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NEW JERSEY'S EXCESSIVE AND UNPRECEDENTED EXPANSION OF *MARYLAND V. CRAIG*

Bridget Devlin

Introduction

Cases where children are key witnesses – especially those involving child abuse – are among the most challenging facing our justice system. The line between protecting children and preventing the wrongful conviction, or the wrongful termination of parental rights, of an alleged abuser can many times be difficult to determine. The system must also ensure that those accused of crimes are presumed innocent until proven guilty, and are given the right to confront witnesses against them. While some specific policy considerations may outweigh a defendant's constitutional rights, it is important to understand at which point the line must be drawn.

The protection of crime victims from further trauma is certainly imperative to society and the justice system, but it may be possible that recent changes in New Jersey law have deprived defendants certain constitutional rights. This note will address the competing interests of a defendant's right to be presumed innocent against the government's interests in protecting a victim-witness. Specifically, this note intends to challenge the notion that the same protections are warranted for both children and adults, as suggested by a recent amendment to a New Jersey statute.[1]

I. Maryland v. Craig

Since the U.S. Supreme Court's 1990 seminal decision in *Maryland v. Craig*, courts have allowed for non-traditional forms of testimony, so long as the circumstances permit it.[2] In *Craig*, the U.S. Supreme Court upheld a procedure that permitted victims of child sexual abuse to testify via closed-circuit television ("CCTV"), out of the presence of the defendant.

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[1] This note is not intended to undermine the trauma that is endured by victims of any crime—especially sexual assault.

[2] Maryland v. Craig, 497 U.S. 836 (1990).

[3] At trial, the State sought to invoke a Maryland statutory procedure which would allow the six-year-old victim to be examined and cross-examined in a separate room, while a video monitor recorded and displayed her testimony to those in the courtroom.[4] The procedure also allowed for the defendant to maintain electronic communication with his counsel, and objections were to be made and ruled on as if the witness were testifying in the courtroom.[5]

Upon finding that the alleged victim would suffer emotional distress if forced to testify in the courtroom, the trial court permitted the CCTV procedure, and the jury convicted the defendant on all counts.[6] On appeal to the U.S. Supreme Court, the defendant argued that the use of the procedure violated his constitutional right to confrontation.[7] The Court rejected this argument, stating that the Confrontation Clause does not guarantee criminal defendants "the *absolute* right to face-to-face meeting with witnesses against them at trial."[8] In support of this interpretation, the Court cited its prior decision, *Ohio v. Roberts*, which held that "competing interests, if 'closely examined,' may warrant dispensing with confrontation at trial."[9] Thus, while the Court noted there is a "*preference* for face-to-face confrontation at trial," the preference "must occasionally give way to considerations of public policy and the necessities of

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[3] *Id.* at 860.

[4] *Id.* at 841.

[5] *Id.* at 842.

[6] *Id.* at 843.

[7] *Id.*; *see also* U.S. CONST. AMEND. VI.

[8] *Craig*, 497 U.S. at 844.

[9] *Id.* at 848 (citing Ohio v. Roberts, 448 U.S. 63 (1980)).

the case."[10] The Court determined that such flexibility is warranted in certain situations, as protecting the welfare of children is an important public policy function that outweighs a defendant's right to confrontation.[11] So long as "the State makes an adequate showing of necessity, the State's interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of a special procedure that permits a child witness … to testify at trial against a defendant in the absence of face to face confrontation."[12] Specifically, the Court found the State's interest in protecting the physical and psychological well-being of child abuse victims outweighed a defendant's right to face his or her accusers in court.[13]

Unsurprisingly, the *Craig* decision was accompanied with criticism.[14] Specifically, in his dissenting opinion, Justice Scalia

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[10] *Id.* at 850 (citing Mattox v. United States, 156 U.S. 237, 242 (1895)).

[11] *Id.* at 854.

[12] *Id.* at 855.

[13] *Id.* (Notably, the Court did not address the impact the procedure would have on the defendant's right to be presumed innocent.).

[14] *See, e.g.*, Robert H. King, Jr., *The Molested Child Witness and the Constitution: Should the Bill of Rights Be Transformed into the Bill of Preferences?*, 53 OHIO ST. L.J. 49, 49-50 (1992) (suggesting that *Craig* may lead to the virtual elimination of the right to confrontation); Tanya Cooper, *Sacrificing the Child to Convict the Defendant: Secondary Traumatization of Child Witness by Prosecutors, Their Inherent Conflict of Interest, and The Need For Child Witness Counsel*, 9 CARDOZO PUB. L. POL'Y & ETHICS J. 239, 261 (2011) ("[S]trikingly, [the Court] has consistently characterized these child victim-witness interests as issues of compelling State importance, but not necessarily as interests belonging to the children themselves.").

condemned the majority's prioritization of public policy over constitutional rights:

> [B]ecause of this subordination of explicit constitutional text to currently favored public policy, the following scene can be played out in an American courtroom for the first time in two centuries: A father whose young daughter has been given over to the exclusive custody of his estranged wife, or a mother whose young son has been taken into custody by the State's child welfare department, is sentenced to prison for sexual abuse on the basis of testimony by a child the parent has not seen or spoken to for many months; and the guilty verdict is rendered without giving the parent so much as the opportunity to sit in the presence of the child, and to ask, personally or through counsel, "it is really not true, is it, that I—your father (or mother) whom you see before you—did these terrible things?" Perhaps that is a procedure today's society desires; perhaps (though I doubt it) it is even a fair procedure; but it is assuredly not a procedure permitted by the Constitution.[15]

The *Craig* holding has also faced criticism because of the lack of guidance it has provided to judges and lawmakers, leading to inconsistent decisions and a plethora of conflicting tests for the admission of closed-

[15] *Id.* at 860-70 (Scalia, J., dissenting); *See also* Coy v. Iowa, 487 U.S. 1012, 1020 (1988) ("[F]ace-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult.").

circuit testimony.[16] Moreover, several scholars have argued that a significant danger posed by *Craig* is that it could lead to expanding protections to classes of people other than child abuse victims.[17]

A. New Jersey's Interpretation of *Craig*

The specific circumstances in which *Craig* was intended to apply is unclear. The Supreme Court's opinion merely states that the requisite necessity be determined on a "case-by-case" basis,[18] providing states with little direction in developing their own statutes authorizing closed-circuit testimony. Arguably, *Craig* could authorize either extending or limiting the use of closed-circuit television. Following the *Craig* decision, state lawmakers endorsed the notion that special courtroom measures may be appropriate in certain situations, specifically those involving abused children.[19] Now, almost 30 years later,

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[16] Jessica Brooks, Two-Way Video Testimony and the Confrontation Clause: Protecting Vulnerable Victims After Crawford, 8 STAN. J. C.R. & C.L. 183, 201 (2012).

[17] King, Jr., *supra* note 14, at 50 ("presumably the State has an equally important interest in protecting the traumatized rape victim, the elderly assault victim, or the victim of gang violence."); Jacqueline Miller Beckett, The True Value of the Confrontation Clause: A Study of Child Sex Abuse Trials., 82 GEO. L.J. 1605, 1624 (1994) ("this exception clears the way for deeming the protection of virtually any victim-witness's welfare more important than the defendant's right to a fair trial.").

[18] Susan Howell Evans, *Criminal Procedure-Closed Circuit Television in Child Sexual Abuse Cases: Keeping the Balance Between Realism and Idealism-Maryland v. Craig*, 26 WAKE FOREST L. REV. 471, 495 (1991).

[19] Theresa Cusik, *Televised Justice: Toward a New Definition of Confrontation Under Maryland v. Craig*, 40 CATH. U.L. REV. 967, 968 (1991).

some states, like New Jersey, have expanded *Craig's* holding to apply to cases that do not necessarily involve children.[20]

Beginning in 1985, New Jersey's CCTV statute, titled "The Child Sexual Abuse Act", provided that a court may allow a child witness to testify by closed circuit television in certain cases.[21] When first enacted the CCTV Statute required a witness to be *sixteen-years-old or younger* and have a substantial likelihood of suffering severe emotional distress if required to testify in open court.[22] In 1990, the New Jersey Supreme Court first addressed the constitutionality of the CCTV Statute in *State v. Crandall*, explaining that the statute's purpose was to "protect young victims of criminal abuse from the effects of testifying in open court in the presence of the accused."[23] Relying on *Craig* and other "child-abuse" statutes, the court opined that the law sought to "spare a youthful witness the ordeal of repeatedly discussing details of sexual assault or abuse."[24]

Following *Crandall*, the New Jersey Supreme Court in *State v. Smith* explained that protecting children from trauma associated with testifying was "[c]learly… the public policy sought to be advanced by [the New Jersey CCTV statute]."[25] In *Smith*, the child victim refused to testify in open court, attributing her fear to both the jury and the defendant's

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[20] N.J. STAT. ANN. § 2A:84A-32.4 (West 2017).

[21] Act of April 11, 1985, ch. 126, 1985 N.J. Laws 390-91 (codified at N.J.S.A. 2A:84A-32.4) (amended 2013, 2017).

[22] *Id.*; State v. Crandall, 120 N.J. 649, 653 (1990).

[23] *Crandall,* 120 N.J. at 651.

[24] *Id.* at 661 (quoting S. Judiciary Comm., Statement to A2454 -- *L.*1985, *c.* 126).

[25] State v. Smith, 158 N.J. 376, 386 (1999).

presence.[26] The Court rejected the Appellate Division's application of the CCTV statute, finding that the statute applied only in instances in which the child's fear is derived solely from the presence of the defendant.[27] Instead, the Court explained:

> … the more reasoned approach is to look at the result of the fear, not simply its origin. If the effect of the child's fear is to prevent the proper functioning of the truth-finding process, whether that fear derives from the presence of the defendant alone, or a combination of the presence of the defendant and jury, or from the courtroom, should not lead to a different result under N.J.S.A. 2A:84A-32.4 or the Confrontation Clause.[28]

B. New Jersey's Amended CCTV Statute

New Jersey's CCTV statute was amended in 2017, eliminating the requirement that a witness be sixteen-years-old or younger.[29] The Assembly Bill makes clear that the age-requirement was purposely omitted, stating that the amendment "expands current law to encompass *victims and witnesses of any age*…"[30] The law still demands that victims and witnesses meet a certain threshold, requiring that the court determine "by clear and convincing evidence that there is a substantial likelihood that the victim or witness would suffer

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[26] *Id.* at 383.

[27] *Id.* at 386.

[28] *Id.* at 387.

[29] N.J. STAT. ANN. § 2A:84A-32.4 (West 1985); *compare with*, Act of Aug. 7, 2017, ch. 205, sec. 1, 2017 N.J. Laws 885 (codified at N.J.S.A. § 2A:84A-32.4).

[30] Assemb., 217th Leg. – A1199 First Reprint, 2016 Sess. 1 (N.J. 2016).

severe emotional or mental distress if required to testify in the presence of spectators, the defendant, the jury, or all of them."[31]

The CCTV statute allows for very different circumstances from that in *Craig*. Aside from the obvious fact that the witness in *Craig* was a child, the witness was also a *victim* and the required threshold was that the victim be emotionally distressed by the presence of the *defendant*. Under New Jersey's CCTV statute, the testifying witness need not be an alleged victim in order to testify via CCTV.[32] The law applies to both victims *and* witnesses who, per the judge's determination, meet the "emotionally distressed" standard.[33] Theoretically, the witness could have no prior relationship to the defendant, possibly never having even met the accused before the day the witness testifies. Even more, the witness need not be emotionally distressed by the *defendant's* presence to testify via closed-circuit, but could qualify to testify by closed circuit if they are found to be emotionally distressed by the presence of *spectators or the jury*.[34] The language in the CCTV statute theoretically would allow a witness to testify via CCTV merely because he or she is shy or has stage fright.

New Jersey's amended statute could therefore have dangerous consequences. Justice Scalia provided the horrific hypothetical of a wrongly convicted abuser, as there are times when one vengeful parent seeks to retaliate against another by falsely accusing him or her of sexually abusing their child.[35] New Jersey's amended statute makes Scalia's hypothetical even

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[31] N.J. STAT. ANN. § 2A:84A-32.4 (West 1985) (amended 2013, 2017).

[32] N.J. STAT. ANN. § 2A:84A-32.4 (West 2017).

[33] *Id.*

[34] *Id.*

[35] Maryland v. Craig, 497 U.S. 836, 860-70 (1990) (Scalia, J., dissenting).

more realistic. Now, even a vengeful parent could potentially testify without having to be in the same room as the defendant. The amended law gives more power to the manipulative and spiteful, and has the potential to destroy families. Even if a charge is successfully refuted and a defendant's parental rights are reinstated, the defendant is likely to lose valuable time with the child, and the allegation will likely have an adverse effect on the parent-child relationship. Moreover, as one commentator explained, the social stigma that attaches to an accusation of child sexual abuse lingers long after a finding of innocence.[36]

C. Other States' Interpretation of *Craig*

Every state has legislation governing the procedures in which witnesses may testify in court, and since *Craig*, almost every state has adopted legislation to permit children to testify via closed-circuit television.[37] However, the states differ in two

[36] Deborah H. Patterson, *The Other Victim: The Falsely Accused Parent in A Sexual Abuse Custody Case*, 30 J. FAM. L. 919, 926 (1992) (citing Karen B. v. Clyde M., 574 N.Y.S.2d 267, 272 (Fam. Ct. 1991)).

[37] *See e.g.,* CAL. PENAL CODE § 1347 (Deering 2018); TENN. CODE ANN. § 24-7-120 (1998); KAN. STAT. ANN. § 22-3434 (1990); OHIO REV. CODE ANN 2945.481 (LexisNexis 2018); MONT. CODE ANN § 46-16-229 (2017); CONN. GEN. STAT. § 54-86g (2018); ARK. CODE ANN. § 16-43-1001 (1997);); WASH. REV. CODE ANN. § 9A.44.150 (LexisNexis 2013); IND. CODE ANN. § 35-37-4-6 (LexisNexis 2015); VA. CODE ANN. § 18.2-67.9 (2018); ALA. CODE § 15-25-3(LexisNexis 2018); MISS. CODE ANN. § 13-1-405 (2019); W. VA. CODE §62-6B-4 (LexisNexis 2018); N.H. REV. STAT. ANN. § 632-A:8 (2018); N.M. STAT. ANN. § 38-6A (LexisNexis 2018).

important aspects: (1) *who* may testify via CCTV,[38] and (2) the age requirement of the person testifying.[39]

Other than New Jersey, only Delaware has amended its CCTV statute to include sexual assault victims of any age.[40] However, unlike New Jersey's CCTV Statute, which doesn't distinguish between victim and non-victim witnesses, Delaware law requires non-victim witnesses to be eleven-years-old or younger in order to testify via CCTV.[41]

States vary on how young a witness must be in order to testify via CCTV. For example, state laws in Florida, Iowa, Illinois, and Nevada allow a witness to testify via CCTV if the witness is eighteen-years-old or younger.[42] In Arkansas, Connecticut, and Minnesota, the maximum age to testify via CCTV is twelve-years-old,[43] and in California, Tennessee, Texas, Kansas, Ohio, and Montana, the maximum age is thirteen-years-old.[44] Some states have an age-requirement of fourteen-years-old, such as New York (with the exception of victims of domestic

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[38] *Compare* KAN. STAT. ANN. § 22-3434 (1990) (victim of the crime), *with* ARK. CODE ANN. § 16-43-1001 (2019) (victim or witness).

[39] *Compare* FLA. STAT. ANN. § 92.54 (LexisNexis 2016) (18 or younger), *with* CONN. GEN. STAT. § 54-86g (2018) (12 or younger).

[40] DEL. CODE. ANN. tit. 11, § 3514 (2015).

[41] *Id.*

[42] *See* FLA. STAT. ANN. § 92.54 (LexisNexis 2016); IOWA CODE ANN. § 915.38 (West 2018); NEV. REV. STAT. ANN. § 174.229 (LexisNexis 2018); 725 ILL. COMP. STAT. ANN. 5/106B-5 (LexisNexis 2015).

[43] ARK. CODE ANN. § 16-43-1001 (1997); CONN. GEN. STAT. § 54-86g (2018); MINN. STAT. ANN. § 595.02 (West 2018).

[44] CAL. PENAL CODE § 1347 (Deering 2018); TENN. CODE ANN. § 24-7-120 (1998); KAN. STAT. ANN. § 22-3434 (1990); OHIO REV. CODE ANN 2945.481 (LexisNexis 2018); MONT. CODE ANN § 46-16-229 (2017).

violence), Washington, and Indiana.[45] Like Delaware,[46] Virginia sets different standards for victims and non-victim witnesses, specifying that a victim must be fourteen-years-old or younger at the time of the offense, but sixteen-years-old or younger at the time of trial.[47] Non-victim witnesses in Virginia must be fourteen-years-old or younger at the time of trial.[48] While no longer the case in New Jersey, the most common age requirement among the states is sixteen-years-old, such as in Alabama, Mississippi, West Virginia, New Hampshire, and New Mexico.[49]

Some states have gone even further to protect the constitutional rights of the accused, limiting the circumstances in which CCTV testimony can be used. For example, an Arkansas statute explicitly states that the CCTV method does not *create* a right of a child witness to closed-circuit television procedure, and that the CCTV method was intended to be used in "limited circumstances."[50] Kentucky and Mississippi have extended the protection to non-victim witnesses aged twelve-

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[45] N.Y. CRIM. PRO. LAW § 65.10 (Consol. 2018); WASH. REV. CODE ANN. § 9A.44.150 (LexisNexis 2013); IND. CODE ANN. § 35-37-4-6 (LexisNexis 2015).

[46] DEL. CODE. ANN. tit. 11, § 3514 (2015).

[47] VA. CODE ANN. § 18.2-67.9 (2018).

[48] *Id.*

[49] ALA. CODE § 15-25-3 (LexisNexis 2018); MISS. CODE ANN. § 13-1-405 (2019); W. VA. CODE § 62-6B-4 (LexisNexis 2018); N.H. REV. STAT. ANN. § 632-A:8 (2018); N.M. STAT. ANN. § 38-6A (LexisNexis 2018).

[50] ARK. CODE ANN. § § 16-43-1001(C)(F) (1997).

years-old and sixteen-years-old, respectively, but require that the child witness be an *eyewitness* to the crimes in question.[51]

States also differ in the required "source" of the witness' emotional distress. For example, Tennessee, West Virginia, and Alaska require a showing that the victim would not be traumatized by the courtroom generally, but specifically by the defendant's presence.[52] On the other hand, some states' CCTV statutes are more liberal; in Rhode Island, a finding of emotional distress is required for an alleged victim who is under eighteen-years-old, but if the child is fourteen-years-old or younger, there is a rebuttable presumption that the child is unable to testify before the court without suffering unreasonable mental or emotional harm.[53]

II. Children Are Treated Differently Under the Law, For Good Reason

Courts have traditionally afforded children greater protections than adults because of a child's vulnerability and lack of experience.[54] As stated by the U.S. Supreme Court, "children cannot simply be viewed as miniature adults."[55] This

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[51] K.Y. REV. STAT. ANN.§ 421.350 (LexisNexis 2018); MISS. CODE ANN. § 13-1-405 (2019).

[52] TENN. CODE ANN. § 24-7-120 (1998) ("The source of trauma is not the courtroom generally, but the defendant."); W. VA. CODE § 62-6B-3 (LexisNexis 2018) ("…unable to testify solely to being required to be in the physical presence of the defendant while testifying."); ALASKA STAT. § 12.45.046 (2018) (notes to decisions) (the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant).

[53] R.I. GEN. LAWS ANN. § 11-37-13.2. (West 2004).

[54] *Id.* at 72.

[55] J. D. B. v. North Carolina, 564 U.S. 261, 274 (2011).

is especially true when a child is forced to testify in a criminal proceeding. [56] Courts have recognized that "because of disparities in power, intellect, maturity, and judgment between adults and children, children are often without the resources and capabilities, both mentally and physically, to protect themselves from harm."[57] State and federal laws routinely distinguish between children and adults in both the criminal and civil context. For example, landowners generally owe a heightened duty of care to children on their premises, regardless of whether the child is an invitee or trespasser.[58] The differentiating characteristics of youth are also demonstrated through the legal disqualifications placed on children as a class, e.g., limitations on their ability to alienate property, enter into a binding contract enforceable against them, and marry without parental consent.[59]

These differences also play a significant role in the criminal context. While there is no textual provision in the U.S. Constitution that recognizes a child's right to special protection or treatment, the Supreme Court has established that children

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[56] People v. Arredondo, 222 Cal. Rptr. 3d 42, 74 (2017) (citing Cecchettini-Whaley, *Children as Witnesses After Maryland v. Craig,* 65 S. CAL. L. REV. 1993, 2005–2018 (1992)) ("Psychological studies have shown that 'the distress the child would experience [testifying in court] would be worse than that of a testifying adult' as '[c]hildren… have not yet developed to the point that they can understand the legal system and its procedural requirements, including the necessity of facing those who have tormented them and of having their own credibility put on trial.'"); *see also* WIS. STAT. ANN. § 950.055 (2018) ("[I]t is necessary to provide child victims and witnesses with additional consideration and different treatment than that usually afforded to adults").

[57] Atty. Griev. Comm'n v. Thompson, 786 A.2d 763, 770 (Md. 2001).

[58] Bennett v. Stanley, 748 N.E.2d 41, 48 (Ohio 2001).

[59] *J. D. B.*, 564 U.S. at 274.

who violate the law are entitled to certain protections guaranteed by due process.[60] Rather than fully incorporating the Bill of Rights into juvenile court proceedings, as it did for adult criminal cases, the Supreme Court relied on the requirement of fundamental fairness under the Fourteenth Amendment to impose procedural protections for youth in juvenile proceedings.[61] Such different considerations allow courts to consider the specific goals of the juvenile judicial system, such as the interest in growth and rehabilitation, in evaluating whether a specific procedural protection is constitutionally- required.[62]

In the seminal case *Miller v. Alabama*, the Supreme Court held that sentencing a juvenile to life in prison without parole was cruel and unusual, and therefore was unconstitutional under the Eighth Amendment.[63] Citing prior decisions, the Court listed three significant factors that made children "constitutionally different from adults," including their (1) lack of maturity and underdeveloped sense of responsibility, (2) vulnerability to negative influences and outside pressures, and (3) lack of 'formed' character.[64] The Court explained that

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[60] Cynthia Soohoo, *You Have the Right to Remain a Child: The Right to Juvenile Treatment for Youth in Conflict With the Law*, 48.3 COLUM. HUM. RTS. L. REV. 1, 37 (2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2966224.

[61] *Id.* (citing Gault).

[62] *Id.* (*see* Marsha Levick et al., article: *The Eighth Amendment Evolves: Defining Cruel and Unusual Punishment Through the Lens of Childhood and Adolescence*, 15 U. PA. J.L. & SOC. CHANGE 285, 311 (2012)).

[63] Miller v. Alabama, 567 U.S. 460, 471 (2012).

[64] *Id.*

such distinguishing factors "rested not only on common sense ... but on science as well."[65]

A. Special Courtroom Measures and the Presumption of Innocence

The Supreme Court has held that the presumption of innocence "is a basic component of a fair trial under our system of criminal justice."[66] To implement the presumption, courts must be alert to factors that may undermine the fairness of the fact-finding process.[67] Accordingly, the right to a fair trial requires that trial courts allow inherently prejudicial practices "only where justified by an essential state interest specific to each trial."[68]

Courts have determined that some procedures send such a powerful message about a criminal defendant's probable guilt that their use is barred. For example, an accused should not be compelled to go to trial in prison garb "because of the possible impairment of the presumption so basic to the adversarial system."[69] Not only would such a practice have a significant effect on the jury's feelings about the defendant, but it furthers

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[65] *Id.*

[66] Estelle v. Williams, 425 U.S. 501, 503 (1976); *See also* Coffin v. United States, 156 U.S. 432, 453 (1895) ("The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.").

[67] *Williams,* 425 U.S. at 503 (citing *In re* Winship, 397 U.S. 358, 364 (1970)).

[68] State v. Artwell, 177 N.J. 526, 534 (2003) (quoting Holbrook v. Flynn, 475 U.S. 560, 568-69 (1986).

[69] *Williams*, 425 U.S. at 504.

no essential state policy.[70] Courts also find serious problems in forcing witnesses to appear in shackles.[71] As the New Jersey Supreme Court explained, the appearance of a defense witness in restraints undermines the credibility of the testimony the witness offers on the defendant's behalf.[72] As one court noted, the danger lies "not merely in the fact that the jury may suspect that the witness committed a crime," but in "the inherent psychological impact" that restraints will have on the jury's assessment of credibility."[73] Some courts find that there is a greater danger of prejudice if the jury is aware that arrangements are extraordinary, while others do not.[74] One study investigated how gender, age, and educational background impact jurors perception of cases with alternative testimony.[75] The study found that those with advanced education may be less susceptible to special measures, such as an accompanying dog or teddy bear.[76]

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[70] *Artwell*, 177 N.J. at 535.

[71] *Id.*

[72] *Id.* at 536.

[73] *Id.*

[74] *Compare* Dorman v. United States, 435 F.2d 385, 327 (D.C. Cir. 1970) *with* Estelle v. Williams, 425 U.S. 501 (1976) ("Even had the jurors been aware that the deployment of troopers was not a common practice in Rhode Island, we cannot believe that the use of the four troopers tended to brand [defendant]… 'with an unmistakable mark of guilt.'").

[75] Kayla Burd, The Effects of Facility Animals in the Courtroom on Juror Decision-Making (April 2013) (unpublished M.S. thesis, Arizona State University) (on file with Arizona State University), https://repository.asu.edu/attachments/110576/content/Burd_asu_0010N_12989.pdf.

[76] *Id.*

Jurors are more understanding when special courtroom procedures are used when the witness is a child.[77] With this notion in mind, courts have permitted child witnesses to testify with a support dog,[78] while playing with a toy,[79] holding a teddy bear,[80] or sitting on a religious minister's lap.[81]

Courts have distinguished these alternative means of testimony from the use of closed-circuit television, however.[82] As noted by the Supreme Court, "a physical barrier blocking the defendant's and witness's views of one another is the most

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[77] State v. Baeza, 383 P.3d 1208, 1212 (Idaho 2016) ("It is easy for jurors to believe that the ... court made allowances for a six-year-old to testify by alternate means because of her young age – and not that the defendant is particularly dangerous or culpable.").

[78] *See* State v. Devon D., 321 Conn. 656, 675 (Conn. 2016) (agreeing that a trial court properly exercised its discretion in allowing a dog's presence to help an eight-year-old victim of sexual abuse testify); State v. Reyes, No. M201500504CCAR3CD, 505 S.W.3d 890, 2016 Tenn. Crim. App. LEXIS 396, 2016 WL 3090904, at *5 (Tenn. Crim. App. May 24, 2016) (determining that the trial court did not abuse its discretion in allowing use of the facility dog to aid a ten-year-old victim in a rape trial); People v. Johnson, No. 325857, 315 Mich. App. 163, 2016 Mich. App. LEXIS 781, 2016 WL 1576933 (Mich. Ct. App. Apr. 19, 2016) (concluding that "use of a support animal is more neutral, and thus less prejudicial, than the use of a support person," in aiding a six-year-old victim).

[79] Day v. McCullough, No. C10-5264 BHS/KLS, 2010 U.S. Dist. LEXIS 141384, at *10 (W.D. Wash. Dec. 6, 2010).

[80] State v. Presley, 10th Dist. Franklin No. 02AP-1354, 2003-Ohio-6069, ¶ 45 (Ohio Ct. App. 2003).

[81] State v. Branch, No. 1-12-44, 3d Dist. Allen No. 1-12-44, 2013-Ohio-3192, ¶ 93. (Ohio Ct. App. 2013).

[82] *See* People v. Chenault, 227 Cal. App. 4th 1503, 1516 (2014) (citing People v. Lord, 30 Cal. App. 4th 1718, 1722 (1994)).

'obvious [and] damaging' type of accommodation,[83] as some jurors will view the measure as the court protecting the witness from the accused.[84]

Notwithstanding the distracting nature of CCTV testimony, courts have allowed non-minor witnesses to use the method in extreme cases. For example, in *People v. Burton*, the trial court allowed a mentally impaired adult victim of sexual abuse to testify via closed circuit after determining that the CCTV method was necessary to prevent the victim from suffering severe mental and emotional distress.[85] The Court cautioned, however, stating:

> In reaching this conclusion, we stress that our holding is not to be taken by the bench and bar as a blanket approval of the application of such methods in every case. Rather, excepting those cases that fall within the ambit of statutory provisions for children of developmentally disabled victims ... the remedy afforded here should be applied only in the most extreme cases.[86]

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[83] Coy v. Iowa, 487 U.S. 1012, 1020 (1988). *But see* Louise Ellison & Vanessa E. Munro*, A 'Special' Delivery?: Exploring the Impact of Screens, Live-Links and Video-Recorded Evidence on Mock Juror Deliberation in Rape Trials*, 23(1) SOC. & LEGAL STUD. 3 (2014), http://journals.sagepub.com/doi/pdf/10.1177/0964663913496676 (placing doubt on the effect video testimony has on juries).

[84] Ralph H. Kohlmann, Article, *The Presumption of Innocence: Patching the Tattered Cloak After Maryland v. Craig*, 27 ST. MARY'S L. J. 389, 415 (1996).

[85] People v. Burton, 219 Mich. App. 278, 284 (1996).

[86] People v. Buie, 285 Mich. App. 401, 409 (2009) (quoting *Burton*, 219 Mich. App. at 291).

Similarly, the Second, Fifth, and Sixth Circuits have permitted this form of testimony by non-minors, but only in extreme cases where the witness was critically ill and unable to travel.[87] Unsurprisingly, the Second Circuit warned that this method "should not be considered a commonplace substitute for in-court testimony by a witness."[88]

III. Recommendations

New Jersey has by far the broadest closed-circuit television statute, and in effect, the most potentially prejudicial closed-circuit television statute.

Not only does the law extend to adult non-victim witnesses, but a witness may give testimony by CCTV if the State shows the witness would be emotionally distressed by testifying in front of the defendant, the jury, or the spectators. Realistically, a stage fright witness who has never even met the defendant may qualify. One solution to this issue may be to require an expert witness to testify as to the particular emotional effect the adult (or any other witness) may experience if forced to testify in the courtroom.

Moreover, because the judge must make a prerequisite finding of the witness' level of emotional distress, the procedure may also lead a jury to presume a defendant is already guilty.[89] If a judge has already decided that a victim will be emotionally distressed by testifying in front of the defendant, a jury could infer an alleged victims accusations are true.[90] For example, if

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[87] United States v. Gigante, 166 F.3d 75 (2d Cir. 1999); Horn v. Quarterman, 508 F.3d 306 (5th Cir. 2007); United States v. Yates, 438 F.3d 1307 (11th Cir. 2006).

[88] *Gigante*, 166 F.3d at 81.

[89] King, Jr., *supra* note 14.

[90] *Id.*

the State has ten witnesses, and three of them are permitted to testify via closed-circuit, a jury may be more likely to find a defendant guilty. One possible solution to this problem may be to require uniformity among witnesses in a trial. If the court determines that it is necessary for a specific witness to testify out of the courtroom, all witnesses in the case should follow the same procedure.