at 3169.

111. *Cf. Coy v. Iowa*, 487 U.S. 1012, 1021 (1988).

112. The child witness in *Craig*, unlike in *Coy*, did not even have to deal with the knowledge that the defendant was present (although shielded from view) in the same room. See *Craig*, 110 S. Ct. at 3161. The psychological significance of never even having to enter the same room with the defendant would seem potentially very substantial.

Justice O'Connor writing the majority opinion, joined by Chief Justice Rehnquist and Justices White, Blackmun, and Kennedy, and Justice Scalia dissenting, joined by the three original dissenters in *Stincer*, Justices Brennan, Marshall, and Stevens. It was also no surprise that *Craig's* analysis and result constituted a rather violent lurch away from *Coy* and back toward the functional balancing test of *Stincer*. While *Coy* was not formally overruled, its analytical reign was cut very short indeed.

Both Justice O'Connor's and Justice Scalia's opinions in *Craig* shed further and very interesting light on the philosophical debate begun in *Stincer* and continued in *Coy*. While Justice Scalia's reasoning continues to exhibit the problems and oddities peculiar to his excessively literal textualist approach, the casual breadth of Justice O'Connor's analysis is ultimately more troubling.

### B. *The Scalia Dissent*

Justice Scalia's dissent in *Craig* is a remarkably intense and concentrated offering. He began with a classic, rhetorically effective appeal to constitutional text as an eternal bulwark against the shifting winds of legislative policy predilections. After quoting the "unmistakable clarity"<sup>113</sup> of the Sixth Amendment's guarantee of confrontation, he asserted: "The purpose of enshrining this protection in the Constitution was to assure that none of the many policy interests from time to time pursued by statutory law could overcome a defendant's right to face his or her accusers in court."<sup>114</sup> He was surely not oblivious to the powerful echo in these words of some of Justice Black's finest efforts in defense of the indissoluble strength of constitutional text. One recalls, for example, Justice Black's concurrence in *Duncan v. Louisiana*:<sup>115</sup>

[D]ue process, according to my Brother Harlan, is to be a phrase with no permanent meaning, but one which is found to shift *from time to time* in accordance with judges' predilections and understandings of what is best for the country. If due process means this, [it] . . . might as well have been written that "no person shall be deprived of life, liberty or property except by laws that the judges of the United States Supreme Court shall find to be consistent with the immutable principles of free government." It is impossible for me to believe that such unconfined power is given to judges in our Constitution that is a written one in order to limit governmental power.<sup>116</sup>

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113. *Craig*, 110 S. Ct. at 3171 (Scalia, J., dissenting).

114. *Id.*

115. 391 U.S. 145 (1968).

116. *Duncan v. Louisiana*, 391 U.S. 145, 168 (1968) (Black, J., joined by Douglas, J., concurring) (emphasis added). Justice Black reasserted in *Duncan* his belief in the principle of "total incorporation" of the Bill of Rights into the Fourteenth Amendment as a limitation on

Justice Scalia in *Craig*, in very consistent style, proceeded to blast the majority for its "subordination of explicit constitutional text to currently favored public policy,"<sup>117</sup> and he declared that "the Constitution" is meant to protect against, rather than conform to, current "widespread belief."<sup>118</sup>

Justice Scalia then shifted to a brief and powerful restatement of the argument set forth in the footnote of his *Coy* opinion devoted to rebutting Dean Wigmore,<sup>119</sup> incisively dissecting the analytical sleight-of-hand by which the majority "abstracts from the right [of confrontation] to its purposes, and then eliminates the right."<sup>120</sup> It was in the very course of this otherwise compelling argument, however, that some of the disturbing facets of Scalia's literal textualism reasserted themselves. His approach, it seems, would denigrate the right of cross-examination—long universally viewed as the "greatest legal engine ever invented for the discovery of truth"<sup>121</sup>—to the status of a mere "implied and collateral right[]"<sup>122</sup> under the confrontation

the power of the states. This is not the place to explore that involved issue, *compare* M. CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* (1986) (pro-incorporation) *with* R. BERGER, *THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* (1989) (anti-incorporation), but it is noteworthy that Justice Black consistently relied, in defense of his approach, on the rhetorical invocation of text as an inflexible barrier to legislative or judicial "experimentation." Thus, in *Duncan* Justice Black stated:

I am not bothered by the argument that applying the Bill of Rights to the States . . . interferes with our concept of federalism in that it may prevent States from trying novel social and economic experiments. I have never believed that under the guise of federalism the States should be able to experiment with the protections afforded our citizens through the Bill of Rights.

*Duncan*, 391 U.S. at 170 (Black, J., joined by Douglas, J., concurring). In another case Justice Black stated:

I fear to see the consequences of the Court's practice of substituting its own concepts of decency and fundamental justice for the language of the Bill of Rights as its point of departure in interpreting and enforcing that Bill of Rights. . . . To hold that this Court can determine what, if any, provisions of the Bill of Rights will be enforced, and if so to what degree, is to frustrate the great design of a written Constitution.

*Adamson v. California*, 332 U.S. 46, 89 (1947) (Black, J., joined by Douglas, J., dissenting).

117. *Craig*, 110 S. Ct. at 3172 (Scalia, J., dissenting).

118. *Id.*

119. *See Coy v. Iowa*, 487 U.S. 1012, 1018 n.2 (1988); *supra* text accompanying notes 77-78.

120. *Craig*, 110 S. Ct. at 3172 (Scalia, J., dissenting). Justice Scalia further stated: The reasoning is as follows: The Confrontation Clause guarantees not only what it explicitly provides for—"face-to-face" confrontation—but also implied and collateral rights such as cross-examination, oath, and observation of demeanor (TRUE); the purpose of this entire cluster of rights is to ensure the reliability of evidence (TRUE); the Maryland procedure preserves the implied and collateral rights (TRUE), which adequately ensure the reliability of evidence (perhaps TRUE); therefore the Confrontation Clause is not violated by denying what it explicitly provides for—"face-to-face" confrontation (unquestionably FALSE).

*Id.* (emphasis in original).

121. *Id.* at 3163 (quoting *California v. Green*, 399 U.S. 149, 158 (1970) (quoting 5 J. WIGMORE, *supra* note 48, § 1367 (3d ed. 1940))) (internal quotation marks omitted).

122. *Id.* at 3172 (Scalia, J., dissenting).



clause, instead of one of the central, and at least coequal, elements of that guarantee, which it surely is.<sup>123</sup> That the defendant's right to visually confront his accuser face to face undoubtedly "serves ends related both to [the] appearances and to [the] reality"<sup>124</sup> of a fair trial, for all the reasons catalogued in *Coy*,<sup>125</sup> hardly changes the obvious fact that, in practice, the opportunity for probing cross-examination is *at least equally* important to both the appearance and the reality of fundamental fairness. I daresay few criminal trial attorneys would maintain the contrary. Perhaps even more disturbing and inexplicable was Scalia's implied denigration of the jury's opportunity to observe the demeanor of the witness.<sup>126</sup>

Justice Scalia's analysis, pushed to its limit, suggests the rather alarming conclusion that he would have rejected the confrontation claim in *Stincer* even if the defendant there had been deprived not only of the personal right of visual confrontation at the competency hearing but also of the right, through his lawyer, to cross-examine his accusers at that hearing. It might be argued that this misses the point, that cross-examination rather than visual confrontation suffices under (and is necessary to satisfy) the confrontation clause at the competency hearing, precisely because Scalia's watered-down "implied and collateral" version of the confrontation right applies at that stage of the proceedings.<sup>127</sup> But Scalia argued in *Coy* that exceptions to the right of confrontation might be justifiable—that the right "may give way to other important interests"<sup>128</sup>—for two different kinds of

123. *California v. Green*, 399 U.S. 149, 158 (1970) (listing "purposes of confrontation" as (1) testimony under oath, (2) cross-examination, and (3) observation by jury of witness's demeanor), would seem adequate authority for this proposition. Interestingly, Scalia's listing of "implied and collateral rights" in *Craig* corresponds precisely to the three "purposes of confrontation" noted by *Green*. I tend to agree with Scalia's implied denigration of the oath factor. Not that I doubt the value and wisdom of the oath as a general matter, but realistically, in terms of evaluating testimony, juries surely do not—and should not—treat it as any guarantee of reliability or honesty. If that were the case, testimony could be taken by sworn, ex parte affidavit. It is clearly the jury's observation of the witness's response and demeanor under cross-examination (and under visual confrontation with the defendant) that is expected to, and in fact does, primarily inform their judgment as to the truthfulness and reliability of his testimony. In that light, the final factor noted in *Green*, observation of demeanor itself, is arguably the most central element of all, in that it builds upon and ties together the other components of confrontation. Indeed, the other elements would be rendered quite useless without it. The jury could hardly "draw its own conclusions" from the witness's shifty-eyed evasion of the defendant's gaze, see *Coy v. Iowa*, 487 U.S. 1012, 1019 (1988), if the jury were unable to observe the witness visually confronting the defendant. It is thus hardly surprising that not even the most innovative and far-reaching procedures designed to protect child witnesses seem to have dared to trench upon that most vital factor.

124. *Coy*, 487 U.S. at 1017.

125. *Id.* at 1015-20.

126. See *Maryland v. Craig*, 110 S. Ct. 3157, 3172 (1990) (Scalia, J., dissenting); see also *supra* note 123.

127. Recall that in *Coy* Justice Scalia defined "the asserted right to face-to-face confrontation at some point in the proceedings other than the trial itself" as a right only "reasonably implicit" in the clause. *Coy*, 487 U.S. at 1020; see also *supra* note 84.

128. *Coy*, 487 U.S. at 1020.

reasons: First, because the exception impinges on a collateral *right* (e.g., cross-examination) rather than on visual confrontation itself, and second, because the exception, even if going to the core right of visual confrontation, takes place during a collateral *proceeding*.<sup>129</sup> *Stincer*, after all, upheld (with Scalia's approval) an exception to the right of visual confrontation, the crown jewel of Scalia's confrontation clause hierarchy. If the nature of the proceeding in *Stincer* justified this exception, why wouldn't it justify an exception to, and thereby override, the lesser collateral rights?

Under Scalia's reasoning, the "implied and collateral" rights such as cross-examination presumably exist, in their limited scope, at any proceeding where the core right of confrontation itself exists. But where the core right doesn't prevail—where an exception is justified, as in *Stincer*, because of the nature of the proceeding—how is it, under Scalia's approach, that the "implied and collateral" rights mysteriously survive and prosper, retaining full constitutional sanction? There is nothing illogical about such a result under the *Stincer* Court's functional reasoning, but it is very illogical under Scalia's analysis. If the competency hearing is a less worthy proceeding, not "really" part of the trial, and thus attended by an inferior grade of confrontation right, then should not the "implied" corollaries of that right be the first to go, with the core itself the last holdout? In other words, given a choice between having visual confrontation but no cross-examination at the competency hearing, or having cross-examination but no visual confrontation, Scalia's hierarchical framework strongly suggests that the constitutionally preferable choice is the former. As suggested above, it seems doubtful that any criminal defense attorney would agree. Can it be that the Sixth Amendment is so perverse?<sup>130</sup>

Justice Scalia's textual hierarchy is all the more distressing since it is perfectly possible to appreciate and accept his argument that the textual substance of a constitutional guarantee should not be perversely diluted by reference to its functional goals without rigidly exiling, as nontextual, crucial

129. *See id.*

130. Of course, one could step back and say that I am *really* missing the point, that I am ignoring the underlying rationale for exceptions to visual confrontation *whatever* the context, whether in a *Stincer*-type competency hearing or during the trial proper: Namely, the trauma to the child witness of facing the alleged abuser. Scalia could perhaps argue that an exception to the right of cross-examination would not be justified in a *Stincer*-type situation, even though the right is doubly "collateral" in that context—both because of the nature of the right and the nature of the proceeding—because the countervailing interest in avoiding trauma would not exist, or would not weigh nearly as heavily. But it turns out to be emphatically not the case that visual confrontation with the defendant is necessarily the only, or even the primary, source of trauma for child witnesses. One team of scholars, for example, without even mentioning the issue of visual confrontation, focuses specifically on the trauma of cross-examination. *See* Berliner & Barbieri, *supra* note 2, at 133; *see generally infra* note 223 and accompanying text. Of course, restricting cross-examination would have a far more dangerous impact on the reliability of both the competency hearing and the trial, *see infra* note 223, but Scalia's antifunctional approach disables him from even raising that issue. *Cf. infra* text accompanying notes 210-225 (criticizing majority in *Craig* for inadequately focusing on truth-seeking goal).

parts of that substance.<sup>131</sup> A powerful analog to Justice Scalia's antidilution argument arises in the Fourth Amendment search and seizure area. The text of that amendment specifically protects privacy and possessory interests in people's "persons, houses, papers, and effects."<sup>132</sup> In *Katz v. United States*,<sup>133</sup> however, the Supreme Court overruled precedent to hold that the protection of the Fourth Amendment extends to the wiretapping of telephone conversations. It justified this eminently reasonable view of the substance of the text by relying on its broad functional purpose: Protection of the people against governmental intrusions into their justifiable expectations of privacy.<sup>134</sup>

This broad, functional, "reasonable expectation of privacy" formulation has lent itself to arguments (usually not accepted by the Court) to expand Fourth Amendment protections even further beyond what, according to the more rigid textualist arguments, constitute the limits of that provision.<sup>135</sup> But it has also, on occasion, permitted prosecutors to plausibly argue, and the Court to plausibly conclude, that people may have less than a fully protected expectation of privacy in certain matters falling *within* the plain textual scope of the Fourth Amendment. Thus, the Supreme Court was recently presented with the argument, successful in the instant case, that a person has less than a fully-protected expectation of privacy in a closed container placed in the trunk of a car.<sup>136</sup> Because it can hardly be reasonably

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131. It is further distressing and inexplicable to see Justices Brennan and Marshall joining unreservedly in such a cramped view of the right of cross-examination. Cf. *Pennsylvania v. Ritchie*, 480 U.S. 39, 66 (1987) (Brennan, J., joined by Marshall, J., dissenting) (disagreeing with Court's rejection of cross-examination claim and emphasizing cross-examination's stature as "a primary interest secured by [the Confrontation Clause]" (quoting *Douglas v. Alabama*, 380 U.S. 415, 418 (1965))).

132. U.S. CONST. amend. IV.

133. 389 U.S. 347 (1967) (overruling *Olmstead v. United States*, 277 U.S. 438 (1928)).

134. See *Katz v. United States*, 389 U.S. 347, 353 (1967) (stating that "[t]he Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment"). Justice Harlan's influential concurring opinion in *Katz* elaborated the idea more explicitly and at greater length, holding that Fourth Amendment protection requires "first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" *Id.* at 361 (Harlan, J., concurring).

135. See, e.g., *Oliver v. United States*, 466 U.S. 170 (1984) (reaffirming "open fields" doctrine); see also *United States v. Dunn*, 480 U.S. 294 (1987). The Court in *Oliver* made a bow to the *Katz* "reasonable expectation of privacy" analysis, see 466 U.S. at 177-79, but placed decisive reliance on the textual argument that an "open field" is neither a "house" nor an "effect," see *id.* at 176-77, and on the historical common-law distinction between "open fields" and areas within the "curtilage" of the dwelling house, see *id.* at 180-81. *But see State v. Dixon*, 307 Or. 195, 766 P.2d 1015 (1988) (rejecting "open fields" doctrine under state constitutional law and holding that private land outside "curtilage" may be protected where owner manifests intent to exclude public).

136. See 59 U.S.L.W. 3493 (1991) (reporting oral argument in *California v. Acevedo*, 111 S. Ct. 1982 (1991), in which counsel for state argued that once defendant "knowingly and intentionally put [his] bag into the car, the bag was subjected to the lesser expectation of

disputed that both automobiles and items placed inside them such as bags and briefcases are "effects" under the Fourth Amendment, are we to conclude that there may, after all, be certain "persons, houses, papers, [or] effects," in some contexts, which may not be clothed with the kind of "reasonable expectation of privacy" necessary to invoke the full, ordinary protection of the Fourth Amendment?<sup>137</sup> Such reasoning would surely "abstract[] from the right to its purposes, and then eliminate[] the right,"<sup>138</sup> just as Justice Scalia accused the Court of doing with the right of confrontation in *Craig*.<sup>139</sup>

Justice Scalia had hinted at his counterintuitive hierarchy of confrontation rights in *Coy* by arguing that the number of cases concerning cross-examination suggested *not* that that element was "the essence of the [Confrontation] Clause's protection,"<sup>140</sup> but "that there is at least some room for doubt (and hence litigation) as to the extent to which the Clause

privacy that applies to vehicles"). Justice O'Connor correctly characterized this argument from the bench as "a little bit weak," *id.*, but the Court ruled seven to two for the state with O'Connor in the majority. See *Acevedo*, 111 S. Ct. at 1985-91. *Acevedo*, of course, is but one more predictable step in the evolution of the misnamed "automobile exception" to the Fourth Amendment warrant requirement, which began simply as a common-sense application of the general rule that exigency permits dispensing with a warrant, *see, e.g.*, *Coolidge v. New Hampshire*, 403 U.S. 443, 458-64 (1971), but has, over the years, become encrusted with the pernicious and Court-created notion that cars, aside from their inherent mobility and bulk (which logically relate solely to the exigency issue), are also surrounded by a "diminished expectation of privacy." *United States v. Chadwick*, 433 U.S. 1, 12-13 (1977); *see also California v. Carney*, 471 U.S. 386, 391-92 (1985); *United States v. Ross*, 456 U.S. 798, 811 (1982). Where the object of a search is truly and properly surrounded by a lesser expectation of privacy, of course, the normal analytical consequence is not merely the attenuation of the warrant requirement but of the probable-cause requirement as well. *See, e.g.*, *O'Connor v. Ortega*, 480 U.S. 709, 722-26 (1987) (plurality opinion) (stating that "reasonableness" rather than "probable cause" standard applied to search of public employee's office in which he allegedly had reduced expectation of privacy); *Florida v. Riley*, 488 U.S. 445 (1989) (finding no expectation of privacy at all regarding aerial helicopter surveillance from 400 feet, therefore no "search" requiring *any* justification in terms of cause or suspicion).

137. The problematic potential of Justice Harlan's *Katz* formulation—as I am surely not the first to note—is that it tends to replace the fixed textual boundary markers of the Fourth Amendment with a test subject to expansion and contraction according to, on the one hand, the individual person's changing subjective privacy expectations (which may easily be influenced, in circular fashion, by what the police are *in fact* permitted to do by the courts), and, on the other hand, the changing views of the government or society at large as to what scope of privacy should be "reasonably recognized" (which can easily be twisted into a bootstrap rationale for any new invasion of privacy, as in, "the democratically-elected legislature, representing society, has authorized this type of police search, therefore society must not recognize any countervailing individual privacy claim as reasonable").

138. *Maryland v. Craig*, 110 S. Ct. 3157, 3172 (1990) (Scalia, J., dissenting).

139. While one cannot be wholly sanguine, there appears to be some reason to hope that even the current Court recognizes this pitfall and will not *completely* eviscerate the Fourth Amendment along the lines hypothesized. While the warrant requirement has certainly taken a beating in *Acevedo* and similar cases, even *Acevedo* reaffirmed the bedrock requirement of probable cause for the search at issue. *See Acevedo*, 111 S. Ct. at 1991.

140. *Coy v. Iowa*, 487 U.S. 1012, 1016 (1988).

includes th[at] element[.]”<sup>141</sup> His language in *Coy*, however, without the insight provided by *Craig*, could be viewed as referring merely to the inherently indeterminate *scope* or proper manner of exercise of the right of cross-examination. Most constitutional case law, after all, concerns marginal issues arising at the indeterminate edge of vague guarantees (*i.e.*, the “*extent*” of those guarantees). And to give Scalia credit where due, he appeared to grasp far better than the majority in *Craig* the distinction between justifying restrictions on the manner of exercise of a right and justifying exceptions which, under certain conditions, cut to the core of the right.

Justice Scalia was clearly correct that *Craig* involved the latter, not the former, kind of issue,<sup>142</sup> and he therefore properly scolded the majority for relying on cases involving only restrictions on the manner of exercise of Sixth Amendment rights.<sup>143</sup> Generally speaking, after all, cross-examination is by its very nature a matter of degree and extent, whereas visual confrontation is usually more of an “all-or-nothing” proposition.<sup>144</sup> Not always, however. If *Craig*, for example, had involved the use of *two-way*, closed-circuit television, which might alter the quality or manner but arguably not the essence of visual confrontation, it might have been a very different case.<sup>145</sup>

Of course, the conclusion that a challenged restriction has invaded the “core” of a right, as opposed to merely nibbling at its “scope” or “manner of exercise,” might ordinarily be viewed as fatal to its validity. But even on that premise, Justice Scalia, as he well knew, was not yet home free. He still had to distinguish the uncontested cases upholding “firmly rooted”

141. *Id.*; see also *supra* text accompanying notes 79-80.

142. See *Craig*, 110 S. Ct. at 3173 (Scalia, J., dissenting) (stating that “we are not talking about the manner of arranging th[e] face-to-face encounter, but about whether it shall occur at all”).

143. See *id.* (disputing majority’s reliance on *Illinois v. Allen*, 397 U.S. 337 (1970) (“[t]he right to confront is not the right to confront in a manner that disrupts the trial”), *Taylor v. Illinois*, 484 U.S. 400 (1988) (“[t]he right ‘to have compulsory process for obtaining witnesses’ is not the right to call witnesses in a manner that violates fair and orderly procedures”), *Perry v. Leeke*, 488 U.S. 272 (1989) (“[t]he scope of the right ‘to have the assistance of counsel’ does not include consultation with counsel at all times during the trial”), and *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987) (“[t]he scope of the right to cross-examine does not include access to the State’s investigative files”)) (parenthetical comments in *Craig* dissent); *cf. id.* at 3166.

144. Generally speaking, either the witness can see the defendant or she cannot. Upholding a general right of cross-examination, however, only begins the inquiry. For example, the difficult debate over rape shield laws, see, e.g., *Michigan v. Lucas*, 111 S. Ct. 1743, 1746-48 (1991) (upholding Michigan law requiring notice to prosecutor within ten days of arraignment if rape defendant wishes to introduce evidence of complainant’s past sexual conduct with defendant), illustrates the Pandora’s box that opens up concerning what questions may be asked, and *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987); see *supra* notes 32-33 and accompanying text, typifies the vexing issues that arise concerning what materials defense counsel must have access to in order to formulate intelligent questions.

145. See *infra* note 243; see generally *infra* text accompanying notes 241-243 (criticizing failure of *Craig* majority to require inquiry into possible efficacy of less intrusive restrictions on confrontation, such as two-way, televised procedure).

hearsay exceptions against confrontation clause attack,<sup>146</sup> which generally have been viewed as justifying exceptions to confrontation which clearly cut to the core of the right.<sup>147</sup> His attempt to dissolve this obstacle to the textual purity of his analysis produced the most brutally simple and alarming turn yet in his reasoning. The out-of-court hearsay declarant, he asserted simply is not a "witness." Scalia reached this startling conclusion as follows: (1) "Witness" means either one who sees (as in "*witnesses*") the underlying events in dispute or one who testifies at the judicial proceeding at issue;<sup>148</sup> (2) hearsay declarants, by definition, are not testifying at the judicial proceeding at issue when they utter their out-of-court statements and, therefore, do not fall within the second definition above; (3) the confrontation clause refers only to the defendant's right to confront the "'witnesses *against him*,'"<sup>149</sup> meaning (according to Scalia) only those witnesses *testifying at trial* "against him"; *ergo* (4) "witness" in the confrontation clause "obviously refers to those who give testimony against the defendant at trial."<sup>150</sup>

With all due respect, this is a bizarre and untenable *non sequitur*. Justice Scalia conceded, and then brushed aside, the first dictionary definition for "witness"—which, I daresay, embraces the predominant common usage of the term.<sup>151</sup> He was forced to acknowledge, of course, that the hearsay

146. See *supra* text accompanying note 24 (quoting *Ohio v. Roberts*, 448 U.S. 56, 65-66 (1980)). The first in the line of cases upholding the "firmly rooted" hearsay exceptions appears to be *Mattox v. United States*, 156 U.S. 237, 243-44 (1895), which reaffirmed the admissibility of dying declarations. See FED. R. EVID. 804(b)(2).

147. See *supra* text accompanying notes 64-65 (noting received view, reflected in *Ohio v. Roberts*, 448 U.S. 56, 63 (1980), that "[i]f one were to read th[e] language [of the confrontation clause] literally, it would require, on objection, the exclusion of any statement made by a declarant not present at trial").

148. See *Maryland v. Craig*, 110 S. Ct. 3157, 3173 (Scalia, J., dissenting) (citing that old classic, 2 N. WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)). Ever enamored of the Latin, Scalia could not resist throwing in a citation to J. BUCHANAN, LINGUAE BRITANNICAE PRONUNCIATIO, a work dating from 1757. See *id.*

For the hardcore literal textualist, dictionaries and similar lexicographical tools are clearly the "in thing" to cite; they are, in a sense, the ultimate authority. See, e.g., Kannar, *supra* note 11, at 1306 (noting Scalia's belief in "an 'unwritten Constitution' from which one may seek guidance, a 'history of meaning in the words contained in the Constitution without which the Constitution itself is meaningless'" (quoting Scalia, *Is There An Unwritten Constitution?*, 12 HARV. J.L. & PUB. POL'Y 1, 1 (1989)); *id.* at 1333 n.178 (noting *John Doe Agency v. John Doe Corp.*, 493 U.S. 146 (1989), where "for majority Blackmun cites two different editions of Webster's Dictionary to prove correctness of his definition of 'compiled'; Scalia, in dissent, counter-strikes with citation to Roget's Thesaurus"); *Grady v. Corbin*, 110 S. Ct. 2084, 2097 (1990) (Scalia, J., joined by Rehnquist, C.J., and Kennedy, J., dissenting) (citing several 18th and 19th century dictionaries to define "offence" for purposes of double jeopardy clause).

149. *Craig*, 110 S. Ct. at 3173 (Scalia, J., dissenting) (quoting U.S. CONST. amend. VI) (emphasis added by Justice Scalia).

150. *Id.* at 3173-74.

151. Do we not often, when hearing about a reported (but as yet untried and even unsolved) crime, say, "Was there a witness?" We don't mean whoever might (or might not) testify at trial; we mean the person who *saw the crime*. I seem to recall that the popular film

declarant fits *that* definition precisely.<sup>152</sup> When John testifies at trial that Beth told him she saw Allen stabbing Jane fifty times with a letter-opener, any person on the street can identify *Beth*, not John, as the “witness” to the crime. John too is a “witness,” of course, though not just because he testified at a judicial proceeding, but also (I would argue at least equally importantly) because he *witnessed* Beth’s out-of-court statement. And yet Scalia would insist that the defendant in this hypothetical trial, unable to confront Beth, has not *literally* been denied the right, under the text of the Sixth Amendment, to confront a “witness *against him*.”<sup>153</sup> Scalia’s claims about the “obvious” and “literal”<sup>154</sup> import of the last two words simply do not hold water and plainly violate his own rule of careful attention to what the text *literally* says. The Sixth Amendment does *not* say that the defendant shall enjoy “the right . . . to be confronted with the witnesses *testifying at trial* against him,”<sup>155</sup> although that is what Scalia’s argument suggested it says and would require it to say. Why a “witness”—in the ordinary sense of one who *witnesses* the underlying events—cannot, by every rule of common-sense interpretation known to the English language, be said to be a witness “against” the defendant when his hearsay account of the underlying events is in fact *used against* the defendant at trial is altogether beyond my ken.<sup>156</sup> Justice Scalia, I submit, is looking to language for an eccentric kind of precision that simply is not there. The text may answer many constitutional questions, and may provide the starting point for answering all of them, but it discredits both text and textualism to make such absurd and overreaching claims on its behalf.

Again, it is not in logic but in experience that Justice Scalia’s reasoning poses its most troublesome implications. Aside from requiring a tortuously revisionist reading of relevant precedent,<sup>157</sup> his pettifogging definition of

*Witness* (Paramount Pictures 1985) involved a young Amish boy who saw a murder but never, during the entire length of the movie, got around to *testifying* about it. Indeed, the film’s dramatic suspense largely concerned whether he would be violently *prevented* from testifying about it. Cf. *supra* note 51 (describing Professor Kannar noting Scalia’s reliance on Hollywood culture to support his reading of the confrontation clause); see also 5 J. WIGMORE, *supra* note 48, § 1362, at 3 (describing hearsay statement as “the bare untested assertion of a *witness*”) (emphasis added).

152. See *Craig*, 110 S. Ct. at 3173 (Scalia, J., dissenting) (stating that “[that] meaning . . . would cover hearsay evidence”).

153. Said Scalia: “The [first dictionary] meaning (one ‘who knows or sees’) . . . is excluded in the Sixth Amendment by the words following the noun: ‘witnesses *against him*.’” *Id.* (emphasis in original).

154. See *id.* (stating that “[t]he Sixth Amendment does not *literally* contain a prohibition upon such evidence . . .” and that “[t]he phrase *obviously* refers . . .”) (emphasis added).

155. See U.S. CONST. amend. VI (emphasized words added).

156. See Comment, *The Supreme Court, 1989 Term: Leading Cases*, 104 HARV. L. REV. 129, 134 (1990) (noting this alternative reading of “the witnesses against him”).

157. Scalia criticized the majority in *Craig* for relying on language from *Ohio v. Roberts*, 448 U.S. 56, 63 (1980), stating that “the Confrontation Clause reflects a *preference* for face-to-face confrontation at trial.” See *Craig*, 110 S. Ct. at 3165 (opinion of the Court), 3172 (Scalia, J., dissenting) (emphasis added by Court). He argued that “what [*Roberts*] had in

“witness” opens up the prospect of complete subversion of the confrontation clause. If one accepts and takes seriously his redefinition of the hearsay declarant’s unopposed accusation of the defendant as merely “the receipt of *other-than-first-hand testimony* from witnesses at trial,”<sup>158</sup> then it is difficult to see on what basis he found even his degraded “evident constitutional preference”<sup>159</sup> against such evidence. He lamely conceded that “some limitation” on such evidence *must* be “implicit” in the confrontation clause, “since otherwise the Government could subvert the confrontation right by putting on witnesses who know nothing except what an absent declarant said.”<sup>160</sup> To be sure. But it is hardly convincing, coming from such a strict textualist as Scalia, to hear that the Constitution simply *must* prohibit something because the alternative, though “obviously” within the “literal” bounds of the text, is awful and unthinkable.<sup>161</sup>

The irony of Justice Scalia’s hypertextualist approach is that he completely overlooked two powerful and fundamental reasons why the constitutional validity of the many traditional hearsay exceptions does not necessarily support carving out exceptions to the right of visual confrontation at trial. First, admitting unopposed hearsay statements advances, in a very potent way, the functional, truth-seeking goal of the trial. Imagine, for a moment, a criminal justice system in which dying declarations,<sup>162</sup> statements against interest,<sup>163</sup> present sense impressions,<sup>164</sup> excited utterances,<sup>165</sup> business re-

mind as the nonpreferred alternative was not (as the Court implies) the appearance of a witness at trial without confronting the defendant. . . . What *Roberts* had in mind was the receipt of *other-than-first-hand testimony* from witnesses at trial.” *Id.* at 3173 (emphasis in original). But this is Scalia’s revisionist reinterpretation of *Roberts*, not what the *Roberts* Court actually “had in mind.” It is obvious from the language used that the *Roberts* Court viewed the “nonpreferred alternative” as involving a violation of the “literal” terms of the confrontation clause, in that a “witness’s” evidence against the defendant would be introduced “at trial,” without confrontation of the declarant-witness, through the trial witness’s testimony. *See supra* text accompanying notes 64-65, 146-147.

158. *Craig*, 110 S. Ct. at 3173 (Scalia, J., dissenting) (emphasis in original).

159. *Id.*

160. *Id.* at 3174.

161. Scalia’s response might be that this misrepresents his argument, which is not that such governmental conduct would be “awful and unthinkable,” *cf.* *Thompson v. Oklahoma*, 487 U.S. 815, 859 (1988) (Scalia, J., joined by Rehnquist, C.J., and White, J., dissenting) (voting to uphold execution of 15-year-old, which many would consider “awful and unthinkable”); *Stanford v. Kentucky*, 492 U.S. 361 (1989) (plurality opinion of Scalia, J., joined by Rehnquist, C.J., and White and Kennedy, JJ.) (upholding execution of 16-year-old), but that it would subvert a textual guarantee. *My* response would be “ah-hah!” The very fact, as Scalia conceded, that such conduct would clearly “subvert” the confrontation clause ought to have alerted him to the possibility that the defendant’s right to “confront[] . . . the witnesses against him” means not just the right to confront those who *testify* “against him” at trial, but also the right to confront those whose assertions are *used* “against him” at trial.

162. *See* FED. R. EVID. 804(b)(2); J. KAPLAN & J. WALTZ, *supra* note 15, at 131-40.

163. *See* FED. R. EVID. 804(b)(3); J. KAPLAN & J. WALTZ, *supra* note 15, at 194-201.

164. *See* FED. R. EVID. 803(1); J. KAPLAN & J. WALTZ, *supra* note 15, at 147-55.

165. *See* FED. R. EVID. 803(2); J. KAPLAN & J. WALTZ, *supra* note 15, at 140-47.



cords,<sup>166</sup> and learned treatises<sup>167</sup> were inadmissible, regardless of the unavailability of the declarant.<sup>168</sup> By contrast, at least in those cases where the justification for restricting or denying visual confrontation is simply the potential for psychological harm or discomfort to the witness, the alternative is not losing the testimony altogether but obtaining the very same testimony in presumptively more reliable form.<sup>169</sup>

Second, and most significantly, virtually all of the established hearsay exceptions concern statements that are not made or elicited for purposes of litigation but rather that occur spontaneously or for independently motivated reasons.<sup>170</sup> People will continue to blurt out excited utterances,<sup>171</sup> express their feelings,<sup>172</sup> comment on the view,<sup>173</sup> tell the doctor where it hurts,<sup>174</sup> fill out paperwork on everything from death to taxes,<sup>175</sup> and offer deathbed confessions,<sup>176</sup> regardless of whether such assertions are admissible or even useful evidence in courts of law. The prosecution is not in a position to influence the content or delivery of such statements in order to serve its trial-related goals. And it is simply impossible to subject such statements to "confrontation," because they occur not merely "out of court" but completely out of the context of the legal proceeding at issue. Given that such statements occur, we face a simple choice: To admit them under

166. See FED. R. EVID. 803(6); J. KAPLAN & J. WALTZ, *supra* note 15, at 247-79.

167. See FED. R. EVID. 803(18); J. KAPLAN & J. WALTZ, *supra* note 15, at 280-83.

168. Admission of the last four types of hearsay, among others, does not require a showing of unavailability. See FED. R. EVID. 803. As to those types of hearsay, however, more so than with the exceptions enumerated in Federal Rule of Evidence 804, their "effect cannot be replicated by live testimony because they 'derive [their] significance from the circumstances in which [they were] made.'" *Maryland v. Craig*, 110 S. Ct. 3157, 3174 (Scalia, J., dissenting) (quoting *United States v. Inadi*, 475 U.S. 387, 395 (1986)) (brackets added by Justice Scalia). Thus, the exclusion of such hearsay, even given the availability of the declarant, would impose a substantial cost in terms of the truth-seeking goal.

169. Of course, where the alternative to permitting the restriction on visual confrontation is complete loss of the testimony—that is, where visual confrontation would likely so traumatize the witness as to effectively silence her—the analogy to the truth-seeking goal of the hearsay exceptions is much stronger. I postpone discussion of this issue to Part III(C). See *infra* text accompanying notes 226-35.

170. The one apparent exception to this rule might seem to be the "former testimony" exception of Federal Rule of Evidence 804(b)(1). Even there, however, such testimony is not usually deliberately elicited for use in whatever instant judicial proceeding is at issue but rather is ordinarily the product of some earlier proceeding with an independent *raison d'être* of its own. And in any event, if the right of confrontation has been consistently applied, then the defendant will presumably have enjoyed it at the earlier proceeding. If not—if unfronted testimony is elicited at a pretrial deposition or proceeding for no other purpose than to substitute for confronted testimony at trial—then, as I suggest in the text and as Justice Scalia argued in *Craig*, it would indeed be the case that the confrontation clause has been subverted and that such a subversion could not properly be analogized to other hearsay exceptions.

171. See FED. R. EVID. 803(2).

172. See FED. R. EVID. 803(3).

173. See FED. R. EVID. 803(1).

174. See FED. R. EVID. 803(4).

175. See FED. R. EVID. 803(6)-(12).

176. See FED. R. EVID. 804(b)(2).

carefully defined circumstances or to ignore them and forsake their substantial evidentiary value. But it is clearly a vastly different proposition for the prosecution to elicit and cultivate unfronted statements in a staged and controlled setting, with an eye to the needs and goals of the litigation at hand, as a *deliberate* substitute for fully confronted testimony at trial. It is precisely in that controlled legal context, when the government has launched against the individual defendant its awesome machinery of criminal investigation and prosecution, that constitutional rights such as confrontation are most especially designed to serve their goal of protecting individual liberty.<sup>177</sup>

Justice Scalia's analysis in *Craig*, while never focusing on this issue explicitly, suggested an implicit and instinctive understanding of the problem. This occurred in his response to the majority's mischievous suggestion that the child witness's unfronted televised testimony not only could be justified by *analogy* to the hearsay exceptions, but might actually *be* hearsay itself.<sup>178</sup> Scalia properly took the majority to task for floating this off-the-wall proposition, but he did so by launching a somewhat shaky and roundabout attack on the alleged "unavailability" of the child witness in *Craig*.<sup>179</sup> "The Court's test today," he said, "requires unavailability only in the sense that the child is unable to testify in the presence of the defendant. That cannot possibly be the relevant sense."<sup>180</sup> But that sense seems hardly unreasonable in light of the broad definition found in Federal Rule of Evidence 804(a), which includes an inability to testify "because of

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177. Although I am generally referring here to proceedings of an obviously legal or quasi-legal character, such as interviews with law enforcement officials, depositions, pretrial hearings, or the trial itself, it is worth noting that even immediate postabuse interviews with suspected child sexual abuse victims, conducted by health care professionals and social workers, may tend more and more to resemble embryonic pretrial proceedings conducted with a definite eye toward criminal litigation. See, e.g., *State v. Giles*, 115 Idaho 984, 996, 772 P.2d 191, 203 (1989) (Huntley, J., concurring in the result) (describing pediatrician's postabuse interview as "involv[ing] a professional engaged in the execution of interrogation specifically designed to elicit information to be utilized in a criminal proceeding"); see also *infra* note 258 (discussing *Giles*); *infra* note 281.

178. See *Maryland v. Craig*, 110 S. Ct. 3157, 3167 (1990) (stating that "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 [*i.e.*, oath, cross-examination, and observation of demeanor] are far greater than those required for admission of hearsay testimony under the Confrontation Clause"). The majority's hasty parenthetical qualification was less than reassuring. Its wording was more than a little odd. The child's televised testimony in *Craig* was indisputably given "out of court"—or at least "out of courtroom"—in a "technical" sense. (This is even more true in the case of previously videotaped testimony, which, as I have noted, see *supra* note 5, is analytically indistinguishable from one-way, televised testimony.) Indeed, that is precisely the issue: Whether such a technological technicality should have any bearing on the question whether, for analytical purposes, such testimony in any way equates with traditionally recognized hearsay. As I argue in the text, it should not and it does not.

179. See *Craig*, 110 S. Ct. at 3174 (Scalia, J., dissenting). Scalia noted that unavailability is required to admit former testimony, which is probably the closest cousin to unfronted trial testimony among the hearsay exceptions. See *id.*; FED. R. EVID. 804(b)(1).

180. *Craig*, 110 S. Ct. at 3174 (Scalia, J., dissenting) (footnote omitted).

. . . mental illness or infirmity”<sup>181</sup> and even a sheer “refus[al] to testify . . . despite an order of the court to do so.”<sup>182</sup> Scalia mockingly compared unconflicted testimony by “the child [who] is unwilling to testify in the presence of the defendant” with “unsworn testimony [by] the witness [who] is unable to risk perjury” and “uncross-examined testimony [by] the witness [who] is unable to undergo hostile questioning,”<sup>183</sup> but his analysis was uncharacteristically sloppy here. The child, by hypothesis, is not simply *unwilling* to testify, but is so mentally traumatized as to be genuinely *unable* to do so. Such a child cannot fairly be compared to a witness who simply refuses to take the oath or submit to cross-examination.<sup>184</sup>

Nevertheless, Justice Scalia was correct, I think, in concluding that the majority’s implicit suggestion was off the mark. He noted that the “very object [of the Confrontation Clause] is to place the witness under the sometimes hostile glare of the defendant.”<sup>185</sup> Indeed, the very purpose of all trial-related procedural rights is to subject the government’s case to a harsh sieve of scrutiny. This gets to the crux of the question: whether the validity of the hearsay exceptions necessarily supports, by analogy, piecemeal exceptions to the right of confrontation regarding testimony staged and elicited by the prosecution as part of, or in anticipation of, the trial. Scalia’s answer, persuasive though oddly reasoned, was no.<sup>186</sup>

181. FED. R. EVID. 804(a)(4).

182. FED. R. EVID. 804(a)(2). The rule, of course, precludes a finding of unavailability when the witness’s refusal or inability to testify “is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.” FED. R. EVID. 804(a).

183. *Craig*, 110 S. Ct. at 3174 (Scalia, J., dissenting).

184. It is difficult to imagine a scenario in which it could be established that a witness, while able to testify, is truly *unable* to take the oath or to submit to cross-examination following direct testimony. A witness might break down or become inarticulate in the face of cross-examination, once it commences, but that might simply serve the cross-examiner’s purposes. Any fear or trauma related to cross-examination, as opposed to visual confrontation, could not render the witness truly unable to testify in the first place, because cross-examination follows direct testimony. See *infra* note 223.

185. *Craig*, 110 S. Ct. at 3174 (Scalia, J., dissenting). It was at the conclusion of this passage that Scalia offered the provocative point discussed in Part III(C), relating to whether even the truth-seeking goal of the trial (in the case where the child witness would be traumatized into silence by visual confrontation) can justify an exception to the right of confrontation. See *infra* text accompanying note 235.

186. It might be suggested that the two criticisms of extending the hearsay analogy set forth above involve functional considerations essentially alien to Scalia’s textualist approach and that this explains why he seemed to overlook them. My point, however, is that given the existence of the hearsay exceptions, Scalia should have recognized that in this area, as in other areas he recognizes, the “scope [of the Sixth Amendment] is [to some extent] textually indeterminate.” *Craig*, 110 S. Ct. at 3173 (Scalia, J., dissenting). Scalia himself appeared to accept the invocation of functional considerations like the truth-seeking goal in order to elucidate the meaning of unclear text, as reflected in his acceptance of the “implicit” right of cross-examination and the “implicit” limitations on hearsay which might otherwise “subvert” the confrontation clause. I certainly see nothing wrong with such an invocation of functional concerns, when most would agree that such concerns, at least in important part, motivated the adoption of the constitutional text in question.

The final part of Justice Scalia's dissent raised still more interesting and troubling issues.<sup>187</sup> He dismissed the asserted "state interest in protecting child witnesses from the trauma of testifying"<sup>188</sup> as nonexistent, arguing essentially that the state can always just choose not to prosecute.

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.<sup>189</sup>

I would assume—indeed, I would not believe the contrary—that Scalia, the kindly father of nine,<sup>190</sup> is sensitive to the Hobson's choice faced by prosecutors and parents<sup>191</sup> in a sexual abuse case, who desperately wish to convict the child's assailant but fear inflicting further psychological damage on the fragile victim, who may only just be recovering from the abuse itself. So why does he offer such remorseless, and questionable, logic?<sup>192</sup> Of course, because Maryland's statute requires trauma "such that the child cannot reasonably communicate,"<sup>193</sup> little motivation would exist to call such a child to testify in the absence of the statutory restriction on confrontation.<sup>194</sup> Psychological evaluations are not infallible, however, and the cruel temptation might exist to put the child on the stand on the off-chance that she might be able to communicate something. In any event, Scalia ignored the fact that many states do not require a showing of trauma sufficient to silence the witness in order to invoke restrictions on confrontation.<sup>195</sup> That, of course, raises a host of additional concerns,<sup>196</sup> but Scalia

187. I postpone until Part V, *see infra* text accompanying note 294, a discussion of the *very* conclusion of his dissent, in which he offered a powerful indictment of "balancing." *See Craig*, 110 S. Ct. at 3176 (Scalia, J., dissenting).

188. *Craig*, 110 S. Ct. at 3169.

189. *Id.* at 3175 (Scalia, J., dissenting).

190. *Cf. McLellan, Meet the Supremes*, THE WASHINGTONIAN, May 1991, at 78, 154 (stating that "Scalia can be seen on occasion heading into A.V. Ristorante, several of his nine offspring—known as the Scallions—trailing him like a row of ducklings"). Along the same line, and offering an amusing sidelight on the anonymity enjoyed by the Justices, *see id.* at 152, which states: "Checking into a motel with his vanload of children during a drive through the heartland last summer, Antonin Scalia laid down his credit card and corrected the clerk who mispronounced his name. 'Oh, just like the Supreme Court justice,' beamed the clerk."

191. Assuming, of course, that one or both parents are not themselves accused.

192. *Cf. Cruz v. New York*, 481 U.S. 186, 197 (1987) (White, J., joined by Rehnquist, C.J., and Powell and O'Connor, JJ., dissenting) (criticizing Scalia's "remorseless logic" in another context); *id.* at 193 (opinion of the Court by Scalia, J.) (cheerfully equating "remorseless logic" with "common sense and good judgment").

193. MD. CTS. & JUD. PROC. CODE ANN. § 9-102(a)(1)(ii) (1989), *quoted in Craig*, 110 S. Ct. at 3161 n.1.

194. *See Craig*, 110 S. Ct. at 3175 (Scalia, J., dissenting) (stating that "[such a child] 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.>").

195. *See Comment, supra* note 156, at 137 n.70 (citing Florida, Rhode Island, Arizona, and Kentucky statutes).

196. *See infra* text accompanying notes 214-25.

neither addressed those concerns nor acknowledged the reality and the cruel dilemma of the dual concern—to prosecute the abusers while protecting the abused from “secondary victimization”<sup>197</sup>—motivating all such laws.

The penultimate paragraph of the dissent invoked that old standby, the parade of horrors—in this case a parade of one: the very real nightmare experienced by two dozen people accused (most falsely, it appears) of sexual abuse in Jordan, Minnesota during the mid-1980s.<sup>198</sup> While disturbing and compelling, this account is not especially on point, because the abuses that occurred in that case related to suggestive and coercive interrogation tactics used with the children during investigation and not to confrontation, or lack thereof, at trial.<sup>199</sup> Scalia cited “studies show[ing] that children are substantially more vulnerable to suggestion than adults, and often unable to separate, recollected fantasy (or suggestion) from reality.”<sup>200</sup> While research into the ability of young children to recall past events truthfully and accurately has raised concerns over suggestibility,<sup>201</sup> however, the weight of

197. See Avery, *supra* note 2.

198. See Craig, 110 S. Ct. at 3175-76 (Scalia, J., dissenting). It appears that a recently reported and ongoing case in Edenton, North Carolina may raise similar concerns. See Goodman, *Sex Abuse Charges Divide a Small Town*, N.Y. Times, May 7, 1991, at B1, col. 5 (reviewing PBS “Frontline” documentary, entitled “Innocence Lost,” about child sexual abuse charges against owners and employees of daycare center that have bitterly divided small town).

199. One of the “misguided investigative techniques” cited by Scalia, *see* Craig, 110 S. Ct. at 3176 (Scalia, J., dissenting), verged on the truly Kafkaesque. “[S]ome children were told by their foster parents that reunion with their real parents would be hastened by ‘admission’ of their parents’ abuse.” *Id.* (citing H. Humphrey, Minnesota Attorney General, Report on Scott County Investigation 9 (1985)). Not only does such an approach amount to a coercive attempt to support a preconceived conclusion, rather than any kind of legitimate investigative technique, but such coercion would logically, and perversely, seem most likely to produce “admissions” of abuse precisely by those children who have *not* been abused by their parents. The desire to be reunited with the parents would presumably be strongest in such children. Children who *have* been abused might well be less moved by such an “inducement”; indeed, they might view reunification as a fearful prospect, and lie to avoid it. It is well known, of course, that a child’s feelings of affection and dependency toward an abusive parent may persist and coexist with the abuse, *see, e.g.*, Berliner & Barbieri, *supra* note 2, at 128 (noting that “the child victim may have mixed feelings toward the accused [family member]”), but that would hardly justify or render more reliable such an outrageously coercive and deceptive interrogation technique.

200. Craig, 110 S. Ct. at 3175 (Scalia, J., dissenting).

201. As long ago as 1900, the respected French psychologist Alfred Binet conducted a study which appeared to show greater susceptibility to suggestion on the part of children than among adults. Although Binet recognized the limitations of his research, he recommended on that basis that the police not ask questions of child witnesses, but simply have them write out or dictate a report of what happened to them. The French criminal justice authorities were apparently unresponsive to this suggestion. See Goodman, *Children’s Testimony in Historical Perspective*, 40 J. Soc. Issues, No. 2, at 9, 19 (1984) (citing A. BINET, LA SUGGESTIBILITÉ (1900)); *cf.* S. GOULD, *THE Mismeasure of Man* 146-54 (1981) (describing and praising Binet’s role in development of modern “I.Q. test” in book otherwise harshly critical of “scientific” attempts to measure intelligence).

The issue turns out to be more complex, however. Suggestibility, for example, may be

modern scholarship has tended to reject any "general assumption that [children] are less truthful than adults."<sup>202</sup> Indeed, in some respects children may have an advantage over adults in terms of reliability.<sup>203</sup> Incidents like

ties as much to the strength of the witness's underlying memory of events as to the witness's age. See Goodman & Helgeson, *supra* note 2, at 187; Loftus & Davies, *Distortions in the Memory of Children*, 40 J. Soc. ISSUES, No. 2, at 51, 56-64 (1984); Cohen & Harnick, *The Susceptibility of Child Witnesses to Suggestion: An Empirical Study*, 4 L. & HUM. BEHAV. 201, 209 (1980). On the other hand, suggestibility may be enhanced when "the questioner is of a relatively high status," a situation obviously more likely to occur when the witness is a young child. See Goodman & Helgeson, *supra* note 2, at 187. It has been noted that adults are often tempted to ask suggestive questions of children because children tend to say less under interrogation. See *id.* But "while children often recall less than adults do, what they recall may be quite accurate." *Id.* at 186. Studies have undermined the notion that children have any systematically or dramatically greater memory deficit than adults, and there is even remarkably little empirical support for the widely accepted proposition that children have greater difficulty than adults in separating remembered fact from fantasy. See Johnson & Foley, *Differentiating Fact From Fantasy: The Reliability of Children's Memory*, 40 J. Soc. ISSUES, No. 2, at 33, 34-39 (1984); see also Note, *Videotaping Children's Testimony*, *supra* note 2, at 811.

A recent collection of studies published under the auspices of the American Psychological Association substantially augments the fund of empirical evidence bearing on children's suggestibility. See THE SUGGESTIBILITY OF CHILDREN'S RECOLLECTIONS (J. Doris ed. 1991) [hereinafter CHILDREN'S RECOLLECTIONS]. This compilation generally presents a mixed portrait of children's reliability, suggesting a high degree of fundamental trustworthiness and accuracy, while reaffirming longstanding fears about the impact of persistently leading and suggestive interrogation. See *infra* note 204.

202. Avery, *supra* note 2, at 10 (noting that "[m]ost experts who have considered and researched this assumption find it to be false"); see also *supra* note 201; *infra* note 203. While critics of the reliability of children's accounts are quick to point to anecdotal horror stories, the anecdotal evidence from those who work most closely with the problem tends to point in the opposite direction. Avery, for example, quotes a Los Angeles police detective who helped found the Los Angeles Police Department's Sexually Exploited Child Unit as saying: "Children are the most truthful people I deal with," and "My advice to the parent whose child tells him he has been molested, is to believe it." Avery, *supra* note 2, at 10 n.46.

203. Johnson and Foley note that "there is some intriguing evidence that young children sometimes notice potentially interesting things that older children and adults miss." Johnson & Foley, *supra* note 201, at 35. They describe a study in which young children demonstrated a greater ability to recall odd, peripheral events (such as a woman with an umbrella walking across a basketball court during a game) that were apparently screened out as "irrelevant" by the older children and adults in the study. See *id.* at 35-36. They note that such events "potentially are relevant in the courtroom." *Id.* at 36 (emphasis in original). The greater knowledge base and inferential ability of adults may, ironically, cause "[t]he importation into memory of erroneous information . . . based on extensive prior knowledge or preconceptions, that children may not possess or may not make use of." *Id.* at 39; see also Goodman & Helgeson, *supra* note 2, at 185 n.10 (citing paper "arguing that adults are at a relative disadvantage . . . because their knowledge and strategies impose greater constraints on information processing and creativity"); Note, *Videotaping Children's Testimony*, *supra* note 2, at 812-13 & n.18 (arguing, *inter alia*, that "[c]hildren are more likely to notice, although they may not recognize the significance of what they see"). Johnson and Foley offer the provocative example of a study in which subjects viewed a picture of a man holding a razor in a subway scene; adults, but not children, tended to erroneously recall that the man was black rather than white. Johnson & Foley, *supra* note 201, at 46. Quoting Sigmund Freud's suggestion that the "untrustworthiness of the assertions of children is due to the predominance of their

the Jordan, Minnesota case do underscore, however, the "picture of the child witness [as] . . . a potentially accurate witness, one who can recount events and answer nonleading questions reasonably correctly, but whose report can easily be contaminated by suggestion."<sup>204</sup> Such incidents also

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imagination, just as the untrustworthiness of the assertions of grown-up people is due to the predominance of their prejudices," they conclude that "it remains unclear whether the imagination of children or the prejudice of adults is the more dangerous enemy of justice." *Id.*

Along the same line is the finding that children (somewhat like Justice Scalia in his interpretation of constitutional text) tend to be highly literal in their accounts of events. Berliner and Barbieri cite trial testimony from an actual case in which the defense attorney seemingly succeeded in causing the child witness to recant and contradict herself on cross-examination, when in fact the apparent conflict (as the prosecutor clarified on redirect) arose from the child's literal, and rigorously accurate, distinction between placing her mouth on the defendant's sexual organ (which did not happen) and the defendant placing his sexual organ in her mouth (which did). See Berliner & Barbieri, *supra* note 2, at 132.

204. Goodman, *supra* note 201, at 22. Goodman describes this picture as emerging from studies conducted in the early 20th century. *Id.* She cites a 1914 British study, for example, which found children's spontaneous descriptions of a staged event to be remarkably accurate, but that substantial inaccuracies emerged when the children were questioned about the event; the researchers concluded that "when the testimony of children is unaffected by questions or suggestions, it is worthy of the utmost consideration." *Id.* at 21. These conclusions would appear to be generally confirmed by recent research reported in CHILDREN'S RECOLLECTIONS, *supra* note 201. With regard to relating factual details in response to questions, some studies indicated a high degree of reliability, and even a high degree of resistance to leading but low-pressure "yes-or-no" questions. For example, in one study 72 five-to-seven-year-old girls were given a standard medical examination by a pediatrician, in which half of the subjects received a genital/anal examination. Of the 36 children who were not given the genital/anal exam, three nevertheless said they were touched there in response to leading questions, and one of those falsely claimed that the doctor had inserted a stick into her rectum. This low but troubling rate of "false positives" was counterbalanced, interestingly, by the disturbingly high rate—over 75%—of "false negatives" (*i.e.*, failure to report touchings that actually occurred) among the 36 children who were given the genital/anal exam and were asked open-ended questions about the experience. The study thus indicated both the dangers of, and yet the pressures to use, leading questions, at least of a straightforward, noncoercive variety. See Goodman & Clarke-Stewart, *Suggestibility in Children's Testimony: Implications for Sexual Abuse Investigations*, in CHILDREN'S RECOLLECTIONS, *supra* note 201, at 92, 98-99.

Far more troubling, however, was a study which revealed the impact of persistently suggestive interrogation on children's interpretations of ambiguous events. One hundred five- and six-year-olds were each left in a room with a man who posed as a janitor and who, following one of two scripts, either cleaned and rearranged some toys, including a doll, or played with the toys in a suggestive and suspicious manner. An interviewer posing as the janitor's boss then interviewed each child afterward, following either a neutral line of questioning, or one which insistently suggested either that the janitor had played with the toys rather than cleaned them or had cleaned rather than played with them. At the end of this initial line of questioning, the interviewer posed an open-ended free-response question, followed by seventeen simple factual questions, and, finally, six "interpretive" questions (*e.g.*, "Was the janitor doing his job or was he being bad?"). The results were that children subjected to a suggestive interrogation inconsistent with what they had actually experienced tended to yield to the interrogator's interpretation of events. Two thirds of such children came around to agreeing with the interrogator's version by the end of the initial line of questioning. The accuracy rate returned to a relatively high level during the seventeen factual questions (indeed,

reinforce the suspicion that "untrained interviewers pose as great a danger to justice as do child witnesses."<sup>205</sup>

Thus spake Scalia in *Craig*. Rarely have so many interesting and troublesome points been raised in a single short dissent. As discussed below, however, the problems of the dissent are ultimately outweighed by those of the majority opinion.

### C. *The Majority Opinion*

As I have already suggested—having taken the somewhat odd approach of discussing the dissent before the majority opinion<sup>206</sup>—the majority in *Craig* was guilty of a careless overgeneralization in concluding, at turgid length, that the validity of the traditional hearsay exceptions, notwithstanding the "literal" denial of confrontation, supported by analogy the complete denial of visual confrontation in *Craig*.<sup>207</sup> The Court's blandly stated balancing test permitted the state to invade the core of a constitutionally enshrined right of criminal procedure where "necessary to further an important public policy and . . . where the reliability of the testimony is otherwise assured."<sup>208</sup> As I have argued, it is one thing to invoke the functional goal of "reliability" to justify admission of fortuitous hearsay statements made outside the context of litigation, and *quite* another to permit the state to invoke alleged alternative "safeguards of reliability"<sup>209</sup> as justification for deliberately dispensing *at trial* with the very "safeguard of reliability" specified by the constitutional text.

The Court did most of the damage in applying the policy prong of its test. The Court was vague about precisely what kind and degree of trauma to the child witness was necessary to justify a denial of visual confrontation. Its initial suggestion—that "a State's interest in 'the protection of minor victims of sex crimes from further trauma and *embarrassment*' is a 'compelling' one"<sup>210</sup>—sounded alarmingly broad. After restating the state's policy

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to a rate similar to that among children subjected to neutral or consistently suggestive interrogations), although one fifth of the children made factual misstatements consistent with the bias of the interrogation, even though they had not been subjected to any specific suggestions with regard to such factual details. More disturbingly, 90% of the children answered at least four of the six interpretive questions in line with the biased interrogation, and inconsistently with the scenario actually experienced. After a second round of similarly biased questioning, only one child in the study failed to answer six out of six of the interpretive questions consistently with the interrogation. Still worse, the children stuck by their tainted versions under questioning by parents and on a follow-up questionnaire conducted one week later. See *id.* at 99-102.

205. Goodman, *supra* note 201, at 22.

206. I have my reasons, of course. Because this article is largely a critique of Justice Scalia's textualist approach in this area, I give his dissent in *Craig* the same prominent treatment as his majority opinion in *Coy*.

207. See *Maryland v. Craig*, 110 S. Ct. 3157, 3162-66 (1990).

208. *Id.* at 3166.

209. *Id.*

210. *Id.* at 3167 (my emphasis) (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982)).



interest in even vaguer terms,<sup>211</sup> the Court held, not very reassuringly, 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.'"<sup>212</sup> The Court finally concluded: "We need not decide the minimum showing of emotional trauma . . . 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."<sup>213</sup>

While *Craig* could be interpreted by a future Court to require, as a prerequisite to denial of visual confrontation, a showing of trauma sufficient to silence the child witness,<sup>214</sup> some commentators have already observed that the Court's broad language, whether carelessly or by design, "will likely encourage lower courts to uphold [confrontation-restrictive] procedures . . . despite lower necessity thresholds than that of the Maryland statute."<sup>215</sup> The most obvious problem with permitting an exception to the right of confrontation on the basis of psychological harm that would not silence the witness is that it divorces the rationale for the exception from "the functional and symbolic goals of the confrontation clause."<sup>216</sup> An exception predicated on the need to avoid losing the child's testimony altogether could at least rely for support on the analogous truth-seeking rationale of the hearsay exceptions.

Furthermore, however worthy and sympathetic the goal of sparing the child witness unnecessary trauma, it seems inherently troublesome to embark on such a bald exercise of balancing the psychological health of the witness against infringements on the defendant's constitutional rights. It is an inherently incommensurable balance because it requires weighing and comparing two intrinsically nonfungible values. The two leading cases cited by the Court to justify such a direct weighing of the child's well-being against a constitutional guarantee are interesting in this light. Neither is really apposite,<sup>217</sup> and

211. *See id.* at 3169 (stating that "the trial court must hear evidence and determine whether use of the one-way closed circuit television procedure is necessary to protect the welfare of the . . . child witness") (emphasis added).

212. *Id.* (quoting *Wildermuth v. State*, 310 Md. 496, 524, 530 A.2d 275, 289 (1987)).

213. *Id.* (citation omitted); *see also id.* at 3170 (concluding that denial of visual confrontation is justified "where necessary to protect a child witness from trauma that would be caused by testifying in the physical presence of the defendant, *at least where such trauma would impair the child's ability to communicate*") (emphasis added).

214. *See id.* at 3174 n.1 (Scalia, J., dissenting) (taking this view of Court's decision and asserting that "[a]ny implication beyond that would in any event be dictum").

215. Comment, *supra* note 156, at 137. As the Comment notes, at least one state court has already done so. *Id.* at 137 n.70 (citing *State v. Crandall*, 120 N.J. 649, 577 A.2d 483 (1990)).

216. *Id.* at 138.

217. *See, e.g., Craig*, 110 S. Ct. at 3167 (citing *Osborne v. Ohio*, 110 S. Ct. 1691 (1990)). *Osborne* upheld against First Amendment attack a law proscribing the private possession of child pornography, distinguishing the protection previously afforded to private possession of

one, by virtue of its very citation in *Craig*, illustrates its own problematic character more than it justifies *Craig*.<sup>218</sup>

The scholarly literature, surprisingly, provides some basis for questioning the assumption that trial testimony is necessarily harmful to the child victim-witness,<sup>219</sup> although the weight of evidence clearly supports that conclu-

"obscene" materials in general. See *Stanley v. Georgia*, 394 U.S. 557 (1969). As the Court in *Osborne* explained, however, the rationale for the incidental impact on expression in that context arises from the distinctive fact that the very creation of the "expression" at issue involves substantive illegal conduct directly harmful to children and lacking even a shadow of First Amendment protection. See *Osborne*, 110 S. Ct. at 1695-97; see also *New York v. Ferber*, 458 U.S. 747, 774-75 (1982) (O'Connor, J., concurring). As the direct and necessary fruit of such conduct, child pornography may properly be viewed simply as contraband for reasons essentially unrelated to its impact on potential viewers—that is, to its "message" or "idea"—and yet inextricably related (thereby justifying the ban as narrowly tailored) to its objective character and origin. To pose a possibly frivolous analogy, would the First Amendment protect the possession or sale of a document printed on marijuana leaves?

218. See *Craig*, 110 S. Ct. at 3167 (citing *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982)). *Globe Newspaper* illustrates the problems inherent in extending a constitutional right to cover new and shaky ground, in this case the "right of access" to trials (and perhaps other governmental sources of news) now thought to be implicit in the First Amendment. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *id.* at 582-84 (Stevens, J., concurring). The necessity or temptation always arises to start qualifying and cabining such newly extended rights, so they don't get *too* out of hand. Then, by an unfortunate feedback process, the limitations on the extended version of the underlying right are used to justify similar limitations on the right itself and, by extension, other constitutional rights. Thus, *Craig*, in order to justify a restriction cutting to the core of the Sixth Amendment right of confrontation, can plausibly cite *Globe Newspaper* for the proposition that

a State's interest in the physical and psychological well-being of a minor victim [is] sufficiently weighty to justify *depriving* the press and public of their constitutional *right* to attend criminal trials, where the trial court makes a case-specific finding that closure of the trial is necessary to protect the welfare of the minor.

*Craig*, 110 S. Ct. at 3167 (emphasis added); *cf.* *United States v. Noriega*, 917 F.2d 1543, 1549-50 (11th Cir. 1990) (upholding prior restraint of TV broadcast on basis, in part, of analysis explicitly drawn from inapposite right of access cases), *cert. denied & stay denied sub nom.* *Cable News Network, Inc. v. Noriega*, 111 S. Ct. 451 (1990) (Marshall, J., joined by O'Connor, J., dissenting). Personally, I tend to find the concept of an implied Sixth Amendment right of access to public trials more convincing. See *Gannett Co. v. DePasquale*, 443 U.S. 368, 406-48 (1979) (Blackmun, J., joined by Brennan, White, and Marshall, JJ., concurring in part and dissenting in part). *Craig*, of course, conveniently ignored one recent case in which the psychological and privacy interests of a sex crime victim were decisively subordinated to a right more clearly flowing from the core of the First Amendment. See *Florida Star v. B.J.F.*, 491 U.S. 524 (1989) (invalidating statutorily authorized civil recovery against newspaper for accurately reporting rape victim's name).

219. Tedesco and Schnell note, for example, that

[i]n contrast to the possible harmful effects of the legal process, some argue that the same procedures may be beneficial. While there is little research, [one study] argue[s] that open discussion and exploration of trauma is beneficial for children. Testifying can be seen as increasing a child's sense of self-efficacy and can serve as a coping strategy. In addition, it can provide a child with a sense of psychological closure to a traumatic experience.

Tedesco & Schnell, *supra* note 2, at 268. They cite one scholar who testified before a U.S. Senate subcommittee "that it is plausible that a child's response to the court and legal

sion.<sup>220</sup> Furthermore, much of the trauma experienced by child victim-witnesses may flow from the intimidating formality and public exposure of the traditional courtroom setting, factors which might be ameliorated without raising any serious constitutional issues.<sup>221</sup> The real problem, however, is precisely that once one embarks on such a blatantly empirical balancing enterprise, policy claims can easily be made to "outweigh"<sup>222</sup> those of the Constitution, whether the operative theory is textual, functional, doctrinal, or rooted in some other principle. Where is a line to be drawn? It is noteworthy that stronger scholarly support arguably exists for restricting *cross-examination* on grounds of trauma than for limiting visual confrontation.<sup>223</sup> And what about the testimonial trauma undoubtedly experienced

procedures may be less severe than that of an adult. The experience could be cathartic, provide a feeling of control, provide vindication, and symbolically put an end to an unpleasant experience." *Id.* Similarly, Berliner and Barbieri note that:

the experience of testifying in court can have a therapeutic effect for the child victim. The child can learn that social institutions take children seriously. Some children report feeling empowered by their participation in the process. Some have complained, when the offender pled guilty, that they did not have an opportunity to be heard in court.

Berliner & Barbieri, *supra* note 2, at 135; *see also* R. KEMPE & C. KEMPE, *supra* note 2, at 85 (noting that in some cases "older children and adolescents do well and feel strengthened in their new role as a person who matters").

220. *See supra* note 2. Weiss and Berg provide some particularly compelling examples of the trauma of testimony for child witnesses. *See* Weiss & Berg, *supra* note 2, at 515-16 (describing seven-year-old girl who became terrified that repeated trial delays meant her abusive father might be able to carry out threats to kill her and her mother, and ten-year-old boy, at closed hearing where no family member or acquaintance was allowed to be present, who reported hearing grand juror laugh as he described being raped by two men).

221. For example, pretrial videotaping or contemporaneous one-way, televised testimony would seem to pose little if any constitutional problem so long as full cross-examination is allowed and the defendant is permitted to be present and to confront the child visually. *See supra* note 5; *supra* text accompanying note 97. It would be relatively easy to structure the out-of-courtroom setting—for example, along the lines of Libai's "Child-Courtroom," *see* Libai, *supra* note 2, at 1003-32—in such a way as to alleviate most of the intimidating features of the traditional courtroom noted in Note, *Videotaping Children's Testimony*, *supra* note 2, at 816. The empirical study conducted by the authors of the note suggested a marked increase in the quality and accuracy of children's testimony when elicited in the more "friendly" noncourtroom environment. *See id.* at 814-17. The authors did not have the "defendant" present in the noncourtroom setting in their study, and their experimental methodology did not separate out this factor from others rendering the traditional courtroom more intimidating. *See id.* at 817 n.26 (conceding need for further "[s]tudies that separate the array of variables in the present study"). Thus, it may be that many of the benefits they believe would accrue from the use of alternatives to the traditional courtroom setting could be achieved without significantly impinging on the defendant's right of confrontation. *Cf. id.* at 819-21 (criticizing efficacy of videotaping with defendant present, despite lack of clear empirical support for this position from their study).

222. *See* Maryland v. Craig, 110 S. Ct. 3157, 3167 (1990). The Court's description of its balancing approach was remarkably candid and blunt: "We . . . conclude today that a State's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to *outweigh*, at least in some cases, a defendant's right to face his or her accusers in court." *Id.* (emphasis added).

223. Berliner and Barbieri state:

by adult victims of rape,<sup>224</sup> or, to some extent, by victims of any violent or traumatic crime? It is not a flippant invocation of the slippery slope to ask where it all ends. Perhaps in the end we are led back, however reluctantly, to Justice Scalia's coldly blunt observation in *Coy* that while confrontation

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Cross-examination is especially difficult for child witnesses. The defense attorney's job is to impeach the child's testimony. Usual cross-examination tactics, such as bringing up other situations that tend to cast doubt on the witness's veracity or competence or using an intimidating manner in the questioning, are less acceptable in the case of child witnesses and should not go unchallenged.

Berliner & Barbieri, *supra* note 2, at 133; see also Tedesco & Schnell, *supra* note 2, at 268 (citing Berliner & Barbieri, *supra* note 2, and noting that as a result of the defense attorney's efforts at impeachment "the child may be intimidated, embarrassed, or otherwise humiliated"); Note, *Videotaping Children's Testimony*, *supra* note 2, at 821-22.

Needless to say, limiting cross-examination would pose far greater dangers to the truth-seeking goal than would restricting visual confrontation, and would be far more difficult to justify, even (perhaps especially) under the prevailing functional approach to the right of confrontation reflected in *Stincer* and *Craig*, with its emphasis on the availability of cross-examination. *But see* Note, *Videotaping Children's Testimony*, *supra* note 2, at 821-22 (arguing that children should be permitted to testify without cross-examination). The authors of the note argue that because of children's psychological characteristics, "cross-examination employed as a means to elicit further details from children significantly impairs the completeness and accuracy of their answers" and "is more likely to generate inaccurate testimony than is the age of the witness." *Id.* at 821 (citations omitted); see also *id.* at 822 n.50 (quoting Pynoos & Eth, *The Child as Witness to Homicide*, 40 J. Soc. ISSUES, No. 2, at 87, 98 (1984), for proposition that child should be "allowed to recount the events in his or her own way, at his or her own pace, and with his or her own emphasis"). The argument is unpersuasive, however, because cross-examination by definition follows the child's direct testimony, when, under the presumably gentle and friendly prodding of the prosecutor, the child will already have been given a full opportunity to tell her story "in her own way, at her own pace, and with her own emphasis." The authors fail to offer a convincing rationale for completely abrogating the defendant's crucial right to probe any weaknesses or inconsistencies of the direct testimony on subsequent cross-examination. If the concern is that the child may "freeze up" and thereby unfairly discredit her own prior direct testimony, expert testimony might be admissible, as appropriate, to explain to the jury that children may react differently to cross-examination than adults and that an inability to bear up well under cross-examination might not necessarily indicate any unreliability in the child's direct testimony. It is doubtful, in any event, that many defense attorneys risk being unduly hard on child witnesses during cross-examination, for fear of arousing the jury's sympathy on behalf of the witness.

224. *Cf.* Michigan v. Lucas, 111 S. Ct. 1743, 1746 (1991) (recognizing valid state interest in protecting rape victims against "surprise, harassment, and unnecessary invasions of privacy" at trial). It is doubtful that it makes any more sense to draw a line separating adults from juveniles with regard to testimonial trauma than one separating children of different ages. One study has shown that five-to-seven-year-old and ten-to-twelve-year-old children have markedly different conceptions and understandings of sexual abuse. See Wurtele & Miller, *Children's Conceptions of Sexual Abuse*, 16 J. CLINICAL CHILD PSYCHOLOGY 184, 188-90 (1987). It stands to reason that there may be far more similarities between the kind and degree of witness trauma suffered by a thirteen-year-old (as in *Coy*) and, say, a twenty-five-year-old, than between a thirteen-year-old and a six-year-old (as in *Craig*). A wide range of upper age limits have been set by the states for invoking child-protective trial procedures, including ten, e.g., CAL. PENAL CODE § 1347 (West Supp. 1991); MINN. STAT. ANN. § 595.02(4) (1988); OR. REV. STAT. § 40.460(24) (1989); OR. R. EVID. 803(24), twelve, e.g., N.Y. CRIM. PROC. LAW § 65.00(1) (McKinney Supp. 1991), and sixteen, e.g., FLA. STAT. ANN. § 92.54 (West Supp. 1991); N.J. REV. STAT. ANN. § 2A:84A-32.4(b) (West Supp. 1991).

“may, unfortunately, upset the truthful rape victim or abused child . . . it may [also] confound and undo the false accuser . . . . It is a truism that constitutional protections have costs.”<sup>225</sup> The very purpose of a criminal trial, after all, is to ferret out the truth with unstinting thoroughness, not to assuage the mental scars left by the victim’s ordeal.

Can *Craig* be justified, therefore, if its reach and rationale are limited to the boundaries set by the truth-seeking goal?<sup>226</sup> While the analogy to the hearsay exceptions would be strong in terms of truth-seeking, it would still falter on the “fortuitous” versus “procured for litigation” axis.<sup>227</sup> This points to a basic flaw in *Craig*’s reasoning, even if narrowly construed according to the truth-seeking paradigm. To justify an exception to the right of confrontation on the ground that “where face-to-face confrontation causes significant emotional distress in a child witness, there is evidence that such confrontation would in fact *disserve* the Confrontation Clause’s truth-seeking goal,”<sup>228</sup> does seem to amount, as Justice Scalia argued, to second-guessing the Constitution.<sup>229</sup>

When the exception to confrontation consists in admitting fortuitous hearsay statements, the loss of such evidence if the exception were not permitted would result from an exclusionary rule premised on a strict reading of the text. But when the exception consists in waiving the strict requirements of confrontation as to actual testimony procured for trial, the (potential) loss of the evidence if the exception is not permitted results not from an externally imposed rule of inadmissibility, but from the effect on the witness of the very procedure sought to be waived—the very procedure generally thought to ensure the reliability of the witness. The truth-seeking justification for *Craig* thus carries to a peculiar, ultimate twist the mode of argument which would permit excising portions of a right by abstracting to the right’s general functional goals.<sup>230</sup> Here the argument is not simply that the functional goals *survive* the allowance of exceptions to the right but that the exceptions are necessary, in certain contexts, to *save* the functional goals *from* the right.

This “save-the-right-from-itself” approach creates a remarkably strong prescription for constitutional emendation. A moment’s thought illustrates its disturbing potential. The right to trial by jury, for example, is generally thought to serve, in important part, the perception that the defendant has received justice at the hands of the community.<sup>231</sup> It is well known, however, that the jury system has been prone, at times, to craven breakdowns in which it has served little purpose but to shield from justice defendants whose crimes express the popular prejudices of the day, thereby threatening

225. *Coy v. Iowa*, 487 U.S. 1012, 1020 (1988); see also *supra* note 54.

226. *Cf.* Comment, *supra* note 156, at 134-35 (praising *Craig* if interpreted in that light).

227. See *supra* text accompanying notes 170-86.

228. *Maryland v. Craig*, 110 S. Ct. 3157, 3169 (1990) (emphasis in original).

229. *Id.* at 3176 (Scalia, J., dissenting); see *infra* text accompanying note 294.

230. See *supra* text accompanying notes 131-39.

231. See, e.g., *Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968).

a catastrophic loss of faith in the fairness and efficacy of the entire judicial system.<sup>232</sup> The right to counsel, like the right of confrontation, is surely designed, in important part, to further the adversary truth-seeking goals of the trial.<sup>233</sup> And yet it is undeniably true that criminal defense attorneys often succeed—and strive knowingly to do so—in securing the acquittal of indisputably guilty defendants.<sup>234</sup> Are we then to embark on the task of identifying peculiar circumstances and contexts that, on the basis of some empirical balancing test, justify piecemeal exceptions to the right to jury trial, the right to counsel, and other constitutional guarantees, on the theory that the right, in the identified context, threatens to devour its own rationale? Count me out.

I think Justice Scalia was getting at essentially the same point when he declared:

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.<sup>235</sup>

Justice Scalia was reminding us, I think, that even as the right of confrontation may conceivably (and perversely) silence a witness who would otherwise give truthful and reliable testimony, so the right to call witnesses may permit a defendant to improperly benefit from unprovably false testimony given on his behalf, the right to counsel may permit a wealthy defendant with a blue-chip legal team to unfairly “beat the rap,” and so forth.

The most distressing and unconscionable aspect of the majority’s approach in *Craig* was its unexplained rejection of a full-fledged “strict scrutiny” approach under which the newly recognized exceptions to the right of confrontation would at most be allowed only when they demonstrably constituted the least restrictive and most narrowly tailored means of achieving the state’s asserted goals. While it is doubtful, in my view, that a complete denial of a constitutional right could properly be justified even under strict scrutiny, that mode of analysis is familiar and well-established

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232. See, e.g., T. YARBROUGH, JUDGE FRANK JOHNSON AND HUMAN RIGHTS IN ALABAMA 127-29 (1981) (describing failure of two Alabama state-court juries to convict murderers of Viola Liuzzo following Selma-Montgomery voting rights march). A subsequent federal prosecution in Judge Johnson’s court did result, however, in jury convictions on federal civil rights charges. See *id.* at 129-35.

233. See, e.g., *Gideon v. Wainwright*, 372 U.S. 335, 343-45 (1963).

234. See, e.g., Mitchell, *The Ethics of the Criminal Defense Attorney—New Answers to Old Questions*, 32 STAN. L. REV. 293 (1980) (offering eloquent and introspective legal and moral analysis and justification of criminal defense attorney’s role in zealously defending clients known to be guilty).

235. *Maryland v. Craig*, 110 S. Ct. 3157, 3175 (1990) (Scalia, J., dissenting).

in such contexts as equal protection claims involving suspect classifications<sup>236</sup> and free speech claims involving time, place, and manner restrictions.<sup>237</sup> Satisfaction of such a searching standard of review would seem to be a minimum necessity for any legitimate exception to a constitutional right of criminal procedure.

The Maryland Court of Appeals in *Craig* had followed a strict scrutiny approach with admirable care, holding both that the confrontation clause required a specific finding of trauma to the child from the presence of the defendant herself, not simply from the courtroom environment generally,<sup>238</sup> and that the trial court had to "explore less restrictive alternatives to the use of the one-way closed circuit television procedure,"<sup>239</sup> such as *two-way*, closed-circuit television. Stringently enforcing as an evidentiary matter the inherent "necessity" element of strict scrutiny, the Maryland court also held that the trial judge must at least "question . . . the children himself, [or] . . . observe [the] child's behavior on the witness stand before making his ruling," rather than simply rely on "expert testimony on the ability of the children to communicate."<sup>240</sup>

The Supreme Court in *Craig*, however, while endorsing the first requirement,<sup>241</sup> rejected the latter two and incorrectly described the second as constituting, like the third, a mere "evidentiary prerequisite."<sup>242</sup> But a finding that testimony in the physical presence of the defendant would create the requisite degree of trauma, whatever its evidentiary basis, would not rule out the possibility that such trauma might be sufficiently alleviated where visual confrontation occurs only through a remote, two-way, televised hook-up. By excusing the trial court from the obligation even to *explore* the possible efficacy of such a less intrusive restriction on confrontation, the Court failed to require any finding that the more intrusive restriction was, in fact, truly *necessary*.<sup>243</sup> This constituted an outrageous abandonment

236. See, e.g., *Palmore v. Sidoti*, 466 U.S. 429, 432-33 (1984) (reviewing racial classification, which Court held "must be justified by a compelling governmental interest and must be 'necessary . . . to the accomplishment' of [its] legitimate purpose").

237. See, e.g., *Frisby v. Schultz*, 487 U.S. 474, 482 (1988) (reviewing ordinance banning picketing of private residences by asking, *inter alia*, "whether the ordinance is 'narrowly tailored to serve a significant government interest'").

238. See *Craig*, 110 S. Ct. at 3170 (citing *Craig v. State*, 316 Md. 551, 564-66, 560 A.2d 1120, 1126-27 (1989)).

239. *Id.* at 3171 (citing *Craig*, 316 Md. at 568-71, 560 A.2d at 1128-29).

240. *Craig*, 316 Md. at 568, 560 A.2d at 1128, *quoted in Craig*, 110 S. Ct. at 3170. The Supreme Court incorrectly suggested that the Maryland court had necessarily required the trial judge "to observe the children's behavior *in the defendant's presence.*" *Craig*, 110 S. Ct. at 3171 (emphasis added).

241. *Craig*, 110 S. Ct. at 3170; see also *supra* note 110.

242. See *Craig*, 110 S. Ct. at 3171.

243. Thus *Craig*, by upholding the use of the one-way, televised procedure, not only mooted the question of the validity of *two-way*, televised confrontation, it failed even to require use of *two-way* rather than *one-way* television where the *two-way* procedure would fully vindicate the state's asserted concerns. Yet the validity of the *two-way* procedure would seem to present a much closer question under the confrontation clause, even under Justice

of the Court's duty to subject a proposed intrusion on a conceded constitutional right to at least the rigor of strict scrutiny.

The Court's relaxation of the Maryland court's third requirement, which may fairly be characterized as merely "evidentiary," was also highly troublesome, especially in light of indications as to how trial and appellate courts across the country may in fact apply *Craig's* requirements. One such indication was provided by an Iowa case, *In re J.D.S.*,<sup>244</sup> postdating *Coy* but predating *Craig*. In *J.D.S.* the Iowa Supreme Court upheld a juvenile defendant's conviction for sexually abusing a four-year-old boy, although the complainant never visually confronted or identified him.<sup>245</sup> The defendant, although able to observe and hear through a one-way mirror-window, was excluded from the room during the complainant's testimony, in a reversal (though otherwise analogous) of the arrangement in *Craig*. An individualized hearing was held on the need for the procedure, but the evidence seemed to fall well short of what should be required under either the truth-seeking or trauma-preventing interpretations of *Craig*. The state offered the report of a social worker who had given the victim therapy for two months and who concluded simply that the victim feared and did not want to face the defendant and that "it would not be in his best interest to have any contact with [the defendant]."<sup>246</sup> The Iowa courts credited this

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Scalia's analysis with its insistent emphasis on visual confrontation. The attenuation or degradation of the immediacy or intensity of visual confrontation inherent in a remote, televised hook-up would, at the very least, seem more properly analogizable to the valid restrictions on the "scope" or "manner of exercise" of other criminal procedure rights cited by the *Craig* majority. See *supra* text accompanying notes 140-45.

244. 436 N.W.2d 342 (Iowa 1989). The Iowa Supreme Court in *J.D.S.*, relying on Justice O'Connor's concurrence in *Coy*, see *supra* text accompanying notes 94-106, reaffirmed the use of protective procedures like that struck down in *Coy* when supported by an individualized hearing. See *J.D.S.*, 436 N.W.2d at 345-47.

245. *In re J.D.S.*, 436 N.W.2d 342, 346, 349 (Iowa 1989). The abuse, as reported by the victim and verified by a doctor, consisted of a single instance of anal penetration by a finger. There was no physical evidence linking the defendant to the crime and no circumstantial evidence other than that he worked at a daycare center attended by the victim. The victim, however, did identify the assailant by name. *Id.* at 343-44. The defendant was sixteen years old and described as tall and heavy. *Id.* at 346.

246. *Id.* at 346. I would not doubt the social worker's conclusions, but I do doubt whether they were properly sufficient, as a matter of law, to justify infringing the defendant's right of confrontation. Perhaps most interesting were the social worker's observations that the victim vehemently and repeatedly accused the defendant of the abuse and "was very angry at [the defendant] for hurting him," *id.*, factors that might seem to indicate a healthy psychological reaction and that, whatever their bearing on trauma, would not suggest a likelihood that the victim would have been terrified into silence in the defendant's presence. While the social worker reported that the victim "had verbalized his fear [of the defendant]," *id.*, that would be expected in most cases and would not necessarily imply that testifying under the controlled circumstances of court, with the constant, supportive presence of parents or guardians, therapists, and courtroom officials, would be unduly frightening or traumatic for the child. (Recalling the previous comment on the trauma of the adult rape victim, see *supra* text accompanying note 224, while the plight of the child naturally arouses more sympathy, and while it is true that extreme fear might cause more lasting psychological damage to a child



report over that of a clinical psychologist hired by the defense who concluded from interviews with the victim and his parents that he would not be traumatized by visual confrontation at trial.<sup>247</sup>

*Craig* indicates, as a general theoretical matter, the degree to which raw empirical balancing can lend itself to justifying unwise and probably unjustifiable intrusions on core constitutional rights. Decisions like *J.D.S.*<sup>248</sup> further suggest how easy it will be, in countless particular cases, for courts to find, on the basis of the kind of balancing approved in *Craig*, that whatever evidence is at hand—so long as it is “more than *de minimis*”<sup>249</sup>—will “outweigh”<sup>250</sup> the defendant’s rights.

#### IV. HEARSAY AND THE CONFRONTATION CLAUSE: SOME COMMENTS ON *IDAHO v. WRIGHT*

In many ways more surprising than *Craig*, in some ways more important, and in almost every way more salutary, was the result in *Idaho v. Wright*,<sup>251</sup> *Craig*’s companion case decided the same day. *Wright*, like *Craig*, was decided by a five-to-four vote and authored by Justice O’Connor. But this time, Justice O’Connor joined the four *Craig* dissenters to issue one of the very few Supreme Court decisions in the quarter-century since *Pointer* and *Douglas*<sup>252</sup> to actually exclude a hearsay statement from evidence on confrontation clause grounds.<sup>253</sup>

than to an adult, a witness’s fear, as such, has never before been thought to justify a denial of the defendant’s right of confrontation. The existence of the federal witness protection program for organized crime witnesses testifies to that fundamental fact.) More fundamentally, the mere fact that the prospective witness does not “*want*” to visually confront the defendant or that, all things considered, such confrontation would not be in the “*best interest*” of the witness cannot properly be given any dispositive weight in the analysis, because such factors would likely be present with virtually every victim-witness, child or adult, and, if accepted as justifications for nonconfrontation, would effectively eviscerate the right of confrontation.

247. See *J.D.S.*, 436 N.W.2d at 346. The Iowa Supreme Court divided five to four in *J.D.S.* Justice Lavorato, who had joined in the original *Coy* decision in 1986, issued a one-sentence dissent joined by three colleagues stating simply that he did “not believe there is sufficient evidence that the delinquent act alleged was committed.” *Id.* at 349.

248. See also, e.g., *State v. Hoversten*, 437 N.W.2d 240 (Iowa 1989), *cert. denied*, 110 S. Ct. 212 (1989). In *Hoversten*, decided a month after *J.D.S.*, the Iowa court, on the basis of its own *de novo* review of the record, upheld a conviction where the trial court had authorized a denial of visual confrontation without any individualized necessity hearing and only on the basis of “brief and rather conclusory” findings. *Id.* at 241.

249. *Maryland v. Craig*, 110 S. Ct. 3157, 3169 (1990).

250. *Id.* at 3167.

251. 110 S. Ct. 3139 (1990).

252. See *Pointer v. Texas*, 380 U.S. 400 (1965); *Douglas v. Alabama*, 380 U.S. 415 (1965); *supra* text accompanying notes 16-21, 28.

253. The Court found hearsay statements in a codefendant’s confession constitutionally inadmissible in *Lee v. Illinois*, 476 U.S. 530 (1986). In *Bruton v. United States*, 391 U.S. 123 (1968), *Parker v. Randolph*, 442 U.S. 62 (1979), *Cruz v. New York*, 481 U.S. 186 (1987), and *Richardson v. Marsh*, 481 U.S. 200 (1987), the substantive inadmissibility of the contested hearsay codefendant confessions was essentially conceded, and the issue was whether cautionary instructions (in *Bruton*, *Parker*, and *Cruz*) or redaction of the confession (in *Richardson*) were sufficient to prevent the jury from improperly relying on the hearsay.

*Wright* involved a pediatrician's testimony relating statements made to him by a two-and-a-half-year-old girl in response to his questions during a medical interview, in which the girl identified the perpetrator of sexual abuse upon her.<sup>254</sup> The doctor's questions were highly suggestive and leading, and the girl's relevant responses apparently consisted of no more than saying "yes" or even just nodding her head affirmatively.<sup>255</sup> The interview was not videotaped, and the doctor failed to record any detailed notes, even discarding a picture he had drawn for the child to use during the questioning.<sup>256</sup> The Court concluded, in accordance with the test set forth in *Ohio v. Roberts*,<sup>257</sup> that the child's hearsay statements—falling outside any "firmly rooted hearsay exception"<sup>258</sup>—did not bear "sufficient 'particularized guarantees of trustworthiness.'"<sup>259</sup>

*Wright* was especially noteworthy for its holding on an issue of dramatic importance well beyond the context of child sexual abuse trials: The extent, if any, to which corroborative evidence is properly considered in determining the admissibility of hearsay evidence. The Court declared that "[t]o be admissible under the Confrontation Clause, hearsay evidence used to convict a defendant must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial."<sup>260</sup> The majority stated that "the 'particularized guarantees of trustworthiness' required for

254. See *Idaho v. Wright*, 110 S. Ct. 3139, 3143-44 (1990).

255. See *id.*; *State v. Wright*, 116 Idaho 382, 388, 775 P.2d 1224, 1230 (1989), *aff'd*, 110 S. Ct. 3139 (1990).

256. See *Wright*, 110 S. Ct. at 3144-45; see also *Wright*, 116 Idaho at 388, 775 P.2d at 1230.

257. 448 U.S. 56 (1980).

258. See *Wright*, 110 S. Ct. at 3147-48. Oddly, the Idaho Supreme Court, while finding the disputed hearsay inadmissible under the confrontation clause, see *Wright*, 116 Idaho at 389, 775 P.2d at 1231, found it admissible under the catch-all exception to Idaho's own rule against hearsay, see *State v. Giles*, 115 Idaho 984, 986-88, 772 P.2d 191, 193-95 (1989), even though that rule, like its federal equivalent and the *Roberts* test itself, focuses fundamentally on whether the disputed hearsay has "equivalent circumstantial guarantees of trustworthiness." See IDAHO R. EVID. 803(24); see also FED. R. EVID. 803(24); FED. R. EVID. 804(b)(5). Compare *Giles*, 115 Idaho at 988-97, 772 P.2d at 195-204 (Huntley, J., concurring in the result) (exhaustively analyzing and demonstrating unreliability of disputed hearsay, although inexplicably concurring in upholding *Giles*'s conviction) with *Wright*, 116 Idaho at 382-89, 775 P.2d at 1224-31 (opinion of the court by Huntley, J.) (largely restating his analysis in *Giles* and reversing *Wright*'s conviction).

*Giles* involved the appeal of the codefendant in the very same case as *Wright*. Laura Lee Wright was the mother of the two victims involved, while Robert L. Giles was *Wright*'s live-in companion and the father of the two-and-a-half-year-old victim. The sexual abuse allegedly committed by *Wright* and *Giles* was initially reported by the five-and-a-half-year-old victim to the live-in female companion of *her* father, *Wright*'s ex-husband. *Wright* and her ex-husband each had custody of the older girl for six months out of the year. See *Wright*, 110 S. Ct. at 3143. *Giles*, unfortunately for him, failed to raise any confrontation clause claim regarding the admission of the disputed hearsay. See *Giles*, 115 Idaho at 988, 772 P.2d at 195 (Johnson, J., concurring).

259. *Wright*, 110 S. Ct. at 3153.

260. *Id.* at 3150.

admission under the Confrontation Clause must . . . be drawn from the totality of circumstances that surround the making of the statement and that render the declarant particularly worthy of belief,"<sup>261</sup> and concluded that "the use of corroborating evidence to support a hearsay statement's 'particularized guarantees of trustworthiness' would permit admission of a presumptively unreliable statement by bootstrapping on the trustworthiness of other evidence at trial."<sup>262</sup>

Justice Kennedy's dissent, joined by Chief Justice Rehnquist and Justices White and Blackmun, was devoted primarily to a strenuous but unpersuasive attempt to refute the majority's reasoning on this point.<sup>263</sup> While citing a host of authorities for his position,<sup>264</sup> Justice Kennedy never came to grips with the Court's antibootstrapping logic. To turn the issue as he phrased it around,<sup>265</sup> if we were to let the jury consider a given hearsay statement because (in part) the proposition it supports is also supported by separate, corroborative evidence, why would we not let the jury consider the statement in the absence of such corroborative evidence? After all, the weight or persuasiveness of evidence is generally left to the trier of fact, subject to minimum legal standards.<sup>266</sup> Justice Kennedy fundamentally confused—just

261. *Id.* at 3149.

262. *Id.* at 3150.

263. *See id.* at 3153-57 (Kennedy, J., dissenting). Justice Kennedy did score a hit in criticizing the majority for failing to either reconcile or candidly overrule dicta in *Lee v. Illinois*, 476 U.S. 530 (1986), and *Cruz v. New York*, 481 U.S. 186 (1987), supporting the consideration of corroborative evidence for purposes of hearsay admissibility in the context of "interlocking" confessions. *See Wright*, 110 S. Ct. at 3155 (Kennedy, J., dissenting). The majority's assertions that the dissent took the dicta from *Cruz* "out of context" and that *Cruz* "said nothing about whether the codefendant's confession would be admissible against the defendant simply because it may have 'interlocked' with the defendant's confession," *id.* at 3151 n.\*, were simply false. *Cruz* explicitly stated (albeit in dicta) that "the defendant's confession may be considered at trial in assessing whether his codefendant's statements are supported by sufficient 'indicia of reliability' to be directly admissible against him. . . ." *Cruz*, 481 U.S. at 193-94. And the majority's assertion that the Court "rejected the 'interlock' theory in [*Lee*]," *Wright*, 110 S. Ct. at 3151, was misleading at best. *Lee* did not reject the interlock "theory"; it *applied* that theory but simply found the degree of interlock to be insufficient on the facts of that case. *See Lee*, 476 U.S. at 545-46.

264. *See Wright*, 110 S. Ct. at 3154 & n.2 (Kennedy, J., dissenting); *see also id.* at 3155 (describing his position, rather immodestly, as constituting "the considered wisdom of virtually the entire legal community"). In my view, Justice O'Connor persuasively demonstrated why all these authorities are simply wrong on this issue.

265. *See id.* at 3153 (Kennedy, J., dissenting) (stating that "[i]t is a matter of common sense for most people that one of the best ways to determine whether what someone says is trustworthy is to see if it is corroborated by other evidence"). As I suggest in the text, this proposition would make much better sense if the operative word were "true" rather than "trustworthy." It seems a matter of common sense, in my view, to note that the question whether a speaker is generally or intrinsically *trustworthy* is quite different and separate from the question whether a particular statement by such a speaker is *true*.

266. *See, e.g.,* *People v. Berkey*, 437 Mich. 40, 52, 467 N.W.2d 6, 12 (1991); 9 J. WIGMORE, *supra* note 48, § 2551, at 664 (J. Chadbourn rev. 1981). The *Berkey* court stated:

It is axiomatic that proposed evidence need not tell the whole story of a case, nor need it be free of weakness or doubt. It need only meet the minimum requirements

as the Court's analysis was fundamentally premised upon—the distinction between the factfinder's role in assessing what ultimate conclusions to draw from the evidence and the initial role of the court, as a matter of law, in deciding whether a given piece of evidence, such as a hearsay statement, is *admissible* in the first place.<sup>267</sup> The relevant question is whether the hearsay

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for admissibility. Beyond that, our system trusts the finder of fact to sift through the evidence and weigh it properly.

*Berkey*, 437 Mich. at 52, 467 N.W.2d at 12. The extent to which Justice Kennedy missed this point, and the point of the distinction generally discussed here, *see infra* notes 267-68 and accompanying text, is illustrated by the following portion of his argument:

Conversely, one can imagine a situation in which a child makes a statement which is spontaneous or is otherwise made under circumstances indicating that it is reliable, but which also contains undisputed factual inaccuracies so great that the credibility of the child's statements is substantially undermined. Under the Court's analysis, the statement would satisfy the requirements of the Confrontation Clause despite substantial doubt about its reliability. Nothing in the law of evidence or the law of the Confrontation Clause countenances such a result . . . .

*Wright*, 110 S. Ct. at 3153-54 (Kennedy, J., dissenting). In other words, having argued that corroborative evidence may be decisively *sufficient* to support admissibility, Justice Kennedy, predictably, started to worry about whether corroboration might be *necessary* as well. But hearsay statements that may be shown to contain demonstrable falsehoods are routinely admissible under all the "firmly rooted" hearsay exceptions, raising no apparent confrontation clause concerns. For that matter, a trial witness subject to full visual confrontation and unrestricted cross-examination may lie through his teeth in the face of conclusive contrary evidence, and no one has ever supposed that this raises any constitutional confrontation concerns as to the defendant (although the witness himself may be liable for perjury).

Just because evidence is admissible is no guarantee—and is not supposed to be a guarantee—that it is true or will not be impeached or refuted by other evidence. That is what the jury is for: To weigh the evidence. In performing that task, corroborative evidence may be both sufficient and necessary to reach the conclusion that any given factual proposition supported by a hearsay statement is, in fact, true. On the other hand, admissible evidence *is* supposed to be the kind of evidence whose probative value we may safely rely on the jury to *properly* weigh and consider. *See infra* note 267. But there is no apparent reason why, if we can trust the jury to properly weigh against other evidence a hearsay statement falling within a traditional exception, we cannot trust the jury to so weigh a hearsay statement falling outside any such exception but bearing equivalent indicia of inherent reliability under the *Roberts* test. In sum, corroborative evidence is neither sufficient nor necessary to support the admission of hearsay evidence, within or without the traditional exceptions. As the Court held in *Wright*, the only relevant factors with regard to a hearsay statement's trustworthiness *for admissibility purposes* are those relating to its making and its maker.

267. That questions of evidentiary admissibility are for the court and not the jury is one of the bedrock principles of evidence law. *See, e.g.*, FED. R. EVID. 104(a); 9 J. WIGMORE, *supra* note 48, § 2550, at 640, 663-64 (J. Chadbourne rev. 1981); J. WEINSTEIN & M. BERGER, *WEINSTEIN'S EVIDENCE* ¶¶ 104[01]-[02] (1990 ed.); Kaplan, *Of Mabrus and Zorgs—An Essay in Honor of David Louisell*, 66 CALIF. L. REV. 987, 987-88 (1978), *quoted in* J. KAPLAN & J. WALTZ, *supra* note 15, at 136. The very premise of the entire system of rules limiting the admissibility of evidence such as hearsay, *see* FED. R. EVID. 801-806, character or prior-bad-acts evidence, *see* FED. R. EVID. 404, or evidence whose probative value is outweighed by unfair prejudicial potential, *see* FED. R. EVID. 403, is the fear that, despite the undoubted marginal probative value of all such evidence, the jury simply cannot be trusted to properly discount the inherently unreliable or prejudicial nature of such evidence. *See, e.g.*, 1 J. WIGMORE, *supra* note 48, § 10a, at 684 (P. Tillers rev. 1983) (noting danger of "jury

statement is intrinsically *trustworthy* enough to be admissible at all, not whether the proposition supported by the statement is also supported by separate evidence or is, in fact, ultimately found to be *true*.<sup>268</sup>

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misdecision" based on evidence whose conceded probative value is outweighed by unfair prejudicial potential); 1A *id.* § 57, at 1180-81 (P. Tillers rev. 1983) (noting that bad character evidence, while relevant, is excluded due to danger of "the uncontrollable and undue prejudice, and the possible unjust condemnation, that such evidence might induce"); 5 *id.* § 1362, at 3 (J. Chadbourn rev. 1974) (stating general rule of hearsay exclusion based on theory that lack of cross-examination will prevent exploration by jury of "the many possible deficiencies, suppressions, sources of error and untrustworthiness, which lie underneath the bare untested assertion of a witness"); see also J. WEINSTEIN & M. BERGER, *supra*, ¶ 104[10] (stating that jury generally is excluded from hearings on threshold evidentiary admissibility issues due to potential for unfair prejudice).

268. Cf. *Wright*, 110 S. Ct. at 3153 (Kennedy, J., dissenting) (using "trustworthy" and "true" interchangeably). Justice Kennedy's application of his approach to the facts of *Wright* provided an alarming illustration of the bootstrapping against which the majority warned. He offered four examples of corroborative evidence which he asserted supported the reliability of the young witness's statements in this case. The first, "physical evidence that she was the victim of sexual abuse," *id.* at 3156, obviously, as the majority noted, "sheds no light on the reliability of the child's allegations regarding the identity of the abuser." *Id.* at 3151. The second, evidence that she was in the custody of her accused parents when the abuse occurred, *id.* at 3156 (Kennedy, J., dissenting), is, if anything, even more troubling. While such circumstantial evidence would, by itself, have some slight tendency to pinpoint at least one of the parents as the guilty party, it obviously has no bearing on the inherent trustworthiness of the child. This factor would exist in every case in which a child accuses someone who had substantial circumstantial opportunity to commit the abuse, which is to say, in a substantial majority of all child sexual abuse cases. See, e.g., D. EVERSTINE & L. EVERSTINE, *supra* note 2, at 3-4 (most child molesters are known to family or are relatives themselves); R. KEMPE & C. KEMPE, *supra* note 2, at 16 (two-thirds of child molesters are either parents or parent substitutes; "the perpetrator of sexual abuse tends to be someone the child knows and trusts: a family member, relative, friend or babysitter"). The synergistic interaction of such weak circumstantial evidence with a dubious hearsay accusation poses precisely the kind of danger of the jury leaping to unwarranted conclusions that underlies evidentiary exclusionary rules in general.

Justice Kennedy's third and fourth examples dealt with corroboration from the older daughter's trial testimony. *Wright*, 110 S. Ct. at 3156 (Kennedy, J., dissenting). With all such evidence, the problem of bootstrapping is self-evident. If the younger daughter's statements were so intrinsically lacking in indicia of reliability that the jury could not be trusted to properly weigh their probative value if they were the only evidence available, then the danger of such improper weighing was *aggravated*, not lessened, by the existence of separate evidence pointing to the same conclusion supported by the disputed statements. It is precisely the synergistic interaction of such evidence which poses the greatest danger. As the Court noted, "[t]here is a very real danger that a jury will rely on partial corroboration to mistakenly infer the trustworthiness of the entire statement." *Id.* at 3151. If the corroborative evidence supports a given conclusion, well and good; let it stand on its own feet and be considered on its own merits. But the fact that a certain quantum of admissible evidence exists to support a finding of guilt does not provide any rational justification for permitting the prosecution to run up the score by throwing in every other piece of evidence, however intrinsically unreliable on its own merits, that happens to be consistent with the concededly admissible evidence.

In the end, it is difficult to imagine what, if anything, would have been left of the confrontation clause's restrictions on unreliable hearsay evidence if Justice Kennedy's approach had prevailed in *Wright*.

Justice O'Connor's opinion in *Wright*, while laudable for its firm and principled enforcement of the right of confrontation in the hearsay context, was somewhat troubling in certain respects bearing especially on child sexual abuse cases. While properly deciding the case on the premise—conceded by the defense—that the two-and-a-half-year-old declarant was “unavailable” to testify at trial,<sup>269</sup> the Court did not adequately address the relevance of her unavailability to the admissibility of her hearsay statements. The Court “reject[ed] [Wright’s] contention that the younger daughter’s out-of-court statements . . . are *per se* unreliable, or at least presumptively unreliable, on the ground that the trial court found [her] incompetent to testify at trial.”<sup>270</sup> Yet under the Court’s own test, aside from assessing the particular circumstances under which the statement is made, the best and most useful basis for determining whether the child is “worthy of belief” presumably will be a general assessment of the child’s ability to coherently and honestly describe and relate factual events. A trial court’s determination of the child’s competency to testify is typically governed, in Idaho as in most states, by precisely such considerations.<sup>271</sup>

Although there are certainly reasons other than incompetency in that sense that might render a child, like any witness, “unavailable” to testify at trial,<sup>272</sup> it appears that precisely such a finding of incompetency underlay the trial court’s ruling in *Wright* that the three-year-old witness<sup>273</sup> was “not capable of communicating to the jury.”<sup>274</sup> That would seem virtually to

269. *Wright*, 110 S. Ct. at 3147.

270. *Id.* at 3151. The Court’s refusal to find at least “presumptive” unreliability on the ground of incompetency was peculiar indeed, given its holding just a few pages before that the hearsay statements in this case, like any hearsay falling outside a “firmly rooted exception,” were for that reason alone “presumptively unreliable.” *Id.* at 3148.

271. See IDAHO CODE § 9-202(2) (1990) (disqualifying as witnesses “[c]hildren under ten (10) years of age, who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly”); accord IDAHO R. EVID. 601(a); see also, e.g., MICH. COMP. LAWS ANN. § 600.2163 (West 1986) (requiring court, in case of child witness under ten, to “ascertain . . . whether such child has sufficient intelligence and sense of obligation to tell the truth to be safely admitted to testify”); MICH. R. EVID. 601 (disqualifying any witness, regardless of age, if “he does not have sufficient physical or mental capacity or sense of obligation to testify truthfully and understandably”).

272. For example, a finding that the prospective child witness is or will be rendered incapable of testifying by the trauma of the courtroom atmosphere or the presence of the defendant would not necessarily have any relevance to whether the child is intrinsically capable of coherently and honestly describing events. Cf. *supra* text accompanying notes 180-84. As the Court correctly noted, “the Confrontation Clause does not erect a *per se* rule barring the admission of prior statements of a declarant who is unable to communicate to the jury at the time of trial.” *Wright*, 110 S. Ct. at 3151. But the Court’s citation in support of this proposition of *Mattox v. United States*, 156 U.S. 237, 243-44 (1895)—which involved a declarant who was *dead* at the time of trial and thus, barring otherworldly intervention (hearsay by seance?), perforce “unable to communicate to the jury”—was so off the point in the present context as to seem quite silly.

273. The two-and-a-half-year-old declarant had turned three by the time of trial. See *Wright*, 110 S. Ct. at 3143.

274. *Wright*, 110 S. Ct. at 3151 (quoting trial court’s ruling). An inability to “receiv[e]

dictate that any hearsay statements by the child—at least those falling outside any “firmly rooted exception” and especially those made six months earlier when the child was only two-and-a-half—were insufficiently reliable to be admitted.<sup>275</sup> It would be absurd to find a child inherently incapable

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just impressions of the facts . . . or [to] relat[e] them truly” is the *only* relevant and proper ground under Idaho law for finding a child witness incompetent to testify. See IDAHO CODE § 9-202(2) (1990); IDAHO R. EVID. 601(a); *supra* note 271. Justice Huntley on the Idaho Supreme Court noted this in his concurring opinion in *Giles*, and he expressed no doubt that this was the basis for the trial court’s incompetency ruling. See *State v. Giles*, 115 Idaho 984, 990 n.4, 772 P.2d 191, 197 n.4 (1989) (Huntley, J., concurring in the result) (stating that “[i]n Idaho, all that is required of witnesses is that they be capable both of receiving just impressions of the facts respecting which they are examined and of relating them truthfully. The trial court found the younger Wright girl to be incompetent to testify at trial.”) (citing IDAHO R. EVID. 601(a)); see also *State v. Wright*, 116 Idaho 382, 383, 775 P.2d 1224, 1225 (1989) (noting that both prosecutor and defense counsel, following judge’s voir dire examination, “agreed [the three-year-old] was not competent to testify”). While it may be true that the Idaho trial court made no explicit findings reciting the governing Idaho standard, see *Wright*, 110 S. Ct. at 3151, the Court’s speculative assertion that “the more reasonable inference is that, by ruling that the statements were admissible under Idaho’s residual hearsay exception, the trial court implicitly found that the younger daughter, at the time she made the statements, was capable of receiving just impressions of the facts and of relating them truly,” *id.*, was unsupported, inexplicable, and flew in the face of Idaho law. The Court did not come to grips with the apparent fact that the Idaho trial court, like the Idaho Supreme Court in *Giles*, simply saw no *conflict* between finding the child incompetent under the governing standard and yet admitting the hearsay statements. *Cf. infra* notes 275-76 and accompanying text. In any event, rather than speculate that the Idaho trial court might have disregarded Idaho law, the more appropriate course—certainly if this issue had been dispositive for the Court—would have been to remand to the trial court for a clarification of the grounds for its incompetency finding.

275. A “*per se* rule of exclusion” based simply on inability to testify at trial would not only “frustrate the truth-seeking purpose of the Confrontation Clause” and “hinder States in their own ‘enlightened development in the law of evidence,’” *Wright*, 110 S. Ct. at 3151-52, but would amount to an absolute prohibition on all hearsay, or at least all hearsay falling outside the traditional exceptions. But a “*per se* rule of exclusion” for hearsay statements falling outside the traditional exceptions, where the declarant is found incompetent to testify at trial because of concerns about reliability and honesty, would seem quite sensible.

It is entirely conceivable that a hearsay statement falling within an established exception and bearing exceptional indicia of reliability—an “excited utterance,” for example, see FED. R. EVID. 803(2)—might justifiably be admitted even though the declarant is otherwise too immature to be relied upon. See, e.g., *State v. Paster*, 524 A.2d 587, 589-91 (R.I. 1987) (excluding hearsay statements by four-year-old declarant deemed incompetent to testify but leaving open possibility that some hearsay statements by similar witnesses, such as spontaneous, excited statements made close in time to acts complained of, might properly be admissible); *State v. Giles*, 115 Idaho 984, 989-90 n.4, 772 P.2d 191, 196-97 n.4 (1989) (Huntley, J., concurring in the result) (citing *Paster*); *Miller v. State*, 517 N.E.2d 64, 72 n. 7 (Ind. 1987) (conceding that “it may appear inconsistent” that hearsay statement of an incompetent child witness could be admissible, but holding that such statement may be admissible under IND. CODE § 35-37-4-6 (1985 & Supp. 1991) where “compelling proof” exists of “adequate indicia of reliability”).

It is even conceivable, furthermore, that a particular hearsay statement *not* falling within an established hearsay exception might nevertheless be surrounded by such exceptional circumstantial indicia of reliability that it might be admissible even though the declarant herself is

of truthfully or reliably describing events and, yet, to turn around and admit into evidence a second-hand, out-of-court statement by that same child made during a pretrial interview.<sup>276</sup>

Also rather perplexing was the *Wright* Court's gratuitous criticism of the Idaho Supreme Court's reliance "on the lack of procedural safeguards at the interview" conducted by the pediatrician,<sup>277</sup> especially in view of the fact that the Court's affirmance of the Idaho court's holding ultimately relied on essentially the same factors, albeit under the rubric of its "totality of the circumstances" approach.<sup>278</sup> The Court seemed especially anxious to reject the Idaho court's suggestion that the videotaping of initial postabuse interviews should be a general prerequisite to the admissibility of statements made by children during such interviews.<sup>279</sup> But after almost a century of

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generally not "worthy of belief." It seems doubtful, however, because the established hearsay exceptions already cover just about every conceivable situation where we tend to think the circumstances indicate trustworthiness. In any event, the professional interview setting, where the interviewer is deliberately attempting to elicit statements from the child about suspected or possible abuse, would seem sufficiently similar to the trial setting that a finding of general, inherent unreliability or untrustworthiness on the child's part should normally apply to both. It seems highly doubtful, in the postabuse interview context, that infirmities in the reliability of the *maker* of the hearsay statement could be overcome by circumstances relating to the *making* of a specific statement. There is certainly a need, however, to define and distinguish more carefully the legal standards relating to witness competency at trial from the standards relating to the general reliability and trustworthiness of the victim. A victim's statements in a postabuse interview certainly should not be excluded simply because of a finding of incompetency turning on some factor unique to the trial process.

276. *But see* State v. Giles, 115 Idaho 984, 986-88, 772 P.2d 191, 193-95 (1989) (reaching precisely this result in very underlying case under discussion, and inaccurately characterizing finding of incompetency as meaning merely that child "was judged unable to communicate in a trial setting"); *cf. id.*, 115 Idaho at 997, 772 P.2d at 204 (Bistline, J., dissenting) (stating that "[t]he trial court found that the three year old child was INCOMPETENT TO TESTIFY AT TRIAL! How, then, could she have made 'reliable' statements six months earlier to Dr. Jambura when she was only two and one-half years old?") (emphasis in original); *cf. also* Miller v. State, 531 N.E.2d 466, 468 (Ind. 1988) (reversing conviction where trial court had admitted hearsay statements of three-and-a-half-year-old child after finding declarant incompetent to testify because "she was not capable of understanding the nature and obligation of an oath"). The facts of *Miller* made it truly incredible that the trial court there could have found, as it did, that the statements bore sufficient indicia of reliability. It was only during the *fourth* interview with the child in one day, after repeated badgering, that the interrogators "finally elicited the answers sought and expected. One cannot imagine a more exhausting, stressful, and coercive situation." *Miller*, 531 N.E.2d at 467-68, 470.

277. *Wright*, 110 S. Ct. at 3148.

278. *See id.* at 3152 (relying, as Idaho court did, on "the suggestive manner in which Dr. Jambura conducted the interview").

279. *See id.* at 3148 (citing State v. Wright, 116 Idaho 382, 388, 775 P.2d 1224, 1230 (1989)). The *Wright* Court cited Nelson v. Farrey, 874 F.2d 1222, 1229 (7th Cir. 1989), *cert. denied*, 110 S. Ct. 835-36 (1990), for the dubious proposition that videotaping is not "feasible" where the suspect has "not yet been criminally charged." *Wright*, 110 S. Ct. at 3148. Judge Posner's opinion in *Nelson* offered a laundry list of arguments for why videotaping "would not have been feasible," all of them generally unpersuasive and some downright odd. First, Judge Posner stated: "The sessions began before [the doctor] knew that a criminal trial would ensue, so he can hardly be faulted for not having videotaped them from the start." *Nelson*,



research supporting the dangers of suggestive and leading tactics in questioning children,<sup>280</sup> and given the inherent difficulty in reconstructing exactly what transpires in the crucial initial interviews following a report of sus-

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874 F.2d at 1229. But the doctor was retained precisely because the victim's mother suspected sexual abuse, *see id.* at 1224, and, since child sexual abuse is known to be a crime, the likelihood of a criminal prosecution would always be apparent "from the start" in that kind of situation, *cf. infra* note 281. Next, Judge Posner suggested that "[the doctor's] clients would be shocked if he had a routine practice of videotaping therapy sessions with child victims of sexual abuse." *Nelson*, 874 F.2d at 1229. This is not necessarily true, however, because the contents of the sessions, whether recorded on videotape or in the doctor's notes and memory, would be equally protected by professional confidentiality, and the doctor presumably would neither testify about the sessions nor turn over the videotapes without the permission (indeed, probably at the urgent request) of the victim or her representative. Abused clients and their guardians would hardly be likely to object to videotaping when it is explained that this might help produce more compelling and admissible evidence with which to convict the abuser. Judge Posner then stated: "Finally, since a videotape cannot be cross-examined and since [the defendant] does not question the accuracy of [the doctor's] testimony (as distinct from the accuracy of the statements by [the victim] to which [the doctor] testified), the videotape evidence would not have assisted the defense." *Id.* But Judge Posner missed the point on a grand scale here. Although videotaped statements cannot be cross-examined, the demeanor of the declarant can be observed, an enormous benefit which eliminates one of the basic infirmities of hearsay. *See infra* note 282. Moreover, the issue is not so much whether the doctor is testifying truthfully about what the victim said during the interview but whether the doctor's precise mode of questioning and even body language may have been unduly suggestive, something that may only be determinable from a videotape of the interview and that bears directly on the crucial issue of the reliability—and thus, admissibility—of the victim's statements.

Judge Posner offered some truly strange arguments. Judge Posner stated: "[T]here is the problem of editing[;] [a] videotape of all the sessions would run many hours and be unbearably diffuse and tedious, but an edited version would tend to magnify the impact of [the victim's] statements about sexual abuse." *Nelson*, 874 F.2d at 1229. Huh? The defendant would be entitled to show the jury anything in the taped sessions arguably relevant to the issues at trial. The extent to which the tapes are edited to focus only on the relevant statements dealing with the charged conduct would raise only ordinary issues of relevance and waste of time. *See, e.g.,* FED. R. EVID. 402, 403. There would be no unfair "magnify[ing]" effect, any more than in singling out a relevant unrecorded hearsay statement by the child rather than "tedious[ly]" trying to recall and relate *everything* the child said during the relevant time period, or, indeed, any more than any criminal trial "magnif[ies]" the relevant evidence by naturally focusing on that evidence. Judge Posner also reasons that "the defense might well have been hurt by the jury's seeing the little girl; it would have made the enormity of the defendant's crime more vivid." *Nelson*, 874 F.2d at 1229. Perhaps so, but why the sudden concern for the defendant? I would say that is the defendant's dilemma to resolve. The defendant, after all, is the one seeking the use of videotaped rather than remembered hearsay. It might "hurt" the defendant even more for the jury to see the victim testify in person at trial, but that is no argument for denying the defendant his right of confrontation if he (perhaps foolishly, in Posner's view) chooses to invoke it.

All in all, it is difficult to see, given the ubiquitous use of video technology for entertainment purposes in today's society, why videotaping could not routinely be employed whenever a mental health professional or social worker interviews a child for the purpose of exploring suspected or possible sexual abuse.

280. *See supra* notes 201, 204-05 and accompanying text; Goodman, *supra* note 201, at 18-22 (discussing early 20th century research); CHILDREN'S RECOLLECTIONS, *supra* note 201 (reporting latest modern research).

pected abuse, encouraging the systematic use of videotaping would seem highly desirable, even essential.<sup>281</sup> Aside from the fact that a videotaped hearsay statement is obviously an intrinsically better form of evidence than one related from memory by a trial witness,<sup>282</sup> videotaping will always provide the best evidentiary basis, and perhaps often the only adequate basis, for courts to apply the *Roberts/Wright* admissibility test.<sup>283</sup>

*Wright* is relevant to this article's focus on Justice Scalia's interpretive approach in that it demonstrates his concern for the right of confrontation even in a context in which, by his own admission, the text offers no detailed or automatic prescriptions.<sup>284</sup> In this regard, Justice Scalia's decisive vote in *Wright* recalls his similarly decisive vote in *Cruz v. New York*,<sup>285</sup> when

281. The *Wright* Court noted that "[o]ut-of-court statements made by children regarding sexual abuse arise in a wide variety of circumstances, and we do not believe the Constitution imposes a fixed set of procedural prerequisites to the admission of such statements at trial." *Wright*, 110 S. Ct. at 3148. The context here, however, does not involve the "wide variety of circumstances" in which children make hearsay statements but rather the single, specific context of professional, postabuse interviews seeking to uncover possible sexual abuse and identify the perpetrator. Given the inherent dangers of suggestibility in such interviews and the prosecution's burden of demonstrating the reliability of presumptively suspect hearsay statements arising therefrom, a simple evidentiary requirement of videotaping would hardly seem an "artificial litmus test." *Id.* It might properly be viewed as the minimum foundation on which a finding of admissibility should be based. See *supra* note 279; *infra* note 282.

This conclusion is bolstered and underscored by the fact that such postabuse interviews—especially as health care and social workers become more sophisticated and knowledgeable about child sexual abuse—have begun to resemble embryonic pretrial proceedings conducted with the preconceived and deliberate goal of cooperating with law enforcement by identifying the perpetrators of suspected abuse and developing evidence for use in criminal trials. See *supra* note 177 and accompanying text. There is nothing wrong with such cooperation; to the contrary, the proper use of carefully conducted, postabuse interviews promises to be one of the most valuable and reliable means of discovering and combatting child sexual abuse. But by the same token, proportional care must be taken to ensure the reliability of evidence obtained by such means and to safeguard the legitimate trial rights of prospective defendants. Cf. generally G. MELTON, J. PETRILA, N. POYTHRESS & C. SLOBOGIN, *PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS* 3-19 (1987) (perceptively discussing "uneasy alliance" between mental health and legal professionals and "attitudinal differences" and "paradigm conflicts" underlying their highly divergent perspectives, and calling upon professionals in both fields to make greater effort to understand and respect different priorities and concerns of each).

282. Although not subject to cross-examination, the videotaped declarant's demeanor can at least be scrutinized by the jury. And although concern over whether a hearsay statement was actually made is not properly part of hearsay analysis (the veracity of the trial witness relating the statement being fully subject to scrutiny and cross-examination on that point), having a videotaped record of a statement obviously alleviates that concern and strengthens the evidence.

283. *But cf.* *Long v. State*, 742 S.W.2d 302 (Tex. Ct. Crim. App. 1987), *cert. denied*, 485 U.S. 993 (1988) (banning admission of unconfronted, pretrial, videotaped interviews with child sexual abuse victims under state constitutional right of confrontation); *accord* *Powell v. State*, 765 S.W.2d 435 (Tex. Ct. Crim. App. 1989).

284. See *Maryland v. Craig*, 110 S. Ct. 3157, 3173-74 (1990) (Scalia, J., dissenting) (discussing confrontation clause's applicability to hearsay).

285. 481 U.S. 186 (1987) (opinion of the Court by Scalia, J., joined by Brennan, Marshall, Blackmun, and Stevens, JJ.) (White, J., joined by Rehnquist, C.J., and Powell and O'Connor, JJ., dissenting).

he wrote for the Court in reaffirming the strict safeguards afforded by the right of confrontation against the use of hearsay codefendant confessions. Both cases reflect what Professor George Kannar has described as Scalia's rule-oriented, precedent-focused approach to criminal procedure issues where the literal text defies even his attempts to divine a clearcut answer.<sup>286</sup>

#### V. JUSTICE SCALIA AND THE JURISPRUDENCE OF TEXTUALISM: SOME CONCLUDING THOUGHTS

The interpretive philosophy of textualism is an intriguing phenomenon, elusive in its ideological stance, often cryptic in its intellectual content, yet remarkably "alluring" to a wide range of legal thinkers.<sup>287</sup> As Professor John Hart Ely has noted, there is no "necessary correlation between an interpretivist approach to constitutional adjudication and political conservatism or even what is commonly called judicial self-restraint."<sup>288</sup> Textualist appeals have been made from both the left and the right of the ideological spectrum. Most recently we have seen the noisy, shallow, right-wing appeal to historical textualism of former Attorney General Ed Meese.<sup>289</sup> The greatest and most influential exponent of textualism in this century, however, was that consummate liberal, in both the political and judicial spheres, Justice Hugo Black. As Professor Philip Bobbitt has observed, "Black developed the textual argument, and a set of supporting doctrines, with a simplicity and power they had never before had."<sup>290</sup>

For a classic statement of the textualist objection to a functional balancing approach to constitutional guarantees (an objection we have

286. See Kannar, *supra* note 11, at 1334-38, 1342.

287. For two excellent overviews of the phenomenon, see J. ELY, *supra* note 13, at 1-9 (ch. 1, "The Allure of Interpretivism"), and P. BOBBITT, *supra* note 13, at 25-38 (ch. 3, "Textual Argument").

288. J. ELY, *supra* note 13, at 1.

289. See Meese, *Address Before the D.C. Chapter of the Federalist Society Lawyers Division*, in *INTERPRETING LAW AND LITERATURE: A HERMENEUTIC READER* 25 (S. Levinson & S. Mailloux eds. 1988). Meese is actually more of a pure historicist than a textualist. As Professor Philip Bobbitt has noted, there is a subtle but important distinction between the historicist (or "originalist") and textualist modes of constitutional argument. The historicist probes for evidence of the actual intentions or understandings of the Framers (or more properly, the body politic responsible for enacting a given law), an inherently subjective and amorphous (many would say impossible) task not commending itself at all to many textualists. Many textualists, placing a high value on the determinacy and clarity of interpretation, tend to apply a sort of parol evidence rule to the Constitution, accepting the text as binding (and to some extent relying on a clear consensus of historical understanding) but refusing to speculate about the motivations of the people who framed or enacted it. See P. BOBBITT, *supra* note 13, at 25-26, for a useful discussion of this distinction. It is too involved a point, and not sufficiently relevant, to profitably pursue further in this article. As Professor Kannar has noted, Justice Scalia, one of the most fervent of textualists, considers himself a "faint-hearted" originalist. See Kannar, *supra* note 11, at 1304-05; cf. Grady v. Corbin, 110 S. Ct. 2084, 2098 (1990) (Scalia, J., joined by Rehnquist, C.J., and Kennedy, J., dissenting) (distinguishing between historical and textual arguments).

290. P. BOBBITT, *supra* note 13, at 31.

already seen reflected in the *Stincer* and *Craig* dissents and the *Coy* majority opinion), we have only to turn to Justice Black's dissent in *Barenblatt v. United States*,<sup>291</sup> possibly the most eloquent opinion he ever wrote. The protagonist was a psychology professor at Vassar accused of having been a Communist while he was a graduate student at the University of Michigan. The majority upheld his show-trial inquisition at the hands of the McCarthy Subcommittee of the House Un-American Activities Committee. Justice Black's majestic fury at this outrage was channeled through his emphatically textualist reading of the First Amendment:

I do not agree that laws directly abridging First Amendment freedoms can be justified by a congressional or judicial balancing process. . . .

To apply the Court's balancing test under such circumstances is to read the First Amendment to say "Congress shall pass no law abridging freedom of speech, press, assembly and petition, unless Congress and the Supreme Court reach the joint conclusion that on balance the interest of the Government in stifling these freedoms is greater than the interest of the people in having them exercised." This is closely akin to the notion that neither the First Amendment nor any other provision of the Bill of Rights should be enforced unless the Court believes it is *reasonable* to do so. . . . [T]his violate[s] the genius of our *written* Constitution . . . . [U]nless we once again accept the notion that the Bill of Rights means what it says and that this Court must enforce that meaning, I am of the opinion that our great charter of liberty will be more honored in the breach than in the observance.<sup>292</sup>

Throughout his career, Justice Black objected to the idea that the plain words and explicit commands of the Constitution could be supplanted by a functional analysis aimed at vindicating the policy concerns thought to underlie constitutional guarantees.<sup>293</sup>

The peroration of Justice Scalia's dissent in *Craig* was pure Black:

I have no need to defend the value of confrontation, because the Court has no authority to question it. It is not within our charge

291. 360 U.S. 109, 134 (1959) (Black, J., joined by Warren, C.J., and Douglas, J., dissenting).

292. *Barenblatt v. United States*, 360 U.S. 109, 141-44 (1959) (Black, J., joined by Warren, C.J., and Douglas, J., dissenting) (emphasis in original).

293. See, e.g., *supra* note 116 and accompanying text (quoting Justice Black's dissent in *Adamson v. California*, 332 U.S. 46, 89 (1947), and concurrence in *Duncan v. Louisiana*, 391 U.S. 145, 170 (1968)); see also, e.g., *New York Times Co. v. United States*, 403 U.S. 713, 716-18 (1971) (Black, J., joined by Douglas, J., concurring) (reiterating belief that "no law means no law" and arguing that Framers of First Amendment "wrote in language they earnestly believed could never be misunderstood"); *American Communications Ass'n v. Douds*, 339 U.S. 382, 448 (1950) (Black, J., dissenting) (objecting to Court's approval of anti-Communist test oath imposed on labor union officers by arguing that Court "has injected compromise into a field where the First Amendment forbids compromise").

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 "widespread belief" and thus null and void. For good or bad, the Sixth Amendment requires confrontation, and we are not at liberty to ignore it. . . .

The Court today has applied "interest-balancing" analysis where the text of the Constitution simply does not permit it. We are not free to conduct a cost-benefit analysis of clear and explicit constitutional guarantees, and then to adjust their meaning to comport with our findings.<sup>294</sup>

Even Justice Black's inspiring invocation of textualism, which in his hands went so far to protect essential constitutional rights, contained disturbing hints of the dangers and limitations of that approach. While textualism can wield great rhetorical power in defending fundamental rights, it can also be applied to cramp and stultify them. This was evident, for example, in Justice Black's distressing conclusion, dissenting in *Katz v. United States*,<sup>295</sup> that telephone wiretaps simply were not "searches" under the Fourth Amendment. Thus, in considering the implications of Justice Scalia's interpretive approach, it is important to know just what kind of textualist he is. Is textualism, in his hands, a defense of the plain meaning of constitutional guarantees against attempts to undermine or soften that meaning through functional analysis and appeals to "balancing tests"? Or is it a rigid, simplistic conception of constitutional rights designed to dodge difficult questions and evade judicial responsibility?

Some of the most intriguing signals appear in two important First Amendment opinions Justice Scalia wrote as a Circuit Judge on the United States Court of Appeals for the District of Columbia. In *Ollman v. Evans*,<sup>296</sup> a seemingly easy and trivial libel case which produced remarkable *sturm und drang* on the *en banc* court, the judges split deeply over a classic opinion versus fact issue: whether conservative commentators Rowland

294. *Maryland v. Craig*, 110 S. Ct. 3157, 3176 (1990) (Scalia, J., dissenting) (citation omitted).

295. 389 U.S. 347, 364 (1967) (Black, J., dissenting). *Katz* overruled *Olmstead v. United States*, 277 U.S. 438 (1928), *see supra* notes 133-34 and accompanying text, in which Justice Butler, in dissent, had emphasized a more appropriate "rule of liberal construction that always has been applied to provisions of the Constitution safeguarding personal rights, as well as to those granting government powers." *Olmstead*, 277 U.S. at 487 (citations omitted). Justice Butler argued that "[t]he direct operation or literal meaning of the words used do not measure the purpose or scope of its provisions. . . . [T]he [Fourth] Amendment safeguards against all evils that are like and equivalent to those embraced within the ordinary meaning of its words." *Id.* at 488.

296. 750 F.2d 970 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985).

Evans and Robert Novak had defamed Professor Bertell Ollman, a political scientist and avowed Marxist, by asserting that he “has no status within the [political science] profession, but is a pure and simple activist.”<sup>297</sup> The court rejected liability by a six-to-five vote, one of the crucial issues being whether “the allegedly defamatory statement has a precise meaning and thus is likely to give rise to clear factual implications.”<sup>298</sup>

A judge's views on such an issue are likely to be shaped by her underlying conceptions of language and its ultimate capacity for determinate clarity—for definite, ascertainable meaning. A textualist judge in particular must, almost inevitably, have relatively more confidence in the inherent concreteness of words.<sup>299</sup> It is thus not surprising to find Judge Scalia among the five dissenters who held that there was determinate factual content in the disputed statement. Despite the clear context of the words in a political editorial filled with opinionated rhetorical hyperbole, Scalia found them unprotected by the “opinion privilege” then thought to exist under *Gertz v. Robert Welch, Inc.*<sup>300</sup> He characterized the words in dissent as “a classic and coolly crafted libel”<sup>301</sup> and joined a separate dissent which asserted, with a straight face, that “Ollman's scholarly reputation is adequately verifiable” because “[o]ne could . . . devise a poll of American Political Science Association members as to their *opinion*, on a scale of one to ten, of the scholarly value of Ollman's work.”<sup>302</sup>

297. *Ollman v. Evans*, 750 F.2d 970, 993 (D.C. Cir. 1984) (appendix to plurality opinion of Starr, J.), *cert. denied*, 471 U.S. 1127 (1985). Evans and Novak quoted an anonymous professor, “whose scholarship and reputation as a liberal are well known,” for their assertion about Ollman. *Id.* at 992-93. When I describe the case as “easy,” I mean that I have difficulty seeing how the disputed statement could reasonably have been viewed by any reader, in context, as anything but an assertion of opinion, much like a hypothetical assertion that “Evans and Novak have no status among journalists, but are pure and simple right-wing ideologues.”

298. *Id.* at 980 (plurality opinion of Starr, J.).

299. For such a judge, to put it quite simply, “words have meaning.” See Kannar, *supra* note 11, at 1305. As Professor Kannar notes: “No doubt to the dismay of deconstructionists and hermeneuticians everywhere, Scalia does not ‘agree with, or even take very seriously, the intricately elaborated scholarly criticisms to the effect that . . . words have no meaning.’” *Id.* (quoting Scalia, *Originalism: The Lesser Evil*, 57 U. CH. L. REV. 849, 856 (1989)). I can only agree with Justice Scalia on this point.

300. 418 U.S. 323, 339-40 (1974); see also *Ollman*, 750 F.2d at 974-76 (plurality opinion of Starr, J.) (discussing *Gertz* standard). The *Gertz* “opinion privilege” appears to have been modified in somewhat perplexing and uncertain ways by the recent decision in *Milkovich v. Lorain Journal Co.*, 110 S. Ct. 2695 (1990), which purported to reject any such “privilege” while at the same time reaffirming its substance, but that is beyond the scope of this article.

301. *Ollman*, 750 F.2d at 1036 (Scalia, J., joined by Wald and Edwards, JJ., dissenting in part). For a cogent critique of Scalia's role in *Ollman*, see Comment, *The Appellate Jurisprudence of Justice Antonin Scalia*, 54 U. CH. L. REV. 705, 728-33 (1987).

302. *Ollman*, 750 F.2d at 1033 (Wald, J., joined by Edwards and Scalia, JJ., dissenting in part) (emphasis added). Judge Wald went on to assert that “[t]estimony of prominent political scientists or other measures of reputation would also serve to verify or refute the statement about Ollman's reputation without sending the jury into a sea of speculation.” *Id.* As a former political science student myself, I frankly doubt it.

Judge Scalia also employed his literal brand of textualism to reject a free speech claim in *Community for Creative Non-Violence v. Watt*<sup>303</sup> (CCNV), which involved demonstrators who staged a "sleep-in" at Lafayette Park to protest the plight of the homeless. The District of Columbia Circuit, in another six-to-five *en banc* decision, struck down the regulation preventing the demonstration, although the Supreme Court ultimately reversed and upheld it.<sup>304</sup> Scalia, in dissent, declared his "willingness to grasp the nettle . . . [and] flatly . . . deny that sleeping is or ever can be speech for First Amendment purposes."<sup>305</sup> He continued: "I start from the premise that when the Constitution said 'speech' it meant speech and not all forms of expression."<sup>306</sup> •

On the one hand, this formulation was enough to send shivers down the spines of many First Amendment scholars, who recalled with a shudder the "speech-conduct" distinction of which Justice Black was so enamored and which led him into such an analytical dead-end in extreme old age.<sup>307</sup> On the other hand, a crucial part of Judge Scalia's analysis in CCNV proved surprisingly useful in Justice Brennan's majority opinion in *Texas v. Johnson*,<sup>308</sup> the 1989 case in which Justice Scalia provided a crucial vote

303. 703 F.2d 586 (D.C. Cir. 1983), *rev'd sub nom.* *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984).

304. *Community for Creative Non-Violence v. Watt*, 703 F.2d 586 (D.C. Cir. 1983), *rev'd sub nom.* *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984). The Supreme Court upheld the regulation seven to two, with Justice Marshall, joined by Justice Brennan, dissenting.

305. *Id.* at 622 (Scalia, J., joined by MacKinnon and Bork, JJ., dissenting).

306. *Id.*

307. *See, e.g., Tinker v. Des Moines School Dist.*, 393 U.S. 503, 515 (1969) (Black, J., dissenting) (finding black armbands worn by school children in protest of Vietnam War "conduct" and not "speech"); *Street v. New York*, 394 U.S. 576, 609 (1969) (Black, J., dissenting) (finding flag burning "conduct" and not "speech"); *Cohen v. California*, 403 U.S. 15, 27 (1971) (Blackmun, J., joined by Burger, C.J., and Black, J., dissenting) (finding it to be "conduct" and not "speech" for man to walk down courthouse corridor wearing jacket emblazoned with words "Fuck the Draft").

It is more satisfying, of course, to recall the magnificent hortatory use to which Justice Black put his literalist conception of speech during his career-long battle against government repression. It might fairly be said that Justice Black shined brightest in those First Amendment cases which were relatively "easy" in an analytical sense but very difficult politically or factually. These might be said to include cases involving, for example, radical "subversive" advocacy, *e.g., Dennis v. United States*, 341 U.S. 494, 579 (1951) (Black, J., dissenting); *Barenblatt v. United States*, 360 U.S. 109, 134 (1959) (Black, J., joined by Warren, C.J., and Douglas, J., dissenting); *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1, 137 (1961) (Black, J., dissenting) (the only case of which I am aware that put Justice Black in a distinctly more speech-protective posture than even his fellow "absolutist," Justice Douglas, and "obscenity," *e.g., Roth v. United States*, 354 U.S. 476, 508 (1957) (Douglas, J., joined by Black, J., dissenting); *Memoirs v. Massachusetts*, 383 U.S. 413, 421 (1966) (Black, J., concurring in the judgment); *Ginzburg v. United States*, 383 U.S. 463, 476 (1966) (Black, J., dissenting).

308. 491 U.S. 397 (1989); *see also United States v. Eichman*, 110 S. Ct. 2404 (1990) (striking down, by identical five-to-four vote, federal legislative response to first flag-burning decision).

to overturn, on First Amendment grounds, a criminal conviction for publicly burning the American flag.<sup>309</sup> The most disturbing and revealing portent of Scalia's approach in *CCNV* may be the way its rigid compartmentalization of speech and nonspeech accords with the even more rigid and limited conception of the "prosecution" suggested by the combination of Scalia's opinion in *Coy* and his vote in *Stincer*, and further accentuated by his dissent in *Craig*.<sup>310</sup>

On the Supreme Court, interestingly, Justice Scalia has, with some notable exceptions, compiled an impressively consistent and libertarian record in the free speech area.<sup>311</sup> In criminal procedure cases, however, Scalia's

309. *Texas v. Johnson*, 491 U.S. 397 (1989). The *Johnson* Court stated:

"[W]hat might be termed the more generalized guarantee of freedom of expression makes the communicative nature of conduct an inadequate *basis* for singling out that conduct for proscription. A law *directed at* the communicative nature of conduct must, like a law directed at speech itself, be justified by the substantial showing of need that the First Amendment requires."

*Id.* at 406 (emphasis in original) (quoting *CCNV*, 703 F.2d at 622 (Scalia, J., joined by MacKinnon and Bork, JJ., dissenting)); *cf.* Comment, *supra* note 301, at 736-38 (discussing Scalia's approach in *CCNV* and finding it to reflect a "preference for the government over dissenters"—an understandable conclusion in light of *CCNV* but questionable in view of flag-burning cases); *see also infra* note 311 and accompanying text.

310. As noted earlier, the only apparent way to reconcile the result in *Stincer* with Justice Scalia's analytical approach in *Coy* is to categorically exclude the competency hearing from the scope of the "prosecution" referred to by the Sixth Amendment. *See supra* text accompanying notes 84-92, 127-30.

311. *See, e.g.*, *United States v. Eichman*, 110 S. Ct. 2404 (1990) (joining in opinion striking down federal law against flag burning); *Austin v. Michigan Chamber of Commerce*, 110 S. Ct. 1391, 1408 (1990) (Scalia, J., dissenting) (dissenting from decision upholding ban on independent speech on behalf of political candidates financed from general corporate funds); *Texas v. Johnson*, 491 U.S. 397 (1989) (joining in opinion striking down state law against flag burning); *Florida Star v. B.J.F.*, 491 U.S. 524, 541 (1989) (Scalia, J., concurring) (concurring in holding rejecting rape victim's privacy claim against newspaper which truthfully reported her name in connection with crime); *Riley v. National Fed'n of the Blind*, 487 U.S. 781, 803 (1988) (Scalia, J., concurring in the judgment) (concurring in holding striking down regulatory scheme restricting charitable solicitation); *Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988) (providing crucial vote, with unlikely allies Justices Brennan, Marshall, and Blackmun, in four-to-three decision striking down ordinance regulating permits for newspaper racks on public property); *Boos v. Barry*, 485 U.S. 312 (1988) (providing crucial vote for five-to-three majority reversing lower court decision (authored by Judge Robert Bork, of all people!) and striking down ban on display within 500 feet of foreign embassy of signs tending to bring embassy's government into disrepute); *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (providing crucial vote, in unusual line-up with Justices Brennan, Marshall, Powell, and O'Connor, over dissents of Chief Justice Rehnquist and Justices White, Blackmun, and Stevens, to strike down application to nonprofit political corporation of federal campaign finance law restricting independent expenditures on behalf of political candidates). *But see, e.g.*, *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456 (1991) (Scalia, J., concurring in the judgment) (providing crucial vote in five-to-four decision upholding ban on nonobscene nude dancing and expressing view that nudity simply is not "speech"); *Rust v. Sullivan*, 111 S. Ct. 1759 (1991) (providing crucial vote in five-to-four decision upholding viewpoint-based restrictions on doctor-patient speech in federally funded family planning programs); *Rutan v. Republican Party*, 110 S. Ct. 2729, 2746-59 (1990) (Scalia, J., dissenting) (dissenting from



textualist bent has led to jarringly disparate results. That his approach is capable of producing and defending surprisingly “prodefendant” results was noted even before *Craig* and *Wright*,<sup>312</sup> and those cases, along with *Coy*, obviously illustrate that point. Professor Kannar properly highlights, in particular, Justice Scalia’s opinion in *Arizona v. Hicks*,<sup>313</sup> a curious little case in which, writing for a six-to-three majority,<sup>314</sup> he invalidated a police search on surprisingly meticulous grounds.<sup>315</sup> As Professor Kannar also correctly notes, however, any contention that Justice Scalia is endemically inclined to favor a broad reading of criminal procedural rights is simply untenable.<sup>316</sup>

holding striking down political patronage system of hiring public employees and urging repudiation of established precedents in that area). *Barnes*, the recent nude dancing case, is the first Supreme Court free speech case of which I am aware in which Justice Scalia, echoing both Justice Black and his own Court of Appeals *CCNV* opinion, has reverted to a rigid and unvarnished (and, in my view, unpersuasive) version of literal textualism.

312. See Kannar, *supra* note 11, at 1321-22.

313. 480 U.S. 321 (1987).

314. Justices Brennan, White, Marshall, Blackmun, and Stevens joined the majority opinion. Chief Justice Rehnquist and Justices Powell and O’Connor dissented.

315. *Arizona v. Hicks*, 480 U.S. 321, 328-29 (1987). Justice Scalia stated: “We are unwilling to send police and judges into a new thicket of Fourth Amendment law, to seek a creature of uncertain description that is neither a plain-view inspection nor yet a ‘full-blown search.’ . . . [W]e choose to adhere to the *textual* and traditional standard of probable cause.” *Id.* (emphasis added); see also Kannar, *supra* note 11, at 1324-28 (providing excellent discussion of *Hicks* and its significance). Professor Kannar also highlights *Coy v. Iowa*, 487 U.S. 1012 (1988), see *supra* text accompanying notes 36-71 (discussing *Coy*), *Jones v. Thomas*, 491 U.S. 376, 388 (1989) (Scalia, J., dissenting), in which Justice Scalia dissented from the Court’s rejection of a defendant’s double jeopardy claim, and National Treasury Employees Union v. Von Raab, 489 U.S. 656, 680 (1989) (Scalia, J., dissenting), in which, in a context notably lacking in strict textual guidance, he dissented, with remarkable eloquence and power, from the Court’s upholding of a mandatory drug-testing program for government employees. See Kannar, *supra* note 11, at 1329-42; see also *Von Raab*, 489 U.S. at 680 (Scalia, J., dissenting) (condemning drug-testing program as an “immolation of privacy and human dignity in symbolic opposition to drug use”).

316. See Kannar, *supra* note 11, at 1323 n.128 (reporting that “[a] review of Scalia’s votes in criminal cases shows that he supports the government approximately eighty percent of the time”). For just a sampling of support for this proposition in recent cases (those in which I personally happen to find Scalia’s position most regrettable), see *Illinois v. Krull*, 480 U.S. 340 (1987) (joining five-to-four decision, over dissent by Justice O’Connor, extending good-faith warrant exception to exclusionary rule to searches conducted in “reasonable” reliance on statute later found unconstitutional), *United States v. Salerno*, 481 U.S. 739 (1987) (joining holding that preventive detention for reasons unrelated to preserving integrity of trial process does not contravene presumption of innocence), *Duckworth v. Eagan*, 492 U.S. 195, 205 (1989) (joining five-to-four decision upholding validity of ambiguous and internally contradictory *Miranda* warning and joining concurrence by Justice O’Connor urging extension of *Stone v. Powell*, 428 U.S. 465 (1976), to bar litigation of *Miranda* claims in federal habeas corpus proceedings), and *James v. Illinois*, 110 S. Ct. 648, 657 (1990) (Kennedy, J., dissenting) (joining Justice Kennedy’s dissent from decision refusing to permit use of illegally seized evidence to impeach testimony of all defense witnesses).

See especially Justice Scalia’s remarkably ill-mannered dissent from Justice Kennedy’s six-to-two majority opinion in *Minnick v. Mississippi*, 111 S. Ct. 486 (1990) (prohibiting uncoun-

On occasion, one can only express whipsawed puzzlement at the bewildering contrast produced in different cases by Justice Scalia's readings of even the very same constitutional language. For example, rigidly construing "seizure" and ancillary terms in the Fourth Amendment according to a strict historical regimen rooted in the common law, he recently dissented angrily from the Court's five-to-four holding that an arrested suspect may be held up to forty-eight hours without any judicial determination of probable cause.<sup>317</sup> By contrast, writing for a seven-to-two majority, Justice Scalia recently reached the counterintuitive conclusion that a suspect under full chase by police officers who are manifestly attempting to "seize" him has not been subjected to any imposition on his liberty even regulated by the Constitution.<sup>318</sup> Employing a strict, narrow interpretation of the word "offence" in the Fifth Amendment's double jeopardy clause, Justice Scalia has dissented from what he views as the Court's overly generous reading of the clause in the context of multiple prosecutions,<sup>319</sup> which have generally been viewed as the prime evil against which the clause is directed.<sup>320</sup> And yet he has *also* dissented from what he views as the Court's insufficiently rigorous application of the clause in the context of multiple punishments,<sup>321</sup>

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seled reinitiation of interrogation with incarcerated accused when accused has already requested and been provided with counsel), in which he assails the Court for "producing a veritable fairyland castle of imagined constitutional restriction upon law enforcement." *Id.* at 497 (Scalia, J., dissenting). Many would view such protection for the rights of the incarcerated suspect as no more than minimal jailhouse common sense. Especially startling is Scalia's moralistic approach to the very concept of self-incrimination, as he maintains that "[w]hile every person is entitled to stand silent, it is more virtuous for the wrongdoer to admit his offense and accept the punishment he deserves," *id.* at 498, and as he concludes by criticizing the Court for hampering "investigators' ability to urge, or even ask, a person in custody to do what is right." *Id.*

317. *See* *Riverside County v. McLaughlin*, 111 S. Ct. 1661, 1672, 1677 (1991) (Scalia, J., dissenting) (noting that at common law "a person arresting a suspect without a warrant [had to] deliver the arrestee to a magistrate 'as soon as he reasonably can,'" and criticizing majority for holding that "a law-abiding citizen wrongfully arrested may be compelled to await the grace of a Dickensian bureaucratic machine, as it churns its cycle for up to two days").

318. *See* *California v. Hodari D.*, 111 S. Ct. 1547, 1549-50 (1991) (Scalia, J.) (noting that at common law suspect under chase was viewed as "seized" if officer had succeeded in touching him, even if only briefly); *cf. id.* at 1553-54 (Stevens, J., joined by Marshall, J., dissenting) (criticizing majority's refusal to consider, for constitutional purposes, common-law concept of *attempted* seizure); *see also* *California v. Acevedo*, 111 S. Ct. 1982, 1992-94 (1991) (Scalia, J., concurring in the judgment) (arguing that long-established presumptive warrant requirement of Fourth Amendment is largely unsupported by "common-law tradition" and therefore should be jettisoned as "general rule").

319. *See* *Grady v. Corbin*, 110 S. Ct. 2084, 2096-2101 (1990) (Scalia, J., joined by Rehnquist, C.J., and Kennedy, J., dissenting) (citing numerous 18th and 19th century cases, treatises, and dictionaries).

320. *See id.* at 2091-92; *Ashe v. Swenson*, 397 U.S. 436, 450-53 (1970) (Brennan, J., joined by Douglas and Marshall, JJ., concurring).

321. *See* *Jones v. Thomas*, 491 U.S. 376, 388-96 (1989) (Scalia, J., joined by Brennan, Marshall, and Stevens, JJ., dissenting); *see also* Kannar, *supra* note 11, at 1334-38 (providing excellent discussion of *Jones* and light it sheds on Scalia's "underlying vision of criminal procedure").

when constitutional concerns are attenuated and the conceded goal is simply to faithfully apply legislative intent.<sup>322</sup>

Far from suggesting any result-oriented cynicism on Justice Scalia's part, however, these outcomes—however problematic on other grounds—only serve to underscore what is clearly one of Scalia's most admirable and incontestable qualities: His rigorous and unflinching intellectual honesty. The depth of that honesty—the extent to which, in Professor Kannar's words, he is “driven by his methodological commitments rather than a desire to reach particular results”<sup>323</sup>—has been dramatically highlighted in at least two cases. In both *Pennsylvania v. Union Gas Co.*<sup>324</sup> and *Arizona v. Fulminante*<sup>325</sup>—each of which involved shifting five-to-four divisions on

322. See *Grady*, 110 S. Ct. at 2090-91; *Jones v. Thomas*, 491 U.S. 376, 380-81 (1989).

323. Kannar, *supra* note 11, at 1299. Professor Kannar describes Scalia as “an individual in whom constitutional theory and personal identity fuse—an integrated constitutional personality in a deconstructed, schizophrenic, and generally post-modernist age.” *Id.* He argues that Scalia's interpretive philosophy “arises from sources in his character running deeper than his specifically political convictions” and that “a facile focus on any supposed ‘result-orientation’ in explaining his approach to constitutional adjudication does not do justice to the Justice.” *Id.* at 1309. Finally, Professor Kannar argues that Scalia's opinions “demonstrate an unflinching belief that inequity, or at least ‘policy’ irrationalities, have to be accepted as the price—or at least the result—of being ‘strong enough to obey’ such strict textual self-discipline.” *Id.* at 1323.

324. 491 U.S. 1 (1989). In *Union Gas*, a majority composed of Justices Brennan, Marshall, Blackmun, Stevens, and Scalia held that the particular federal statute at issue clearly expressed an intent to override the states' Eleventh Amendment immunity from suit. *Id.* at 7-13. Justice White, joined by Chief Justice Rehnquist and Justices O'Connor and Kennedy, dissented from that holding. *Id.* at 45-56. A different majority of Justices Brennan, Marshall, Blackmun, Stevens, and White further held, with dramatically greater importance, that Congress constitutionally could override the states' Eleventh Amendment immunity under its general Article I powers, such as the commerce power. *Id.* at 13-23 (plurality opinion of Brennan, J., joined by Marshall, Blackmun, and Stevens, JJ.); *id.* at 56-57 (White, J., concurring in the judgment on that point). Although Justice Scalia agreed with the Brennan quartet that Congress had clearly expressed an intent to override the Eleventh Amendment in the law at issue, thereby permitting the Court to reach the deeper issue whether Congress had the constitutional power to do so under Article I, he emphatically and vigorously dissented on the latter point. *Id.* at 35-45 (Scalia, J., joined by Rehnquist, C.J., and O'Connor and Kennedy, JJ., dissenting on that point).

325. 111 S. Ct. 1246 (1991). In *Fulminante*, a majority composed of Justices White, Marshall, Blackmun, Stevens, and Scalia held that the defendant's confession in that case was coerced. *Id.* at 1251-53. Chief Justice Rehnquist, joined by Justices O'Connor, Kennedy, and Souter, dissented on that point. *Id.* at 1261-63. A different majority of Justices White, Marshall, Blackmun, Stevens, and Kennedy held that the admission of the disputed confession was not harmless error in that case. *Id.* at 1257-61 (plurality opinion of White, J., joined by Marshall, Blackmun, and Stevens, JJ.); *id.* at 1266-67 (Kennedy, J., concurring in the judgment). Justice Scalia and Justice O'Connor joined Chief Justice Rehnquist's dissent on that point. *Id.* at 1266. (Justice Souter expressed no view on whether the admission of the confession in the instant case was harmless.) Finally, and perhaps most importantly (although, in contrast to the dominant reaction from the media and legal community, I tend to find the coercion issue at least equally significant), a majority composed of Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Souter held that the erroneous admission of a coerced confession could be subject to harmless-error analysis. *Id.* at 1263-66. Justice White,

several interrelated issues—Justice Scalia provided the crucial fifth vote for a majority on one threshold issue, thereby permitting the other four members of that majority to reach and decide, with the support of a different fifth Justice, another issue (in *Union Gas*, a far more important issue) over his dissent.

As we step back to contemplate Justice Scalia's interpretive approach, what conclusions can we draw regarding its potential impact on the future treatment of criminal procedure guarantees in the Rehnquist Court? Given that Scalia, on the whole, may be little more sympathetic than his conservative colleagues to the constitutional claims of criminal defendants<sup>326</sup> and that even when he is, he is increasingly likely to end up in dissent anyway on this ideologically lopsided Court,<sup>327</sup> I tend to be pessimistic.<sup>328</sup> We have seen how a proper understanding of Scalia's textualist approach in *Coy* and *Craig*, especially in light of his vote in *Stincer*,<sup>329</sup> tends to spoil whatever encouragement might be afforded by the results he reaches in the former cases. It may be doubted whether a Court that rigidly parsed fundamental trial rights "simply as a matter of English"<sup>330</sup> would be better, in the long run, than one, like the *Craig* majority, that at least pragmatically weighs the conflicting concerns bearing on the right of confrontation, especially in the difficult area of child sexual abuse. Indeed, one gets the feeling that

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joined by Justices Marshall, Blackmun, and Stevens, vigorously dissented on that point, favoring the long-established rule of automatic reversal where coerced confessions are involved. *Id.* at 1253-57. Because of Justice Scalia's crucial vote to find the confession coerced in the first place, which in turn caused Justice Kennedy to reach and decide in the defendant's favor the harmless error issue on the facts of the instant case, the defendant gained a sufficient (albeit shifting) majority in support of his claim to a new trial without the disputed confession being admitted into evidence.

326. See *supra* note 316.

327. The leading exhibits for this proposition, aside from *Craig* itself, are *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 680 (1989) (Scalia, J., dissenting), *Jones v. Thomas*, 491 U.S. 376, 389 (1989) (Scalia, J., dissenting), and *Riverside County v. McLaughlin*, 111 S. Ct. 1661, 1671 (1991) (Scalia, J., dissenting). Furthermore, the trend is unfortunately clear. The three leading criminal procedure cases in which Justice Scalia has written for a majority reaching a "liberal" result are *Arizona v. Hicks*, 480 U.S. 321 (1987), *Cruz v. New York*, 481 U.S. 186 (1987), and *Coy v. Iowa*, 487 U.S. 1012 (1988), all decided relatively early in his tenure and followed by his dissents in *Von Raab*, *Jones*, *Craig*, and *McLaughlin*. But see *Idaho v. Wright*, 110 S. Ct. 3139 (1990); *supra* Part IV (discussing *Wright*); *Arizona v. Fulminante*, 111 S. Ct. 1246 (1991) (Scalia providing fifth vote for holding that defendant's confession was coerced, while also providing fifth vote for holding that admission of coerced confession into evidence can be harmless error, and dissenting from holding that such error was harmful in that case); *supra* note 325 (discussing *Fulminante*).

328. Cf. Kannar, *supra* note 11, at 1349 (taking somewhat less pessimistic view that, although results of Scalia's approach would probably "not be a great deal more 'liberal'" than those of Burger Court, "Scalia's version of constitutional criminal procedure is unlikely to prove much worse").

329. See *supra* text accompanying notes 84-92, 127-30 (noting interrelationship among Scalia's positions in *Stincer*, *Coy*, and *Craig*); see also *supra* text accompanying note 310.

330. *Coy v. Iowa*, 487 U.S. 1012, 1016 (1988) (quoting *California v. Green*, 399 U.S. 149, 175 (1970) (Harlan, J., concurring)).

Justice Scalia may have pushed the textualist argument so hard in *Craig*, and so far beyond its capacity for persuasion, that the majority felt quite secure in simply dismissing it.

In the end, however, I am even more troubled by the implications for constitutional criminal procedure of the *Craig* majority's approach. As I have noted,<sup>331</sup> it seems all too predictable how courts will misapply and exploit the gap in the right of confrontation opened up by *Craig*. It would indeed be safer and more defensible in the long run to approach that right—as with all rights, both in criminal procedure and otherwise—from the secure and unshifting premises of textualism. Justice Scalia's dissent in *Craig* suggests the power of such an approach, even as it distorts and discredits the textualist enterprise by its strenuous overreaching from secure premises to implausibly automatic answers.

As Professor Kannar reminds us, it would be unwise “to sell [textualism] short—in terms of its internal coherence and its consequent persuasive power for Americans outside the academy.”<sup>332</sup> Where I would depart from Kannar, and from what I perceive to be the views of many other liberals and progressives who have “rediscovered” textualism,<sup>333</sup> is in the slightly cynical distaste—perhaps agnosticism is the better word—with which they seem to view that philosophy.<sup>334</sup> There is a certain whiff of condescension, for example, in Kannar's observation that Justice Kennedy in the flag-burning case “adopted a simple ‘The Constitution made me do it’ line.”<sup>335</sup>

331. See *supra* text accompanying notes 244-50 (discussing *J.D.S. v. State*, 436 N.W.2d 342 (Iowa 1989)).

332. Kannar, *supra* note 11, at 1343.

333. One of the earliest and most influential observations of the current renewed “allure” of textualism is in J. ELY, *supra* note 13, at 3 (noting that many “observers who might earlier have been content to let the justices enforce their own values (or their rendition of society's values) are now somewhat uneasy about doing so and are more likely to pursue an interpretivist line, casting their lot with the values of the framers”). As a preface to his classic “representation-reinforcing” model of constitutional interpretation, Ely offers a powerful critique of textualism, at least as applied to certain “open-ended” clauses of the Constitution. See *id.* at 11-41 (ch. 2, “The Impossibility of a Clause-Bound Interpretivism”). Ely's own attitude toward textualism seems to be not one of “cynical distaste” but, rather, tempered admiration. See, e.g., *id.* at 11 (stating that “[o]ur legal culture is right in finding the general idea of interpretivism alluring, but some crucial reservations and refinements are necessary”).

334. Some progressive scholars, of course, remain quite unreconciled in their hostility to textualism. See, e.g., TUSHNET, *A Note on the Revival of Textualism in Constitutional Theory*, 58 S. CAL. L. REV. 683 (1985). Tushnet's attacks on textualism are generally so extreme as to lack credibility, however, and have been effectively answered elsewhere. See Bobbitt, *Is Law Politics?*, 41 STAN. L. REV. 1233, 1261-65 (1989) (reviewing M. TUSHNET, *RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW* (1988)).

335. Kannar, *supra* note 11, at 1343. I hope Professor Kannar will accept my apologies if I am misinterpreting him. Personally, I am quite unembarrassed to say that I regard Justice Kennedy's concurrence in *Texas v. Johnson*, 491 U.S. 397, 420 (1989), as one of the most stirring and eloquent statements ever offered in a Supreme Court opinion. I am not particularly fond of many aspects of Justice Kennedy's jurisprudence, see, e.g., *supra* notes 263-68 and accompanying text, but he was, in my view, quite simply right that the First Amendment, properly interpreted, dictated the result the Court reached in *Johnson*. There

He questions "[w]hether such statements make sense in logical or academic terms,"<sup>336</sup> and notes that for many legal scholars, "the absurdities of such mechanistic thinking may seem overwhelming."<sup>337</sup> More fundamentally, he is fairly frank in advocating a shift (albeit selective)<sup>338</sup> toward textualism as a wise and defensible tactical move on the part of liberal and progressive lawyers,<sup>339</sup> although he sounds a less than enthusiastic call to arms.<sup>340</sup>

I happen to agree that such a shift is both wise and defensible—also, more fundamentally, that it is *right*. Textualism, with all its problems, still represents the most intellectually coherent and politically legitimate means by which the judiciary can—and should—enforce the rights that we hold so dear, and that "the text [of the Constitution] just happens to support."<sup>341</sup>

are, of course, two ways of interpreting Kennedy's self-proclaimed cognitive dissonance. He may have been saying: "The Constitution made me do this, and that's a bad thing; please amend this asinine document as soon as possible so as to relieve me of this odious task." Or (and this captures both my own view and what I think Justice Kennedy *really* meant) he may have been saying: "I dislike flag burning and flag burners, and this result therefore pains me, but the Constitution requires it; moreover, that is a good thing, and I wouldn't have it any other way, because sometimes adhering to a principle—like the right of free expression even for ideas that we hate—justifies an incidentally painful and disagreeable result."

336. Kannar, *supra* note 11, at 1343.

337. *Id.* On textualism's behalf, I would note that Kannar's view of it may well have been colored by its aggressively rigid and simplistic application by the subject of his (and my) study.

338. Professor Kannar makes the subtle and well-argued point that criminal procedure is probably the most fruitful field for the postulated textualist renaissance. He notes, correctly in my view, both that "in constitutional criminal procedure, [we are] all more or less interpretivists [now]," *id.* at 1350, and that the vague "communitarian" theories of constitutional law so popular with modern progressives and Critics have rather alarming potential in the field of criminal procedure, *see id.* at 1350-51.

339. *See id.* at 1352-53, 1356-57. With eminent pragmatism, Professor Kannar argues that "[i]n the midst of a judicial sea-change of the sort we are undergoing, it is neither alarmist nor intellectually dishonest for scholars to consider adjusting their agenda in light of these new realities—and even less so for those scholars whose premise is that all law is political." *Id.* at 1356.

340. Professor Kannar notes, rather left-handedly, that "if accepting a somewhat narrow textualism in interpretation is the price of obtaining a rule-oriented approach to precedent, many would feel that under present circumstances the bargain is less than Faustian." *Id.* at 1352. I understand part of his point, with which I couldn't agree more, to be that liberals rather than conservatives have a greater stake in *stare decisis* these days, as a glance at the most notable recent appeals to that doctrine indicates. *See, e.g., Payne v. Tennessee*, 111 S. Ct. 2597, 2619, 2624 (1991) (Marshall, J., joined by Blackmun, J., dissenting) (asserting that "[p]ower, not reason, is the new currency of this Court's decision-making" and that "[c]arried to its logical conclusion, the majority's debilitated conception of *stare decisis* would destroy the Court's very capacity to resolve authoritatively the abiding conflicts between those with power and those without"); *McCleskey v. Zant*, 111 S. Ct. 1454, 1489 (1991) (Marshall, J., joined by Blackmun and Stevens, JJ., dissenting) (condemning majority for "toss[ing] aside established precedents without explanation" in death penalty case involving "abuse of the writ" doctrine of habeas corpus law). Put bluntly, there is still more than enough left of the Warren Court legacy to be worth protecting, even if the price is otherwise complete rigidity in legal development.

341. Kannar, *supra* note 11, at 1352. It is hardly odd or ironic that the Constitution

At any rate, it has always been a mystery to me how a judiciary that is no more than a creature of that very text could ever become magically endowed with the divine right to enforce, against the democratic will, values drawn from some other, "higher" source. Thus, if liberals and progressives—stymied in their adherence to nontextual "grand theories" as painfully lacking in support from the body politic as from the Constitution itself—are to circle the wagons in a last, textualist stand for freedom against the onslaught of the Rehnquist Court, I for one am happy to join the barricades, not as an ironic skeptic<sup>342</sup> or an "astute politician,"<sup>343</sup> but as a true (if troubled) believer.

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"just happens" to enshrine many "good" values. Despite the ugly compromises they accepted and the inherent limitations of their time and social context, the Framers were an unusually liberal and enlightened group as privileged white male politicians go. (Anyone who doubts that needs to read more history.) And, as should never be forgotten, some of the best parts of the Constitution were framed by a later and still more enlightened group of white male politicians: The post-Civil War Republicans in Congress. *See, e.g.,* M. CURTIS, *supra* note 116, at 57-91. Furthermore, in view of the sickeningly perennial violence and instability that have afflicted so many societies lacking a well-entrenched and universally respected scheme for mediating the ongoing power struggle that is politics, I would not criticize or poke fun at the "considerable affection" that "Americans still have . . . for the Constitution's venerable text." Kannar, *supra* note 11, at 1357 (citing M. KAMMEN, *A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE* (1987)). Of course, there are many theories purporting to explain the relative stability and consensus historically enjoyed by the American polity, *see, e.g.,* L. HARTZ, *THE LIBERAL TRADITION IN AMERICA* (1955), and I don't suggest a brief, 204-year-old document, no matter how well-drafted, deserves all or most of the credit. But I would stoutly maintain that the very sacrosanctity of our Constitution is one of the most dearly won and priceless parts of our cultural heritage.

342. Which I perceive Professor Kannar to be.

343. Kannar, *supra* note 11, at 1356.