Confronting Legal and Technological Incongruity: Remote Testimony for Child Witnesses

ABSTRACT

Child victims are often the only eyewitnesses in cases against their abusers. A child’s testimony may be necessary for a prosecutor to secure a conviction. However, the child must often face his or her abuser and relive the traumatic experience while giving this testimony. Any accommodations or protection of a child witness at trial must be balanced against the defendant’s rights under the Confrontation Clause. The Supreme Court’s decision in Maryland v. Craig allows child victims to testify via one-way, closed-circuit television in some circumstances, but the Court has not addressed two-way, closed-circuit testimony or remote testimony. In the absence of authorization from the Court, prosecutors have been reluctant to utilize state statutes allowing alternative methods of testimony from child witnesses. This Note proposes a limited expansion of trial accommodations for child witnesses, suggesting that the Supreme Court rule two-way video testimony permissible in any circumstances where one-way video testimony can be used. Additionally, testimony from a remote location should be allowed when one-way or two-way video testimony would not be sufficient to protect the mental health of the child witness.

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A nine-year-old boy sits at the witness stand, his hands sweaty. He glances nervously around the courtroom as a lawyer questions him about the things his mother and her boyfriend did to him. The judge tells him to speak up—everyone needs to hear what he has to say. But the boy is embarrassed. He knows that what happened was wrong, and he is scared. As the lawyer repeats her question, he looks up and sees his mother's boyfriend staring at him, refusing to look away. He told the boy that no one would believe him and telling anyone about what happened would be a terrible mistake. The boy begins to cry softly. The lawyer has told him that the only way to make sure this man does not hurt other children is for him to tell his story. Yet, as he sits there, he cannot escape the man’s glare. The memories he has tried so hard to stifle come rushing back; he is too afraid to speak.

This scenario is far from uncommon. Children are testifying in the courtroom more frequently now than in the past, due in large part to more prosecution of sexual abuse claims involving children. Prosecuting these claims faces several obstacles. Third-party witness testimony is often unavailable to prosecutors; often, only the child and the accused abuser know the details of what happened. Physical evidence is not always present, and the testimony of other family members, teachers, or other adults in the child’s life may not be conclusive enough for conviction. Thus, “the burden of producing direct evidence of abuse can rest on the tender shoulders of a traumatized child.”


3. Id.

4. Id.

5. Id. at 187.
Child victims generally do want to play a role in the judicial process and can benefit from doing so, according to data compiled by the National Child Protection Training Center (NCPTC). The data shows, “while children may not understand the players or terminology used during the court process, they know that the process impacts their happiness, safety, and well being; therefore, they want to be heard and have a say in what happens.” When children do participate in their cases, they have a more favorable attitude towards the process. However, testifying in court may still be traumatic, and the experience can exacerbate emotional and behavioral problems for some children. In the wake of the Supreme Court’s decision in Crawford v. Washington, children are now required to testify more frequently. Yet, some of these victims may suffer irreparable harm if required to testify in front of the defendant.

This Note evaluates the current status of laws governing the testimony of child witnesses. Part I provides a summary of existing guidance from the Supreme Court and state statutes enacted to protect children as a vulnerable subset of witnesses. This Section also explains key terminology used in these sources of law. Part II analyzes the confusion created by a lack of explicit authorization from courts for remote testimony. Part II also looks at the discrepancies between statutes, case law, and application of the law by prosecutors. Finally, Part III proposes that courts should allow remote testimony by witnesses who are medically unable to come to court to testify in order to protect the most severely affected child witnesses.

I. JURISPRUDENCE ON AND PERCEPTIONS OF CHILD WITNESSES

Accommodations made for child witnesses testifying in court reflect the understanding that children are a special, more vulnerable class of witnesses. However, any witness testifying against the defendant in a criminal trial raises Sixth Amendment Confrontation Clause concerns, and courts must balance the welfare of child witnesses against the constitutionally guaranteed rights of the

7. Id.
8. Id.
10. See infra text accompanying notes 54–64.
11. See generally Phillips & Walters, supra note 6 (discussing possible accommodations that can be made to “minimize anxiety and trauma” to child witnesses).
12. See infra Part I.B.
The Supreme Court provides general guidance on what these rights are in *Maryland v. Craig* and *Crawford v. Washington*. Since the Sixth Amendment itself is silent on what exactly meets its requirements, additional guidance comes from judicial interpretation of state statutes that fill in the details of remote testimony procedures.

A. Child Witnesses as a Vulnerable Class of Witnesses

Child victims of sexual abuse are particularly vulnerable and testifying in court can exacerbate the trauma already experienced. When children testify about sexual abuse, they are often confronting someone they know well, rather than a stranger. Perpetrators of these crimes “often acknowledge that they look for the most vulnerable children,” targeting those with self-confidence or self-esteem issues, as well as those who lack family support or need help. In many cases, abusers proceed to “groom” these victims to gain their trust, producing victims reluctant to disclose abuse. Essentially, the perpetrator becomes someone the child alternately trusts and fears, making the decision to report abuse one that is fraught with conflicting emotions for the child.

Child victims have reported that the act of facing the defendant is one of, if not the most frightening parts of the criminal justice process. The experience of testifying can also be harrowing, and

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13. *See* U.S. CONST. amend. VI; *infra* Part I.B–D.
14. *See infra* Part I.B.
15. *See infra* Part I.C.
16. *See* Schwalb, *supra* note 2, at 187 (“[T]he traumatic experience of recounting graphic details of abuse in an unfamiliar, intimidating courtroom, while also in the presence of the abuser, can render an otherwise competent child functionally incompetent.”).
18. *Id.* at 1206 (“Vulnerability was defined both in terms of a child’s status (e.g. living in a divorced home or being young) and in terms of her emotional or psychological state (e.g. a needy child, a depressed or unhappy child.”).
19. *Id.* at 1206–09.
20. *Id.* at 1209–14.

When three researchers from the National Institute of Justice asked courtroom professionals what facet of the criminal justice system troubled children most, the most frequently mentioned fear was facing the defendant. That experience is frightening for most adults, but to a child who does not understand the reason for confrontation, the anticipation and experience of being in close proximity to the defendant can be overwhelming. This fear was mentioned by virtually all respondents, including police, social workers, advocates, therapists, doctors and judges.
“some courtroom trauma may simply revictimize an already traumatized victim of abuse.” In recent years, courts have begun to recognize this particularly complex dynamic between a child abuse victim and the crime’s perpetrator, and to make courtroom accommodations for child witnesses as a result.

Courts will sometimes allow the admission of hearsay, closed-circuit testimony, or videotaped testimony by children to help reduce the potential trauma for child witnesses. However, prosecutors rarely utilize the closed-circuit statutes. In a survey of district attorneys across the country, respondents reported seldom using “innovations” in child testimony and primarily using those that were easiest to implement. Because live testimony is generally assumed to be more credible, requiring the child witness to actually come to court to testify is naturally preferred. When prosecutors do pursue alternate methods for child witness testimony, these accommodations raise constitutional questions.

B. Constitutional Implications and Supreme Court Guidance

The Confrontation Clause of the Sixth Amendment states that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” A witness testifying outside the presence of the defendant implicates the Confrontation Clause. Courts sometimes allow a witness to testify outside the physical presence of the defendant during civil trials, but the constitutional guarantee set out in the Confrontation Clause requires that certain procedural safeguards be in place for the defendant in criminal trials.

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Id. at 152 n.2 (citing D. Whitcomb, E. Shapiro & L. Stellwagon, WHEN THE VICTIM IS A CHILD: ISSUES FOR JUDGES AND PROSECUTORS, 17–18 (1985)) (internal quotation marks omitted).

22. See Schwalb, supra note 2, at 190.

23. See supra notes 16–20 and accompanying text.

24. Jonathan M. Golding et al., Jurors’ Perceptions of Children’s Eyewitness Testimony, in CHILDREN AS VICTIMS, WITNESSES, AND OFFENDERS 188, 199–200 (Bette L. Bottoms et al. eds., 2009). Child hearsay is one way courts have tried to mitigate the harm (and in theory, this is even less of an opportunity for “confrontation” than closed-circuit testimony). See id.


26. Id. at 255–81.

27. Natalie R. Troxel et al., Child Witnesses in Criminal Court, in CHILDREN AS VICTIMS, WITNESSES, AND OFFENDERS 150, 161 (Bette L. Bottoms et al. eds., 2009).

28. U.S. CONST. amend. VI.

29. Grearson, supra note 1, at 468–69.

30. See U.S. CONST. amend. VI; Fed. R. Civ. P. 43(a) (“For good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by
Supreme Court jurisprudence on the Confrontation Clause has helped fill in the gaps of exactly how its guarantees apply to the trial process; at its core, “[t]he right to confront one’s accusers is deeply ingrained in the human condition.”31 This core right has evolved over time in response to societal changes and notable trials, eventually becoming “a bedrock” principle of criminal trials in the United States.32 The requirements of the Confrontation Clause serve several functions: (1) witnesses who testify under oath will understand the seriousness of the situation, and the potential for prosecution against them for perjury if they lie; (2) witnesses will be cross-examined by opposing counsel; and (3) the jury will be able to watch these proceedings, which helps in assessing the credibility of each witness.33

The seminal Supreme Court case addressing the constitutionality of remote witness testimony is *Maryland v. Craig.*34 In *Craig*, the Supreme Court evaluated the use of one-way, closed-circuit video testimony by child victims in a case of child abuse and molestation.35 To allow the use of this technology, the trial judge had to make a preliminary determination that “testimony by the child victim in the courtroom [would] result in the child suffering serious emotional distress such that the child cannot reasonably communicate.”36 The Court held that the right to face-to-face confrontation was not absolute, and the state’s interest in protecting child victims from further trauma was compelling enough to justify this alteration to traditional testimony.37 In this decision, the Court pointed out that the “central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary

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32. *Id.* at 306–08 (discussing the right to confrontation in Roman society, in political trials in England—notably the trial of Sir Walter Raleigh—and the Sixth Amendment’s ratification in 1791).
33. *Id.* at 308 (summarizing *Maryland v. Craig*, 497 U.S. 836, 845–46 (1990)).
34. 497 U.S. 836 (1990); see Grearson, *supra* note 1, at 471.
36. *Id.* at 840–41.
37. *Id.* at 844–45.
proceeding before the trier of fact.”\textsuperscript{38} In describing what constitutes “rigorous testing,” the Court articulated the core elements of confrontation: “physical presence, oath, cross-examination, and observation of demeanor by the trier of fact.”\textsuperscript{39} Remote testimony, of course, erodes the “physical presence” requirement, but the Court reasoned that it was still permissible because the witness was under oath and the defendant—or defendant’s counsel—had the opportunity to cross-examine.\textsuperscript{40} The judge, jury, and defendant were able to view the witness’s demeanor; the level of adversarial testing was “functionally equivalent to that accorded live, in-person testimony.”\textsuperscript{41} Essentially, the witness’s absence from the courtroom was not fatal to the testimony since other procedural safeguards ensured that the defendant’s Sixth Amendment rights were intact.\textsuperscript{42}

\textit{Craig} also set forth the guidelines for a showing of “necessity”—the finding a trial court must make to permit an alternative method of testimony.\textsuperscript{43} Under \textit{Craig}, a trial court must hear evidence to determine whether the procedure is “necessary to protect the welfare of a particular child witness”; this is a case-by-case inquiry.\textsuperscript{44} The court must also find that the presence of the defendant, rather than merely the courtroom setting, would traumatize the child witness, and that the resulting emotional distress would be “more than \textit{de minimis}, i.e., more than mere nervousness or excitement or some reluctance to testify.”\textsuperscript{45}

Justice Scalia stringently objected to the majority in \textit{Craig}, essentially arguing that the majority had wrongfully “merge[d] the two aspects of confrontation—the absolute, determinant textual right to face-to-face confrontation and the implications of that right.”\textsuperscript{46} According to Justice Scalia, the Court had disregarded the plain text of the Sixth Amendment to reach its holding that testimony that preserved the other elements of confrontation—the “implied and collateral rights” guaranteed through oath, cross-examination, observation of demeanor—could be Constitutional.\textsuperscript{47} In true textualist fashion, Justice Scalia stated, “Whatever else [the Confrontation Clause] may mean in addition, the defendant’s constitutional right to

\begin{itemize}
\item {38.} \textit{Id.} at 845.
\item {39.} \textit{Id.} at 845–46.
\item {40.} \textit{Id.} at 851.
\item {41.} \textit{Id.}
\item {42.} \textit{See id.}
\item {43.} \textit{Id.} at 855.
\item {44.} \textit{Id.} (emphasis added).
\item {45.} \textit{Id.} at 855 (internal quotation marks omitted).
\item {47.} \textit{See Craig}, 497 U.S. at 862 (Scalia, J., dissenting).
\end{itemize}
be confronted with the witnesses against him means, always and everywhere, at least what it explicitly says: the right to meet face to face all those who appear and give evidence at trial.”

Though Craig dealt specifically with one-way, closed-circuit testimony, the Supreme Court notably declined to approve a proposed amendment to Rule 26 of the Federal Rules of Criminal Procedure in 2002 that would have allowed the use of two-way video testimony. Justice Scalia rejected the amendment as a violation of Craig, noting that the amendment was too broad, because it did not mandate the case-specific finding of necessity required by Craig. Without this showing of necessity, Justice Scalia reasoned that witness statements outside a defendant’s presence would happen frequently. He revisited his concerns with the idea of any video testimony, stating, “Virtual confrontation might be sufficient to protect virtual constitutional rights; I doubt whether it is sufficient to protect real ones.”

Fourteen years after Craig, the Supreme Court revisited the Confrontation Clause in Crawford v. Washington. This case involved the admission of a witness’s out-of-court taped statement over objections that the defendant had no opportunity for cross-examination. The Court held that the evidence could not be admitted, as it violated the defendant’s rights under the Confrontation Clause. Though this case involved testimonial hearsay, not remote testimony as in Craig, Justice Scalia’s opinion for the majority used language that implicates all remote testimony, clarifying that “[w]here testimonial statements are at issue... the Sixth Amendment demands what the common law required: unavailability [of the witness] and a prior opportunity for cross-examination.” Justice Scalia concluded the Court’s opinion stating, “Where testimonial statements are at

48. Id. (alteration in original) (internal quotation omitted).
53. Id.
55. Id. at 38.
56. Id. at 68–69.
57. Id. at 68.
issue, the only indicium of reliability sufficient to satisfy constitutional
demands is the one the Constitution actually prescribes: confrontation.”

_Crawford_ set off a flurry of academic commentary as followers of the Court attempted to interpret just how broad this holding was. Though this case dealt with hearsay, the Court emphasized procedural guarantees of the Sixth Amendment in all criminal prosecutions. Rather than relying on a judicial determination of reliability, reliability in testimony must be tested by cross-examination. However, the Court created ambiguity through this emphasis on cross-examination, providing almost no guidance on “what exactly constitutes ‘effective’ cross-examination.” Since cross-examination is one of the core elements of confrontation the Court set out in _Craig_, _Crawford_’s treatment of the issue may affect how the Court would analyze a future remote testimony challenge. After _Crawford_, the Court left open this question: whether various methods of remote testimony allow the defendant the opportunity to effectively cross-examine the witness in a manner that satisfies the defendant’s rights under the Confrontation Clause.

**C. Guidance From Lower Courts and State Statutes**

Lower courts have evaluated live two-way video testimony outside the child witness context. Although most courts have focused primarily on child witnesses as candidates for remote testimony, these cases have forced the courts to grapple with the scenario of medically unavailable witnesses. Notably, the Supreme Court declined to address the use of two-way video testimony, denying

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58. _Id._ at 68–69.
59. See, e.g., Kevin R. O’Neil, _Navigating the Confrontation Clause Waters After Crawford v. Washington; Where Have We Gone and Where Are We Headed?_, 51 NAVAL L. REV. 175, 175 (2005) (“Trial lawyers and jurists all over the country read initial abstracts of the landmark decision and immediately questioned themselves on its scope and applicability.”).
60. _Crawford_, 541 U.S. at 51–53.
61. Jessica Brooks, Note, _Two-Way Video Testimony and the Confrontation Clause: Protecting Vulnerable Victims After Crawford_, 8 STAN. J. C.R. & C.L. 183, 190 (2012) (“In effect, the _Crawford_ decision transformed the substantive Sixth Amendment right subject to reliability balancing tests into a procedural guarantee provided to every defendant regardless of judicial interests or public policy concerns.”).
62. _Id._ at 191.
64. Brooks, _supra_ note 61, at 190–91.
65. See, e.g., People v. Wrotten, 923 N.E.2d 1099 (N.Y. 2009).
66. _Id._
certiorari in People v. Wrotten.\textsuperscript{67} In Wrotten, the witness was not a child, but an ailing elderly individual.\textsuperscript{68} Following the alleged crime, the witness had moved out of state and poor health prevented him from traveling to court to testify.\textsuperscript{69} Before allowing the victim to testify, the trial court required medical testimony showing that coming to court would be detrimental to the victim's health, resulting in a determination that he was “unavailable.”\textsuperscript{70} During testimony, the witness could be seen “very clearly,” including “any expression on his face.”\textsuperscript{71} The defendant was convicted, but his conviction was overturned on appeal, where the court held that “in the absence of any express legislative authorization, the [lower] court lacked authority to permit televised testimony.”\textsuperscript{72} However, the New York State Court of Appeals relied on Craig and a state statute concerning child witnesses to reverse the lower court and uphold the conviction, noting the policy concerns that justified remote testimony after a determination of unavailability.\textsuperscript{73} The court went on to cite several examples of federal and state courts allowing two-way video testimony when witnesses were too ill to travel to court, and were thus “unavailable.”\textsuperscript{74}

In Wrotten, the court referenced a statute passed by the New York state legislature to regulate the remote testimony of child witnesses.\textsuperscript{75} New York was not alone in legislating child witness

\begin{itemize}
\item \textsuperscript{68} Wrotten, 923 N.E.2d at 1101.
\item \textsuperscript{69} \textit{Id.} at 1100–01.
\item \textsuperscript{70} \textit{Id.} at 1101.
\item \textsuperscript{71} \textit{Id.}
\item \textsuperscript{72} \textit{Id.}
\item \textsuperscript{73} \textit{Id.} at 1103 (“Additionally, if Supreme Court’s findings were supported by clear and convincing evidence, Craig’s public policy requirement is satisfied here. Nowhere does Craig suggest that it is limited to child witnesses or that a ‘public policy’ basis for finding necessity must be codified.”).
\item \textsuperscript{74} \textit{Id.} (citing Horn v. Quarterman, 508 F.3d 306, 317–18 (5th Cir. 2007)) (denying habeas relief where state court admitted two-way video testimony of witness too ill to travel); United States v. Benson, 79 F. App’x. 813 (6th Cir. 2003) (permitting the two-way video testimony of an elderly witness too ill to travel); United States v. Gigante, 166 F.3d 75, 79 (2d Cir. 1999) (permitting two-way video testimony of a key prosecution witness too ill to travel); see also Bush v. State, 193 P.3d 203, 215–16 (Wyo. 2008) (approving live video testimony of a witness too ill to travel to court in Wyoming); State v. Sewell, 595 N.W.2d 207, 213 (Minn. Ct. App. 1999) (approving live video testimony of a witness too ill to travel to court in Minnesota); Harrell v. State, 709 So. 2d 1364, 1368–71 (Fla. 1998) (approving live video testimony where witnesses could not travel to court in Florida, in part because of one witness’s ill health).
\item \textsuperscript{75} Wrotten, 923 N.E.2d at 1101 (“Indeed, the CPL [criminal procedure law] requires live video testimony of a child witness in a prosecution of a sex crime after a judicial finding of ‘vulnerability’ (CPL 65.00–65.30).”). Notably, the cited statute is silent as to whether the child
testimony; almost every state has passed a statute that provides some guidance in this area. However, many of these statutes, as well as subsequent cases that rely on them, provide only limited guidance as to remote, two-way testimony. Many of these statutes became law before the Internet made live, two-way video testimony convenient and feasible; thus, they are silent as to whether testimony from a truly remote location—outside the closed-circuit television confines of the courthouse—is acceptable. Further, state case law interpreting these specific statutes can cause additional confusion. This is due in part to states’ ability to set their own constitutional bar for the rights of defendants higher than the US Constitution, with some requiring face-to-face confrontation and physical presence of the witness—requirements that are at odds with Craig’s Confrontation Clause interpretation. Nonetheless, even states without the face-to-face language in their constitutions have been reluctant to explicitly authorize remote, live, two-way video testimony.

In 2009, North Carolina passed one of the more recent statutes addressing two-way video testimony. The statute’s relatively vague language could allow live, two-way video testimony, but it does not expressly permit it. The law defines “remote testimony” simply as “a method by which a child witness testifies in a criminal proceeding outside the physical presence of the defendant.” The law clarifies that any such “remote testimony” must allow the judge, defense counsel to be present where the child testifies, and the defendant must be able to communicate with counsel during the testimony. In a legislative bulletin, the University of North Carolina witness can testify from a remote location, and mentions only live, two-way, closed-circuit television, essentially restricting the potential testimony to the courthouse. N.Y. CRIM. PROC. §§ 65.00–65.30 (McKinney 2006).

77. Id.
78. Id.
79. See, e.g., MASS. CONST. art. XII (“And every subject shall have a right to produce all proofs, that may be favorable to him; to meet the witnesses against him face to face . . . .”).
80. See infra Part II.B.
82. Id.
83. N.C. GEN. STAT. § 15A-1225.1(e) (2009). The full clarification of “remote testimony” is that: The method used for remote testimony shall allow the judge, jury, and defendant or juvenile respondent to observe the demeanor of the child as the child testifies in a similar manner as if the child were in the open forum. The court shall ensure that the defense counsel, except a pro se defendant, is physically present where the child testifies, has a full and fair opportunity for cross-examination of the child witness, and
Carolina School of Government points out that this law is justified under Craig, and it provides “specific procedures for trial courts to follow.”84 This statement is true, in a sense, because while there are almost no technical specifications or particular methods of testimony articulated, this statement is true.85 The statute does provide clear guidelines for trial courts to follow as to the judicial determination that must be made before remote testimony is authorized.86

Although the legislative bulletin forecasted judicial challenges to the statute, thus far, courts have upheld the statute.87 Most recently, a court held that the defendant’s rights were not violated by allowing an eleven-year-old victim to testify via closed-circuit television because the victim was cross examined, the defendant watched the proceedings in real time, and the defendant was able to communicate with his attorney.88 This holding reaffirmed the position taken by the court in State v. Jackson, another rejection of a defendant’s Crawford-based challenge.89 The court in Jackson pointed out that many jurisdictions had followed Craig in this circumstance, even after the Supreme Court’s decision in Crawford, and the two cases addressed different confrontation questions in different contexts.90 Yet, even though the statute is drafted broadly enough to allow remote, live, two-way video testimony—and has clearly enumerated prerequisites for use—it has not been utilized for remote testimony.91

The lack of clear guidance in state and federal statutes, coupled with the apparent discrepancies between Craig and Crawford, has led lower courts to reach “inconsistent decisions and a plethora of conflicting tests for the admission of remote witness testimony.”92 Indeed, the ambiguity created by state statutes and the occasional acceptance of two-way video testimony by courts outside the child witness context has led to “exactly what Crawford did not want:

86. Id.
87. Rubin, supra note 84, at 25.
90. Jackson, 717 S.E.2d at 39–40 (discussing the differences between Craig and Crawford).
92. Brooks, supra note 61, at 201.
individual judicial determinations of whether video testimony is permitted.”

**D. Different Methods of Testimony**

This Note addresses whether testimony from a location outside the courthouse is materially different from testimony inside the courthouse. For purposes of this Note, the terms “one-way, closed-circuit television,” “two-way, closed-circuit television,” and “closed-circuit testimony” refer to testimony where the child witness testifies from within the courthouse, or a room adjacent to the courtroom, and the testimony is transmitted to the courtroom. In contrast, “remote testimony” or “two-way video testimony” refers to testimony transmitted using an Internet or data connection that does not require the witness to be in the courthouse or adjacent room. This type of testimony involves newer technology than closed-circuit testimony, and it lacks the physical constraint of cables and cords that are necessary to connect a closed-circuit television system. An online video conferencing service like Skype could provide an effective platform for this type of testimony.

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93. *Id.*

94. *Id.*

95. See Nat’l Ctr. for Prosecution of Child Abuse, *supra* note 76, at 1.

Closed Circuit Television (CCTV) is a secured video system in which signals are transmitted from a video camera to specific television monitors. . . . CCTV allows the child witness to testify in a separate room, and contemporaneously transmit his or her testimony to the courtroom. Several CCTV configurations exist. One-way and two-way CCTV are traditionally used in child abuse cases. One-way CCTV has one camera and one monitor. The defendant and the jury are in the courtroom with the monitor. The child, the defense attorney, the prosecutor, and the judge are in a separate room. The child faces the camera, testifies, and is subject to cross examination. The defendant and jury must be able to see and hear the child’s testimony. The defendant must also have the ability to communicate with his attorney at all times. The two-way CCTV configuration has two cameras and two monitors. The additional camera records the defendant in the courtroom and transmits the signal to a monitor in the room where the child is testifying. Two-way CCTV which more readily mimics face-to-face confrontation is preferred.

96. *Id.*


98. Though online services do raise questions of security, this Note focuses on the legal basis for authorization of remote testimony, not the technical specifications that would be necessary for a particular provider or messaging service to be certified for use in the courtroom. For a discussion of technical issues with Skype testimony from an expert witness, see Claire Duffet, *Tech Glitches in Zimmerman Trial Were Avoidable,* PALM BEACH DAILY BUS. REV., Oct. 7, 2013, at A4.
In terms of function, remote testimony is more closely analogous to two-way, closed-circuit testimony than to one-way, closed-circuit testimony.99 A typical two-way, closed-circuit testimony setup would require the child to be in a conference room or other area adjacent to the courtroom.100 The child would sit in front of a video camera with a monitor showing her the courtroom.101 Both the child’s and defendant’s attorneys would be present in the room, and the defense attorney would be in constant communication with his client—through a headset equipped with a microphone, for example.102 The video camera in the conference room would project the child’s answers into the courtroom, with “her facial expressions and mannerisms as plainly visible to those in the courtroom as the defendant’s are to the child,” but the child is physically separated from any perceived threat from the defendant.103 This scenario could be replicated with the child witness in a remote location, with slight modification necessary to determine whether defense counsel would remain in the courtroom or be with the child witness.104 In contrast, one-way, closed-circuit testimony simply projects the testimony of the child witness into the courtroom, but the child witness does not have a view of the courtroom proceedings or the defendant.105 The Supreme Court reviewed one-way testimony in Craig and upheld its use.106 Because the child witness can also see the defendant in two-way testimony, the procedure encompasses and adds to one-way testimony, fitting within the Court’s rationale in Craig.107 Remote testimony takes the separation one step further, and though Skype might be functionally equivalent to live, two-way video testimony, the physical

100. Id. at 157–58.
101. Id.
102. Id.
103. Id.
104. Id. at 167–69 (discussing the use of remote testimony by an adult witness as “two way closed circuit television from a remote location”). While the distinction between closed-circuit and remote testimony should not be blurred completely, Harmon’s analysis provides an argument that the appearance of the testimony to the defendant, the witness, and the jury is the same during closed-circuit and remote testimony if both are done via a two-way system of transmission. See id.
105. Id. at 161.
106. Id. at 159.
107. Id. at 169–70 (discussing how the Ninth Circuit “distinguished the holding of Craig from the use of two-way, closed-circuit television, stating that ‘if Craig upheld the constitutionality of one-way television testimony in an appropriate case, then two-way television testimony, a procedure that even more closely simulates in-court testimony, also passes constitutional muster.’” (citing United States v. Etimani, 328 F.3d 493 (9th Cir. 2003))).
distance may make witness management more difficult. A witness who is uncooperative or has a poor Internet connection could delay a trial, and these practical issues may give a court pause in allowing remote testimony. Thus, remote testimony must be justified as constitutional in its own right in order to be used as an accommodation for witnesses.

II. CONFRONTING REALITY: FAILURES OF CURRENT LAW IN APPLICATION

There are several possible ways to resolve the controversy over child witnesses and to allow for the incorporation of new technology. First, courts could interpret the Confrontation Clause to allow remote testimony under all circumstances. Second, courts could uphold state statutes that do not expressly forbid remote testimony; this would likely happen through case-by-case use of remote testimony by prosecutors and challenges by defendants. Third, courts could allow federal rules or statutes to provide a source of authority for the more widespread utilization of remote testimony. Unfortunately, each of these options falls short for various pragmatic and policy reasons. The following sections evaluate each of these potential options in turn.

A. Complete Expansion of Remote Testimony

Although alternative methods of testimony are acceptable in some civil contexts, the Confrontation Clause sets criminal trials apart. Nevertheless, some courts have allowed remote video testimony in pre-trial proceedings and for expert witnesses. Some practitioners see no problems with extending authorization of remote testimony to other contexts. Indeed, if the focus of the inquiry is on

108. Fotios (Fred) M. Burtzos, Beam My Witness In, 40 COLO. LAW. 107, 110 (2011).
109. Id.
110. See infra Part II.A.
111. See infra Part II.B.
112. See infra Part II.C.
113. See infra Part II.A–C.
114. See FED. R. CIV. P. 43(a).
115. U.S. CONST. amend. VI.
117. See, e.g., Burtzos, supra note 108, at 109 (“I think most people can spot a liar from a thousand miles away. If we as television and Internet viewers can spot politicians and others lying to us on the news, at press conferences, and in speeches, jurors surely can spot someone on a screen trying to pull one over on them.”).
the jury’s observation and perception of the witness, properly transmitted remote video testimony can provide just as accurate a view of the individual testifying.\textsuperscript{118}

The defense’s presentation of a witness through Skype does not raise the Confrontation Clause issues that would arise if the prosecution made a motion to do so, since the Confrontation Clause requires only that the defendant have the right “to be confronted with the witnesses \textit{against} him.”\textsuperscript{119} Some courts approve of remote expert witness testimony, for example.\textsuperscript{120} Defense witnesses have been able to testify via Skype or similar remote, two-way video technology.\textsuperscript{121} Allowing defense witnesses to testify remotely can also save money.\textsuperscript{122} Recognizing these financial benefits, some courts employ remote procedures for arraignments and other pre-trial hearings; without a jury present, courts are less stringent about Confrontation Clause concerns.\textsuperscript{123} Additionally, the slow pace of litigation can make securing witnesses in person more difficult.\textsuperscript{124} As time passes, witnesses may move for various reasons, making it more difficult to bring them to court, or at least more expensive to do so.\textsuperscript{125}

Even with these efficiency and comparability rationales, a full expansion of remote testimony to all witnesses is unlikely to happen, nor should it. Despite the argument that remote testimony in real time is equivalent to, or even better than, live testimony, courts will likely focus on the prong of the Confrontation Clause dealing with the accountability mechanism in place for the witness—what Justice Scalia referred to as “placing] the witness under the sometimes hostile glare of the defendant.”\textsuperscript{126} The varying standards for expert testimony.

\textsuperscript{118} Id. at 109 (“Depending on the size of the screen being used and the quality of the transmission, it could well be easier for jurors to see a witness sweat on a screen than from the witness box. You probably can see an 8’ x 8’ ‘talking head’ a lot more clearly than you can see a witness in a box thirty feet away.”).


\textsuperscript{120} See, e.g., Duffet, supra note 98.

\textsuperscript{121} See, e.g., Meisel, supra note 119.

\textsuperscript{122} See id. (“Shirley Whitsitt, the attorney for King, said the defendant is indigent and the resources are limited to bring in witnesses. She said there’s a possibility that in the end the witness from California may testify. She said that travel, lodging and flood [sic] costs could exceed $1,000. ‘It gets very pricey very quickly,’ she said.”).

\textsuperscript{123} See Montell, supra note 49, at 377–82.

\textsuperscript{124} See Burtzos, supra note 108, at 108.

\textsuperscript{125} Id.

\textsuperscript{126} Maryland v. Craig, 497 U.S. 836, 866 (1990) (Scalia, J., dissenting). Whether this should be the Court’s focus is open to debate and empirical analysis, but the Court’s detailed discussion in \textit{Crawford} of the Confrontation Clause’s historical backdrop implies that the current Court would likely focus again on how a remotely testifying witness would be held accountable. See Crawford v. Washington, 541 U.S. 36, 42–51 (2004).
witnesses and accusatory witnesses—a distinction one author describes as “disinterested witnesses” vs. “accusatory witnesses”—may play a part in the way courts regulate them. While courts may be willing to stretch the limits of Craig for experts, child witnesses testifying for an accusatory purpose present a unique situation.

Child witnesses in sexual abuse cases are a narrow subset of accusatory witnesses with unique characteristics that can pose challenges to prosecutors. Often, when children are testifying in court, they do so not only as witnesses, but also as victims. Juror perceptions of child witnesses are key to a prosecutor’s strategy since physical evidence or other eyewitnesses are often lacking in these cases. In general, “adults perceive children as less accurate in memory reports than adults.” When accommodations like closed-circuit television (CCTV) are used, children provided more accurate testimony, but were seen as “less credible” by jurors. It is clear that these children are testifying about traumatic experiences. Evidence suggests that trauma experienced after infancy can usually be remembered well, even after lengthy delays. However, there is also evidence that these memories, though powerful, can be distorted and some details forgotten. There is less evidence about children who were exposed to chronic maltreatment, as is the case of many abuse victims. Though children can be effective and reliable witnesses, children can be especially susceptible to “misleading suggestions and memory distortion.”

127. Montell, supra note 49, at 378–81 (advocating that courts should first categorize witnesses, and then “apply a legal standard based on that particular type of witness in deciding whether to admit the testimony. For disinterested witnesses, a deferential test that focuses on the reliability of the witness statements should be utilized. For accusatory witnesses, the precedent of Craig should be utilized.”).

128. See supra notes 122–27 and accompanying text; infra notes 129–31 and accompanying text.

129. Golding et al., supra note 24, at 188.

130. Id.

131. Id. at 195.

132. Id. at 199–200 (“For example in Goodman et. al.’s (1998) elaborate mock trial involving 5- to 6-year-old and 8- to 9-year-old alleged child sexual abuse victims, children who testified via CCTV were viewed as less credible despite a higher rate of accuracy than those children who testified live in court.”).

133. Andrea Follmer Greenhoot & Sarah L. Bunnell, Trauma and Memory, in CHILDREN AS VICTIMS, WITNESSES, AND OFFENDERS 36, 40 (Bette L. Bottoms et al. eds., 2009). (“[O]ne-time traumas experienced after infancy and toddlerhood are usually well remembered, even over delays as long as 6 years.”).

134. Id. at 40.

135. Id. at 40–42.

136. Iris Blandón-Gitlin & Kathy Pedzek, Children’s Memory in Forensic Contexts: Suggestibility, False Memory, and Individual Differences, in CHILDREN AS VICTIMS, WITNESSES, AND OFFENDERS 57, 57 (Bette L. Bottoms et al. eds., 2009).
are often crucial to prosecuting the accused in child abuse and molestation cases, child witnesses do face credibility issues as perceived by juries.\footnote{137} Thus, expanding remote testimony authorization to all child witnesses could lead to further witness credibility issues with juries.\footnote{138} Child witnesses may not understand the seriousness of the situation if they testify in this manner and prosecutors would be unlikely to utilize this broad exception if it existed with no limitation.\footnote{139}

**B. More Aggressive Utilization of Current State Statutes**

1. Judicial Guidance and Available Statutes

Another solution would be to simply maintain the status quo. After all, many states do authorize one- or two-way, closed-circuit video testimony, and some states have passed statutes with broad enough language to encompass remote, two-way video testimony.\footnote{140} There is, arguably, already a framework in place for truly remote, outside the courthouse testimony after \textit{Craig}.\footnote{141} \textit{Craig} opened the door for public policy exceptions to in-person testimony and dealt specifically with child witnesses; there is a possible exception already in place for this class of victims and witnesses.\footnote{142} However, this idea, raised in \textit{Wrotten} and subsequent commentary, is a misinterpretation of the current status of the law.\footnote{143}

The testimony at issue in \textit{Wrotten} involved a witness who was physically unable to come to the courthouse.\footnote{144} Two-way, closed-circuit video testimony—as well as one-way, closed-circuit testimony—must happen within the limitation of cables, cords, and cameras linking the witness with the courtroom—like a “telephone” made of string and tin cans rather than a cellular phone.\footnote{145} Blurring

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\begin{itemize}
\item[137.] See supra notes 129–36 and accompanying text.
\item[138.] See supra notes 129–36 and accompanying text.
\item[139.] See supra notes 129–36 and accompanying text.
\item[140.] See, e.g., MASS. GEN. LAWS ch. 278, § 16D (2012); N.C. GEN. STAT. § 15A-1225.1 (2009); N.Y. C.RIM. PRO. § 65.00 (McKinney 2006) (“Live, two-way closed-circuit television’ means a simultaneous transmission, by closed-circuit television, or other electronic means . . . .”) (emphasis added).
\item[141.] See Quinn, supra note 116, at 209–11.
\item[142.] See \textit{id}.
\item[143.] See People v. Wrotten, 923 N.E.2d 1099, 1101 (N.Y. 2009); Quinn, supra note 116, at 209–11.
\item[144.] \textit{Wrotten}, 923 N.E.2d at 1101.
\item[145.] See Burtzos, supra note 108, at 110 (highlighting one drawback of remote testimony as the fact that the judge or trier of fact cannot control the witness if the witness decides to leave, whereas testimony that takes place within the courthouse separates the witness and defendant while still allowing management and surveillance of the witness).
\end{itemize}
the distinction between two-way, closed-circuit testimony and remote testimony outside the courthouse oversimplifies the issue.146 One commentator on Wrotten relies on New York’s statute147 and The Child Victims’ and Child Witnesses’ Rights Act of 1990148 as models for extending the availability of remote testimony to all “infirmed witnesses whose health and well-being would be severely jeopardized upon having to travel to and attend court.”149

This position is untenable because broad statutory language alone, without use by prosecutors and enforcement by courts, does not permit remote testimony.150 Massachusetts’s child witness statute, for example, allows testimony by child witnesses in certain circumstances by “simultaneous electronic means,” which is defined as “any device capable of projecting a live visual and aural transmission such as closed-circuit television.”151 This language is conceivably broad enough to allow Skype testimony, or any kind of remote, two-way video testimony.152 The statute even allows for a motion to be made on the grounds “that the child witness is likely to suffer psychological or emotional trauma as a result of testifying in open court, as a result of testifying in the presence of the defendant, or as a result of both testifying in open court and testifying in the presence of the defendant.”153 The inclusion of “as a result of testifying in open court” as an independent grounds courts may use when granting a motion could justify remote testimony that would prevent the child from having to physically come to the courthouse.154 Yet, Massachusetts’s state constitution includes face-to-face as a part of the guaranteed confrontation rights of the defendant.155 Further, despite the broad language of the statute, Massachusetts’s highest court found

146. See, e.g., Quinn, supra note 116, at 193–205. Quinn interprets New York’s current state statute protecting child victims as allowing “Live Video Teleconferencing” like that in Wrotten. Id.

147. N.Y. CRIM. PROC. § 65.00 (McKinney 2006).
149. Quinn, supra note 116, at 195.
150. See infra notes 151–56 and accompanying text.
151. MASS. GEN. LAWS, ch. 278, § 16D (2012).
152. See id.
153. Id.
154. See id.
155. MASS. CONST. art. XII.
testimony taken, pursuant to the statute, outside the presence of the defendant to be a violation of the defendant’s right to confrontation.\footnote{156. Commonwealth v. Bergstrom, 524 N.E.2d 366, 368–70 (Mass. 1988). In Bergstrom, the testimony was taken in another room in the courthouse and a video monitor was set up for the defendant to watch in the courtroom. \textit{Id.} The jury observed on another screen and the defendant was in communication with his attorney at all times. \textit{Id.}}

2. Prosecutorial Hesitation to Utilize State Laws

The reluctance of prosecutors to use existing alternate methods of testimony is perhaps the most striking indicia that the current statutory scheme is insufficient.\footnote{157. See, for example, infra notes 159–75 and accompanying text for a detailed analysis of how a group of prosecutors described their methods and motivations.} Prosecutors’ reluctance may stem from either wanting children to testify or feeling that the available alternate methods would not be helpful.\footnote{158. \textit{Id.}} Prosecutors who are unsure of the constitutionality of alternate methods may be hesitant to do anything that could jeopardize a conviction on appeal.\footnote{159. Goodman et al., supra note 25, at 270.} Since child witnesses present a perceived credibility issue with jurors, and jurors are routinely instructed that they can choose whether to believe or not believe anyone’s testimony, prosecutors may be mindfully choosing the method of testimony that research has indicated is most credible—live, in-person testimony.\footnote{160. \textit{See} Golding et al., supra note 24, at 199–200.} Credibility issues aside, the image of a small child testifying about details of abuse he or she has suffered is a striking and poignant one. The child is often the key or only witness in these cases, and a prosecutor will likely be unwilling to forgo the opportunity to make such a strong impression on jurors.\footnote{161. Anderson, supra note 49, at 23 (describing the scene of a child walking into court to testify).}

Gail Goodman, a leading researcher on child witness testimony, conducted a nationwide survey of prosecutors in 1999 to learn more about how they used alternate testimony for child witnesses.\footnote{162. Goodman et al., supra note 25, at 263–64.} Goodman’s survey took place soon after the Court’s decision in Craig. In her survey, Goodman asked prosecutors specifically how Craig impacted their use of alternate methods of child testimony.\footnote{163. \textit{Id.} at 264.} Prosecutors were asked about a range of accommodations for child witnesses throughout the process of bringing a case to trial, including accommodations before a child’s courtroom testimony.\footnote{164. \textit{Id.} at 267.}
responded that they relied on “vertical prosecution, preparation of children for testifying, the presence of a support person (e.g., parent) in the courtroom, and a tour of the courtroom for children” with the most frequency.\textsuperscript{165} Essentially, simple, inexpensive techniques before trial were used to help children become more familiar with the process and more comfortable with testifying.\textsuperscript{166}

In contrast, the innovations or accommodations used most rarely by prosecutors were those that altered the proceedings during the trial itself, “particularly by allowing children not to face a defendant while testifying.”\textsuperscript{167} When prosecutors were asked to rate how frequently they used various “innovations” for child witnesses, methods affecting testimony in the courtroom were used with the least frequency of any option.\textsuperscript{168} The reluctance of prosecutors to use one-way, closed-circuit testimony after the method had been resoundingly approved in Craig is particularly striking.\textsuperscript{169} However, Goodman’s study echoed earlier findings from a study completed six years before Craig, where prosecutors voiced concerns that methods of alternate testimony could violate the constitutional rights of a defendant, which could be grounds for a reversal of a conviction on appeal.\textsuperscript{170}

Prosecutors also reported the reasons they did not use innovations that impacted the structure of the trial.\textsuperscript{171} Most commonly, prosecutors reported that the court would not allow an alternate method of testimony or a shielding procedure.\textsuperscript{172} Even in states where one- or two-way, closed-circuit testimony has been approved, these determinations are still often made by a judge in pre-trial hearings, and a judge has discretion to rule that the prosecution or child advocate has not made the showing required by the particular governing statute.\textsuperscript{173} The other reasons most commonly

\textsuperscript{165} Id.
\textsuperscript{166} Id.
\textsuperscript{167} Id.
\textsuperscript{168} Id. at 268 tbl. 3 (listing “Screen to shield child from the defendant,” “Two-way closed circuit TV,” “One-way closed circuit TV,” and “Videotaped deposition” as the four lowest-ranking methods in a list of thirty-two “innovations” prosecutors could use to impact the experience of child victims and witnesses).
\textsuperscript{169} Id.; Maryland v. Craig, 497 U.S. 836 (1990).
\textsuperscript{170} Goodman et al., supra note 25, at 267 (quoting results of B. Smith et. al., THE PROSECUTION OF CHILD SEXUAL AND PHYSICAL ABUSE CASES (FINAL REPORT TO THE NAT’L CTR. ON CHILD ABUSE AND NEGLECT), DEPT. OF HEALTH AND HUMAN SERVICES (1993)).
\textsuperscript{171} Goodman et al., supra note 25, at 270.
\textsuperscript{172} Id.
\textsuperscript{173} See, e.g., N.C. GEN. STAT. § 15A-1225.1 (2009) (“Upon motion of a party or the court’s own motion, and for good cause shown, the court shall hold an evidentiary hearing to determine whether to allow remote testimony. . . . An order allowing or disallowing the use of remote
given were “fear of defense challenge or appeal” and as a lack of resources for using closed-circuit testimony. Goodman offers several theories for why prosecutors rarely use alternate methods of testimony for child witnesses, noting that it is “strategic” for prosecutors to require children to testify without courtroom accommodations, even if doing so could be beneficial to the child witness, when those accommodations might hurt the case.

Only three of the survey’s 134 respondents reported that they had used closed-circuit testimony after Craig. One reason might be the threshold findings required by Craig do not apply to all child witnesses. Another is the inconsistency between Craig and state supreme court holdings evaluating state constitutional provisions. Given prosecutors’ fears of losing a case on appeal and courts’ denials of motions for alternate methods of testimony, it appears that the discord between existing Supreme Court jurisprudence and state law impacts the realities of the child witness experience.

The realities reflected in Goodman’s study have a structural basis in the morass of statutes, cases, and research that continues to complicate matters over twenty years after Craig. Prosecutors do have discretion on whether to pursue alternate methods of testimony for child witnesses. Though not every method is approved in every jurisdiction, almost every state offers some way for prosecutors to modify the courtroom experience for child victims. However, prosecutors choose not to use these statutes. Given the damage that may occur to child victims, this choice may seem “inhumane.”

testimony shall state the findings of fact and conclusions of law that support the court’s determination.

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174. Goodman et al., supra note 25, at 270.
175. Id. at 272.
176. Id. at 273.
177. Id.; Maryland v. Craig, 497 U.S. 836, 857–88 (1990); see also supra notes 54–55 (discussing as factors, case by case inquiry, emotional trauma to child that would be caused by the defendant—not just the experience of testifying, and whether emotional trauma would be more than de minimus).
179. Goodman et al., supra note 25, at 273.
180. See supra Part II.A; infra Part II.C.
182. Id. (“The ability to request shielding of at least some child witnesses is available to prosecutors in virtually every jurisdiction.”). Again, not every state will allow literal shielding of the witness or remote testimony. See, e.g., MASS. GEN. LAWS. ch. 278, § 16D (2012).
183. See supra notes 157–70 and accompanying text.
184. Schwalb, supra note 2, at 190 (“Regardless of the veracity of a person’s testimony, some courtroom trauma may simply revictimize an already traumatized victim of abuse. The psychic damage caused by such trauma may be unfair and inhumane.”).
On the other hand, the numbers and ratings of self-reporting prosecutors may not take into account some of the very real challenges of working with child witnesses: children have falsely reported abuse, and their testimony and recollection can be impacted by the suggestions of adults—even well-intentioned therapists and detectives. Sometimes a child may not want to testify, but their testimony is the only way the prosecutor can hope to secure a conviction. Professor Andrea Dennis, a former prosecutor, states that prosecutors’ rationales fall into four main categories, stating alternate methods are: “(1) infeasible, (2) needless, (3) ineffective, and (4) impermissible.” Dennis argues that each reason is valid, even in the wake of Craig and in light of new technology that is judicially untested in the child witness context. Still, the legislators who passed these statutes “presumably expected that prosecutors would use the latest addition to their trial-benefit toolbox, ultimately to the benefit of both children and the public at large.”

Thus, the absence of a prohibition on remote testimony, combined with broad statutory language that could authorize remote testimony, should not be read as a yet-untested solution to the dilemma. Prosecutors are reluctant to try even Craig-approved closed-circuit testimony. Exploiting legislative ambiguity is not a workable answer to the question of how to best protect the most vulnerable class of child witnesses.

C. Proposed Amendment to Federal Rules of Criminal Procedure: The Uniform Child Witness Testimony Act

One proposed solution for this inconsistency is the Uniform Child Witness Testimony Act. Several states have adopted and enacted this Act. The Act was drafted in 2002 and was subsequently approved by the American Bar Association in February

185. Id. at 185–86.
186. Id. at 191.
187. Id. at 187.
188. See Faculty Profiles: Andrea L. Dennis, UNIVERSITY OF GEORGIA LAW, http://www.law.uga.edu/profile/andrea-l-dennis.
189. Dennis, supra note 181, at 346.
190. Id.
191. Id. at 345.
192. See supra Part II.B.
193. See supra notes 157–70 and accompanying text.
194. See supra notes 140–56 and accompanying text.
196. Id.
The drafters “considered both existing state statutes and Supreme Court decisions” in formulating the Act, and the Act accepts that some types of remote testimony are permissible, placing more detailed emphasis on the determination of whether a child can testify remotely. The Act does not define the specific procedures that would be acceptable means of testimony, instead defining “alternative testimony” in the negative. An “alternative method” of testimony is a method by which a child testifies, which does not include all of the following:

(A) having the child present in person in an open forum; (B) having the child testify in the presence and full view of the finder of fact and presiding officer; and (C) allowing all of the parties to be present, to participate and to view and be viewed by the child.

However, the Act is still not explicit about the method of testimony used—whether truly remote, out of the courthouse testimony would be appropriate or not. In fact, the broad definition of “alternative method” coupled with the lack of guidance on technological specifications has led to sharp criticism that the Act should be deemed unconstitutional. If Craig sets the standard for Sixth Amendment exceptions, no federal or state statute can be interpreted in a way that affords less than that standard of protection for criminal defendants. Even though the Act was drafted broadly enough to allow for “as-yet undeveloped technology” as an acceptable alternative method of testimony, the Supreme Court has not ruled on the acceptability of any method beyond one-way, closed-circuit testimony. Thus, a strict reading of the Act would place it beyond the Supreme Court’s approved method in Craig, as well as at odds with states requiring face-to-face confrontation.

Practically speaking, the Act does not explicitly authorize any technology, and in the wake of states adopting and codifying the language for themselves, there has been no mass movement toward

197. Grearson, supra note 1, at 469.
199. Grearson, supra note 1, at 470.
200. UNIF. CHILD WITNESS TESTIMONY BY ALTERNATIVE METHODS ACT § 2(1) (emphasis added).
201. See id.
202. See, e.g., Grearson, supra note 1, at 491.
203. Id.
204. See Maryland v. Craig, 497 U.S. 836, 840 (1990) ("This case requires us to decide whether the Confrontation Clause of the Sixth Amendment categorically prohibits a child witness in a child abuse case from testifying against a defendant at trial, outside the defendant's physical presence, by one-way, closed-circuit television."); Grearson, supra note 1, at 479, 491–92.
205. See Craig, 497 U.S. at 857–60; Grearson, supra note 1, at 491–95.
the use of remote, two-way video technology. Just as with the North Carolina state statute, it seems prosecutors are reluctant to utilize a method of testimony not explicitly authorized by statute or approved by courts, as evidenced by the dearth of cases in which anything but one- or two-way, closed-circuit testimony has been used. These proposed solutions similarly fall short because of vague terms leading to implementation problems, as well as potential conflicts with scenarios not contemplated and approved by Craig.

III. FINDING A SOLUTION: AUTHORIZATION OF REMOTE TESTIMONY UNDER A MEDICALLY UNAVAILABLE EXCEPTION

This Note proposes two changes to the existing status of federal law. First, the Supreme Court should explicitly clarify that testimony from a remote location, outside the courthouse, can meet the constitutional guarantees of the Confrontation Clause under narrow circumstances, and two-way, closed-circuit testimony can be used in all scenarios where one-way, closed-circuit testimony is used. Second, the Court should outline those narrow circumstances by adopting a requirement of medical unavailability for child witnesses. The findings required for a pre-trial determination of medical unavailability should be a case-by-case balancing of the child witness’s mental and physical well being against the defendant’s right to face his or her accuser, as in Craig. However, the Court must also determine that one- or two-way, closed-circuit testimony would not be sufficient to protect the child witness.

The Supreme Court should be the source of authority for incorporating remote testimony. As evidenced by empirical data from prosecutors, complying with constitutional guarantees as interpreted by the Supreme Court is a concern leading to underutilization of existing methods of alternative testimony for child witnesses. The Supreme Court denied certiorari in Wrotten, but did so because the case was before the Court on “an interlocutory posture.” Justice Sotomayor noted, “The question is an important one, and it is obviously not answered by Maryland v. Craig.” Justice Sotomayor went on to add, “I think it appropriate to emphasize that the Court’s action does not constitute a ruling on the merits and certainly does not

206. See supra Part II.B.
207. See supra Part II.B.
208. See Craig, 497 U.S. at 836–37; supra notes 34–48 and accompanying text.
209. See supra Part II.B.
211. Wrotten, 130 S. Ct. at 2520.
represent an expression of any opinion concerning ‘the importance of the question presented.’” 212 Thus, there has been an acknowledgement from the Court that the issue of remote testimony is separate and unique from the issue of one-way, closed-circuit testimony in Craig, and the Court may be willing to address the constitutionality of remote testimony in the right case. 213 Without the express approval of the Supreme Court, remote testimony will likely remain unused by prosecutors. 214

Approval by the Supreme Court would also provide justification for prosecutorial reliance on state statutes with language broad enough to allow remote testimony. Prosecutors making motions for use of remote testimony, if the Supreme Court favorably addresses the issue, for example, could employ North Carolina’s statute. 215 For states with face-to-face language in their state constitutions—like Massachusetts—the acceptability of remote testimony would likely depend on the breadth of the Supreme Court’s holding. 216 Ideally, the pre-authorization determinations required by the Court could be interpreted as ensuring the same protections guaranteed by the state’s own Confrontation Clause. 217 By explicitly allowing two-way, closed-circuit testimony, the Court could extend the protections of Craig, leaving only a narrow range of circumstances where remote testimony would be necessary to protect the child witness.

To pass constitutional muster, the authorization of remote testimony should be limited to situations where a doctor determines

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212. Id. at 2521 (quoting Stevens, J., statement respecting denial of certiorari in Moreland v. Federal Bureau of Prisons, 547 U.S. 1106, 1107 (2006)).
213. Id. at 2520.
214. See supra Part II.B. (discussing prosecutorial reluctance to use alternate methods of testimony for fear of reversal or judicial denial could be remedied by the Supreme Court’s explicit approval of remote testimony).
216. See generally Maryland v. Craig, 497 U.S. 836, 857–60 (1990). For example, if the Court were to frame the decision in the “public policy exception” language of Craig, that might not be enough to justify remote testimony above state constitutional protections. See id. If the Court declared remote testimony as the functional equivalent of face-to-face confrontation, this would likely meet the bar set by state constitutions like Massachusetts’s. See id. However, as discussed later in this Note, this is not the ideal, or likely, solution.
217. See Commonwealth v. Bergstrom, 524 N.E.2d 366, 374–76 (Mass. 1988), for an example where Massachusetts’s highest court has focused on the quality of the testimony’s transmission and the adequacy of the showing made by the state to justify the use of closed-circuit testimony. The judge in Bergstrom expressed concern with how the alternative method was used in that specific incident, rather than the constitutionality, under the state constitution, of an alternative method as a whole. See id. Thus, even a state with face-to-face language might be willing to employ remote testimony if the threshold finding is set high enough to meet state Confrontation Clause guarantees. See id.
the child witness is medically unavailable to come to court. This rationale, like that of the court in Wrotten, encompasses situations where the experience of coming to court—not only testifying in the presence of the defendant—would cause trauma to the child witness.\textsuperscript{218} However, testimony by a medical professional that a child witness is medically unavailable to come to court should be added to the analysis in Craig to determine if the case is so severe or exceptional that remote testimony should be authorized.\textsuperscript{219} A “Craig plus” analysis would require a finding that the accommodations provided by either one- or two-way, closed-circuit television would be insufficient to protect the child witness. This highly tailored exception is necessary to satisfy state statutory language and legislative intent—and ultimately Sixth Amendment requirements—specifying that the presence of the defendant, not the experience of the courtroom, be the source of trauma.\textsuperscript{220} Only in situations where the child witness would suffer exceptional harm from coming to court would there be the option of having the child witness testify remotely.\textsuperscript{221} Through Supreme Court clarification and expansion of Craig, child witnesses who would be traumatized by the presence of the defendant could still testify from the courthouse through two-way, closed-circuit testimony.\textsuperscript{222}

This intended solution is a pragmatic one that prosecutors would implement with confidence, rather than with hesitation because of potential constitutional challenges. Thus, even though Craig requires a case-by-case analysis, the Court could provide some guidelines for the medical unavailability determination.\textsuperscript{223} For example, giving testimony multiple times seems to have a greater negative impact on children.\textsuperscript{224} Children who lack a strong family support system have more difficulty recovering psychologically from abuse—especially those who testify in court.\textsuperscript{225} Understandably, children who endure the most severe abuse tend to have more

\begin{footnotes}
\textsuperscript{218}. People v. Wrotten, 923 N.E.2d 1099, 1101–02 (N.Y. 2009) (“[T]he court . . . held that complainant . . . could not travel to New York without endangering his health, and was therefore unavailable.”).
\textsuperscript{219}. \textit{See} Craig, 497 U.S. at 851–60 (discussing the analysis that must be undertaken when deciding if remote testimony of a child witness should be allowed).
\textsuperscript{220}. \textit{See}, e.g., N.C. GEN. STAT. § 15A-1225.1 (2009).
\textsuperscript{221}. \textit{See} Wrotten, 923 N.E.2d at 1101–02.
\textsuperscript{222}. As the Second Circuit pointed out in United States v. Gigante, 166 F.3d 75, 81 (2d. Cir. 1999), two-way, closed-circuit testimony provides an even more realistic interaction between the defendant and the witness than the one-way testimony authorized in Craig.
\textsuperscript{223}. \textit{See} Craig, 497 U.S. at 851–56.
\textsuperscript{224}. \textit{See} Goodman et al., \textit{supra} note 9, at 62.
\textsuperscript{225}. \textit{See} id. at 119.
\end{footnotes}
problems coping and recovering.226 The Court’s guidelines could include bright-line rules that would result in a clear finding of medical unavailability for children testifying on multiple occasions, victims of alleged crimes involving incest, or children who have undergone severe, pervasive abuse.

Perhaps the most obvious example of this rule’s applicability would be a child receiving treatment in an in-patient facility or mental hospital. Like the adult witness in Wrotten, leaving such a facility to come to court might endanger a child under current supervision of a mental health professional.227 However, the level of psychological services available to a child witness may vary based on location, resources, or adult perception of the child’s trauma, so lack of in-patient treatment should not be dispositive.228 Rather, the evidence presented should center on whether and why accommodations provided by Craig would be inadequate.

Though timesaving and cost-cutting rationales for remote testimony might make a compelling case for allowing it in all situations where a child witness might be traumatized, remote testimony should be reserved for situations more severe—and rarer—than that contemplated by Craig.229 Child victims already present credibility problems for prosecutors, and the testimony of child witnesses is often key to making a case of child abuse or molestation.230

Remote testimony introduces new hurdles of ensuring the security of location and transmission, as well as finding a setting that will not be unduly prejudicial to a defendant.231 Additionally, without a higher bar than Craig, there would be little to no enforcement mechanism for making a child witness ever come to court.232 Prosecutors faced with an uncooperative parent or advocate may struggle to manage witnesses if a Craig showing were all that was

226. See id.
227. See Wrotten, 923 N.E.2d at 1101.
229. See Montell, supra note 49, at 377–81, for an argument that remote testimony is more efficient than even closed-circuit testimony. Skype, for example, is a free service requiring only secure Internet service and two computers with camera and microphone capability to be used in a courtroom. See What is Skype?, supra note 97.
230. See supra Part II.A.
231. See Burtzos, supra note 108, at 110. For example, a child witness testifying from a hospital bed would likely not be acceptable. See id.
232. See id. for a discussion of witness management difficulties potentially posed by remote testimony.
necessary to justify remote testimony. Practically, given the reluctance of courts, as well as state legislatures, to authorize remote testimony, any change in the current law would need to be an incremental step with a high showing of necessity. Successful trials utilizing remote testimony in exceptional circumstances might lead to expansion of the method, but would prevent overutilization, both with child witnesses and for other witnesses by judicial analogy as in *Wrotten.* Since the court in *Wrotten* relied on *Craig* by analogy without noting that child victims are a unique category of witnesses, the Court must be careful to craft a gradual rule that will be applied in a limited set of circumstances, rather than a more general authorization that would open the door to remote testimony in all criminal cases.

IV. CONCLUSION

The Supreme Court’s authorization of remote testimony for child witnesses in cases of medical unavailability would protect the most vulnerable child witnesses while still protecting the Sixth Amendment rights of defendants. Though current statutes do not provide a clear basis for this authorization, the Supreme Court is ideally situated to clarify the types of technology that are acceptable. Should prosecutors successfully use this type of testimony in exceptional circumstances, courts and legislatures may look favorably upon expanding it. However, medically unavailable child witnesses are the class of witnesses most at risk. Until and unless courts authorize remote testimony more extensively, child witnesses who would be irrevocably traumatized or reinjured, not only by the presence of the defendant, but also by the experience of coming to court should be the subset of child witnesses for

233. See Maryland v. Craig, 497 U.S. 836, 857–60 (1990) ("In sum, we conclude that 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, the Confrontation Clause does not prohibit use of a procedure that, despite the absence of face-to-face confrontation, ensures the reliability of the evidence by subjecting it to rigorous adversarial testing and thereby preserves the essence of effective confrontation."). If a finding of necessity is conditioned only on the presence of the defendant, not the ordeal of coming to court, any child witness who qualified for two-way, closed-circuit testimony would qualify for remote testimony. *See id.*

234. *See supra* Part II.B.

235. See People v. Wrotten, 923 N.E.2d 1099, at 1100–01 (N.Y. 2009). Though this solution is based on the type of medical unavailability determination made in *Wrotten,* remote testimony for adult witnesses is not contemplated or addressed in the scope of this Note. *See id.*

236. *See id.* at 1102–03.
whom courts reevaluate current precedent on alternate methods of testimony.

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