State v. Foster: Washington State Undermines Confrontation Rights to Protect Child Witnesses

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While clerking at the King County Prosecuting Attorney's Office in Seattle in 1997, the author came to appreciate the broadened scope of the protections afforded defendants in Washington. It is this divergence from the state's tradition of asserting a broader statement of defendant's rights that makes this subject so compelling.

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I. INTRODUCTION

In *Kirby v. United States*,[1] the United States Supreme Court declared the right to confrontation as

> [o]ne of the fundamental guarantees of life and liberty . . . long deemed so essential for the due protection of life and liberty that it is guarded against legislative and judicial action by provisions in the Constitution of the United States and in the constitutions of most if not all of the States composing the Union.[2]

When the Court penned this statement in 1899, the Sixth Amendment's Confrontation Clause did not apply to the states. Indeed, it did not fully apply to the states until 1965.[3] Since 1965, application of the Confrontation Clause to the states went through various stages.[4] Yet, until 1990, the key purposes of the federal clause remained and "'guaranteed the defendant a face-to-face meeting with witnesses appearing before the trier of fact'" and to permit the jury to observe the credibility of witnesses.[5]

In 1990, the Supreme Court limited the protection afforded some criminal

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1. 174 U.S. 47 (1899).
2. *Id.* at 55-56.
3. *See* West v. Louisiana, 194 U.S. 258 (1904) (finding that a state court's construction of its constitution on the subject of reading depositions of witnesses does not present a federal question), *overruled by* Pointer v. Texas, 380 U.S. 400 (1965).
4. *See* S. DOC. NO. 103-6, at 1421-28 (1st Sess. 1996) (analyzing and interpreting cases decided by the Supreme Court addressing the Sixth Amendment Confrontation Clause).
5. Maryland v. Craig, 497 U.S. 836, 844-45 (1990).

defendants by holding in *Maryland v. Craig*[6] that the Sixth Amendment Confrontation Clause did not prohibit the use of one-way, closed circuit television for child witness testimony in child abuse cases.[7] This ruling weakened the constitutional guarantee of face-to-face confrontation. By eroding defendants' federal rights to confront child witnesses in child abuse cases, the *Craig* Court deferred to the state courts when determining the breadth of the state's constitutional protections.

Unlike the federal Constitution, many state constitutions require a defendant to meet witnesses face-to-face.[8] Interpretations of this phrase diverge on whether the right requires actual physical face-to-face confrontation, or permits merely televised face-to-face confrontation.[9]

Article I, section 22, of the Washington State Constitution provides that an "accused shall have the right . . . to meet the witnesses against him face to face . . . ."[10] This language is similar to that of the Sixth Amendment's Confrontation Clause, applicable to the states through the Fourteenth Amendment, which states: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."[11] Given the

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6. 497 U.S. 836 (1990).

7. *Craig*, 497 U.S. at 860.

8. *See, e.g.*, ARIZ. CONST. art. II, § 24; COLO. CONST. art. II, § 16; DEL. CONST. art. I, § 7; ILL. CONST. art. I, § 8, *amended* 1994 (eliminating face-to-face requirement); IND. CONST. art. I, § 13; KAN. BILL OF RIGHTS § 10; KY. CONST. § 11; MASS. CONST. pt. 1, art. XII; MO. CONST. art. I, § 18(a); MONT. CONST. art. II, § 24; NEB. CONST. art I, § 11; N.H. CONST. pt. 1, art. 15; OHIO CONST. art. I, § 10; OR. CONST. art. I, § 11; PA. CONST. art. I, § 9; TENN. CONST. art. I, § 9; WIS. CONST. art. I, § 7.

9. *See* People v. Fitzpatrick, 633 N.E.2d 685, 688-89 (Ill. 1994) (declaring closed circuit television testimony unconstitutionally violates the face-to-face confrontation guarantee of the state's constitution); Commonwealth v. Bergstrom, 524 N.E.2d 366, 374 (Mass. 1988) (holding that, under the state's constitution, the accused has the right to be present when a witness testifies against him); Commonwealth v. Ludwig, 594 A.2d 281, 285 (Pa. 1991) (holding that the state confrontation right requires an alleged child abuse "victim must testify in the courtroom before the judge . . ."); and Brady v. State, 575 N.E.2d 981, 989 (Ind. 1991) (holding that the state constitution requires the witness and the accused see and recognize each other when live or videotaped testimony is given). *Cf.* Commonwealth v. Willis, 716 S.W.2d 224, 227 (Ky. 1986) (holding "[t]he requirement in the Kentucky Constitution to 'meet witnesses face-to-face' is basically the same as the Sixth Amendment to the federal constitution . . ."); State v. Chisholm, 777 P.2d 753, 758 (Kan. 1989) (holding that obtaining testimony of victim via closed circuit television was justified as an exception to confrontation rights under the state and federal constitutions); State v. Self, 564 N.E.2d 446, 452-53 (Ohio 1990) (holding that the use of a child sexual abuse victim's videotaped deposition at trial in place of live testimony did not violate a defendant's right of confrontation under the state or federal constitutions).

10. WASH. CONST. art. I, § 22.

11. U.S. CONST. amend. VI.

apparent differences between the federal and state confrontation clauses, the Washington Supreme Court has delineated the similarities.

In *State v. Foster*,[12] the Washington State Supreme Court noted "the language of the Sixth Amendment and this state's confrontation clause is not word-for-word identical, the meaning of the words used in the parallel clauses is substantially the same" and, consequently, adopted *Craig*.[13] Based on this reasoning, *Foster* upheld the Revised Code of Washington (WASH. REV. CODE) § 9A.44.150, which permits a child witness to testify via one-way, closed circuit television in lieu of face-to-face confrontation.[14]

This Article examines *Foster* and argues the Washington State Supreme Court improperly held that Washington's confrontation clause guarantees no more protection to defendants than its federal counterpart. Furthermore, this Article asserts that abridging the state constitutional right to confront witnesses face-to-face should not have been considered as the primary method to protect child witnesses.

Part II of this Article provides a historical analysis of the Sixth Amendment's Confrontation Clause and examines the history of the Washington State Constitution's confrontation clause, as well as the policy behind the statute challenged in *Foster*. Part III summarizes the facts and the court's reasoning in *Foster*. Part IV analyzes the court's decision and argues the holding in *Foster* was improper because it: (1) diminished the Washington State Supreme Court's tradition of an independent constitutional analysis;[15] (2) adopted a faulty hearsay analysis; (3) unwisely bypassed constitutional amendment procedures;[16] and (4) ultimately defeated the purpose of Washington State's clearly worded confrontation clause and diminished the guaranteed right of criminal defendants to wage a defense. Part V asserts the proper way to protect alleged victims of child abuse is to either amend the Washington State Constitution's confrontation clause or institute policies to alleviate the anxiety child witnesses face when testifying in child abuse cases.

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12. 957 P.2d 712 (Wash. 1998).

13. *Id.* at 721.

14. *Id.* at 727; WASH. REV. CODE § 9A.44.150 (1998).

15. *Foster*, 957 P.2d at 733-36 (Johnson, J., dissenting) (noting the "duty" to interpret and apply the state constitution).

16. *See, e.g.*, The Federalist No. 78 (Alexander Hamilton).

II. BACKGROUND

A. *The Sixth Amendment's Confrontation Clause*

In *Mattox v. United States*,[17] the Supreme Court held the Sixth Amendment was drafted to protect the rights of criminal defendants against

> *ex parte* affidavits . . . being used against . . . [them] in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of *compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor* upon the stand and the manner in which he gives his testimony *whether he is worthy of belief*.[18]

The most common exceptions to this right are within the framework of hearsay rules.[19] These exceptions have created a Sixth Amendment dialogue and derivative analytical framework that often skews what the Confrontation Clause actually stands for.[20]

1. *Pointer v. Texas*—Confusing Hearsay Analysis With the Confrontation Clause

Until the Confrontation Clause applied to the states in 1965, "[the Supreme Court] had little need to clarify the relationship between the right of confrontation and the hearsay rule, inasmuch as its supervisory powers over the

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17. 156 U.S. 237 (1895).

18. *Id.* at 242-43 (emphasis added).

19. For a basic explanation of hearsay rules and exceptions, *see* 29 AM. JUR. 2d *Evidence* §§ 658-707 (1994) (noting "[h]earsay is evidence of a statement which is made other than by a witness while testifying at the hearing, offered to prove the truth of the matter stated . . . . To constitute hearsay (1) the statement must be an out-of-court statement . . . and (2) the out-of-court statement must be offered to prove the truth of the matter asserted." *Id.* § 661. Under hearsay rules, federal and state courts exclude out-of-court statements, "because they lack the conventional indicia of reliability . . . ." *Id.* § 658. Nevertheless, "[c]ourts have long imposed exceptions on the hearsay rule based on . . . necessity . . . and trustworthiness . . . ." *Id.* § 659).

20. While both hearsay rules and confrontation rights ensure the truth is presented in court, each has a different primary purpose: Hearsay rules guarantee trustworthiness of evidence, while confrontation rights: (1) ensure a criminal defendant the right to cross-examine witnesses; and (2) give the trier of fact the opportunity to judge whether a witness in court, not evidence, is worthy of belief. 29 AM. JUR. 2D *Evidence* § 658 (1994); 21 AM. JUR. 2D *Criminal Law* § 1168 (1998). Hearsay rules primarily protect the integrity of the court, while confrontation rights primarily protect the presumed innocence of defendants. *Id.*

inferior federal courts permitted it to control the admission of hearsay on this basis."[21] In *Pointer v. Texas*,[22] the Supreme Court held that the constitutional right to confrontation should be protected against state abridgement.[23] Since *Pointer*, the hearsay framework fails to guide cases requiring a Sixth Amendment interpretation.

When *Pointer* was decided in 1965, the Court began a line of reasoning that "seemed to equate the Confrontation Clause with the hearsay rule, positing that a major purpose of the clause was 'to give the defendant charged with crime an opportunity to cross-examine the witnesses against him,' unless one of the hearsay exceptions applies."[24] In an effort to create and rescind exceptions to the hearsay rule, the Supreme Court failed to articulate which elements of the confrontation right should be afforded what protection.

Since 1895, the Court has repeatedly held the Confrontation Clause protects two portions of the defendant's right to defend: (1) "the opportunity to cross-examine;" and (2) "the occasion for the jury to weigh the demeanor of the witness."[25] Still, the Court in *Barber v. Page* not only failed to stress the protection of actual face-to-face confrontation, but also failed to emphasize the implied necessity of a witness taking an oath before testifying.[26] This all-too-common omission of confrontation elements took place because the Court disguised hearsay analysis in an ill-fitting constitutional mask.

2. *Coy v. Iowa*—Guaranteeing the Right to Confront Accusers Face-to-Face

The focus on a hearsay-based analysis diverts from the development of a sound confrontation clause framework. In its 1970 decision of *California v. Green*,[27] the Court denied that it ever set up a framework establishing a complete overlap of the Confrontation Clause and hearsay rules.[28] It was not until *Coy v. Iowa*,[29] when the Court determined the constitutionality of a child witness not taking the stand, that the implications of *Green* became obvious.

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21. S. DOC. NO. 103-06, at 1421 (1st Sess. 1996).

22. 380 U.S. 400 (1965).

23. *Id.* at 407 (holding the Sixth Amendment right to confront witnesses is fundamental and, by the Fourteenth Amendment, obligatory on the states).

24. S. DOC. NO. 103-06, at 1422 (1st Sess. 1996) (quoting *Pointer*, 380 U.S. at 406-07; Douglas v. Alabama, 380 U.S. 415, 418 (1965)).

25. Barber v. Page, 390 U.S. 719, 725 (1968); Mattox v United States, 156 U.S. 237, 242-43 (1895).

26. *Page*, 390 U.S. at 725.

27. 399 U.S. 149 (1970).

28. *Id.* at 155-56.

29. 487 U.S. 1012 (1988).

Until *Coy*, the Court focused almost exclusively on either the unavailability of witnesses and the trustworthiness of evidence or the scope of cross examination.[30] As a result, the Court discussed various core Confrontation Clause elements, such as cross examination, oath-taking, observation of the witness' demeanor by the trier of fact, and the ability of the jury to sift through evidence.[31] Yet, the Court consistently emphasized only the right to cross-examine.[32] This precedent set the stage for *Coy's* examination of a broader meaning to the Confrontation Clause.

In *Coy*, the Court analyzed the constitutionality of allowing two thirteen-year-old witnesses to testify behind a screen that served as a visual shield from the defendant in a sexual abuse case.[33] The Court, in a 6-2 decision, determined the Confrontation Clause "guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact."[34] It held that the use of the screen violated the defendant's right to confront the children face-to-face and emphasized Iowa's misguided presumption that children are always traumatized by testifying in the presence of the defendant face-to-face.[35]

Still, Justice Scalia, writing for the majority, left "for another day . . . the question whether any exceptions exist" to the requirement of face-to-face confrontation.[36] He speculated that exceptions may "be allowed only when necessary to further an important public policy."[37] This speculation left the core rights of the Confrontation Clause undefined. Yet, the *Coy* Court did recognize the defendant's right to actual face-to-face confrontation.

3. *Maryland v. Craig*—Allowing Video Testimony Under the Confrontation Clause

The Court adopted a public policy exception to the face-to-face requirement in *Maryland v. Craig*.[38] In *Craig*, the state trial judge followed directions of a

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30. *Coy*, 487 U.S. at 1016 (holding "[m]ost of this Court's encounters with the Confrontation Clause have involved either the admissibility of out-of-court statements . . . or restrictions on the scope of cross-examination" . . . .) *Cf.* Delaware v. Fensterer, 474 U.S. 15, 16-18 (1985) (per curiam) (noting the two categories and finding neither acceptable).

31. Kentucky v. Stincer, 482 U.S. 730, 736-37 (1987); Lee v. Illinois, 476 U.S. 530, 540 (1986); California v. Green, 399 U.S. 149, 158 (1970).

32. *Fensterer*, 474 U.S. at 22 (holding "the Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity" to cross-examine witnesses).

33. *See Coy*, 487 U.S. at 1014.

34. *Id.* at 1016.

35. *Id.* at 1019-22.

36. *Id.* at 1021.

37. *Id.*

38. 497 U.S. 836 (1990).

Maryland statute and received testimony of an alleged victim of child abuse over closed circuit television.[39] Writing for the *Craig* majority, Justice O'Connor noted that *Coy* left open the question of public policy exceptions to the face-to-face requirement of the Confrontation Clause.[40] Then, the majority recognized such a policy exception, declaring:

> Given the State's traditional and "transcendent interest in protecting the welfare of children," . . . and buttressed by the growing body of academic literature documenting the psychological trauma suffered by child abuse victims who must testify in court, . . . we will not second-guess the considered judgment of the Maryland Legislature regarding the importance of its interest in protecting child abuse victims from the emotional trauma of testifying. Accordingly, we hold that, if the State makes an adequate showing of necessity, the state interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify use of a special procedure that permits a child witness in such cases to testify at trial against a defendant in the absence of face-to-face confrontation with the defendant.[41]

The *Craig* holding allows states to determine, on a case-by-case basis, "whether the use of the one-way closed circuit television procedure is necessary to protect the welfare of the particular child witness who seeks to testify."[42] In doing so, courts must recognize a preference for face-to-face confrontation.[43] Furthermore, even though *Craig* is the law regarding the Sixth Amendment, states can interpret comparable constitutional provisions independently, as the Washington high court did in *State v. Foster*.[44]

B. *History and Interpretation of the Washington State Confrontation Clause*

Washington's constitutional history behind the confrontation clause and its face-to-face language is a mystery. However, the *Foster* majority illuminated some history, finding:

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39. *Id.* at 840-41 & n.1 (citing MD. CTS. & JUD. PROC. CODE ANN. § 9-102(a)(1)(ii) (1989), which was transferred to MD. CODE 1957, Art. 27, § 774 (1996)).

40. *Craig*, 497 U.S. at 844.

41. *Id.* at 855 (citations omitted).

42. *Id.*

43. *Id.* at 850-57.

44. *See* State v. Foster, 957 P.2d 712, 714 (Wash. 1998) (finding the Sixth Amendment right to confront witnesses is not absolute and may be limited to further an important state interest).

> The Journal of the 1889 Washington State Constitutional Convention . . . , in a footnote, indicates that some provisions of Washington's constitution, including article I, section 22, were identical to the Indiana and Oregon state constitutions . . . . The language appears, as well, in the early statutory law of the Washington Territory.
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> . . . .
>
> "Face to face" confrontation or "physical presence" of witnesses was generally, but not always, required under the Sixth Amendment Confrontation Clause or under common law near the time [Washington State] was drafting its constitution.[45]

Little is known about the framer's intent behind drafting the Washington State Constitution's confrontation clause, except that some language is copied from the Oregon and Indiana constitutions.[46]

Before *Foster*, the relationship Washington's confrontation clause had with the federal Confrontation Clause was unsettled. In *State v. Florczak*,[47] the Washington Court of Appeals held the protection afforded by both provisions is identical.[48] In *State v. Palomo*,[49] the Washington Supreme Court "opined that the state confrontation clause arguably provides greater protection than its federal counterpart . . . ."[50] Then in *State v. Rohrich*,[51] the Washington Supreme Court held:

> the federal [C]onfrontation [C]lause, at its core, "represents a preference for live testimony" because live testimony requires the witness to "relate the facts herself in open court subject to cross examination while under oath in a *face-to-face* setting before the watchful eyes of the jury."[52]

In *Foster*, the majority followed *Rohrich* and found the Washington confrontation clause to be "'even more specific' than its federal counterpart[,]" which the *Foster* majority called dicta and the minority found controlling.[53] With the conflict over the weight of *Rohrich* and the court of appeals' opinion that the federal and state confrontation rights are identical, prior to *Foster*, the

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45. *Id.* at 722.
46. *Id.*
47. 882 P.2d 199 (Wash. 1994).
48. *Id.* at 209.
49. 783 P.2d 575 (Wash. 1989).
50. *Foster*, 957 P.2d at 719; *see Palomo*, 783 P.2d at 577.
51. 939 P.2d 697 (Wash. 1997).
52. *Foster*, 957 P.2d at 736 (Johnson, J., dissenting) (quoting *Rohrich*, 939 P.2d at 700).
53. *Id.*

constitutionality of WASH. REV. CODE § 9A.44.150 was an open question.[54]

C. *WASH. REV. CODE § 9A.44.150*

Revised Code of Washington section 9A.44.150 was devised to alleviate the problems of proof that frustrate prosecutions for child sexual abuse "by facilitating the prosecution of abusers."[55] Child sexual abuse usually occurs in private and often leaves no physical evidence.[56] Consequently, prosecutors frequently rely on the testimony of the only witness, the child victim.[57] "Testifying in open court," as to sexual matters, coupled with "exposure to the [accused] abuser," may lead children to "suffer serious emotional and mental trauma."[58] Consequently, children often are unable or, as in *Foster*, unwilling to recount their abuses.[59] Thus, children may be poor or even incompetent witnesses.[60]

With the problems surrounding child witnesses, almost all states have passed statutes allowing videotaped testimony, via one-way, closed circuit television or by two-way closed circuit television, to substitute for courtroom testimony.[61] Washington joined the trend when it enacted WASH. REV. CODE § 9A.44.150 in 1990.[62]

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54. *Foster*, 957 P.2d at 719.

55. Karen R. Hornbeck, Comment, *Washington's Closed circuit Testimony Statute: An Exception to the Confrontation Clause to Protect Victims in Child Abuse Prosecutions*, 15 U. PUGET SOUND L. REV. 913, 913 (1992).

56. *Id.*

57. *Id.*

58. *Id.*

59. *Foster*, 957 P.2d at 714-16.

60. *Id.* at 714-15.

61. Maryland v. Craig, 497 U.S. 836, 853-54 nn.2-4 (1990) (citing thirty-seven state provisions allowing videotaped testimony; twenty-four state such rules allowing one-way, closed circuit television; and eight giving direction for two-way, closed circuit television).

62. *See* Hornbeck, *supra* note 55, at 913. WASH. REV. CODE § 9A.44.150 states, in relevant part:

> (1) On motion of the prosecuting attorney in a criminal proceeding, the court may order that a child under the age of ten may testify in a room outside the presence of the defendant and the jury while one-way closed circuit television equipment simultaneously projects the child's testimony into another room so the defendant and the jury can watch and hear the child testify if:
>
> (a) The testimony will describe an act or attempted act of sexual contact performed with or on the child by another or describe an act or attempted act of physical abuse against the child by another;
>
> (b) The testimony is taken during the criminal proceeding;
>
> (c) The court finds by substantial evidence, in a hearing conducted outside the presence of the jury, that requiring the child to testify in the presence of the defendant will cause the child to suffer serious emotional

or mental distress that will prevent the child from reasonably communicating at the trial. If the defendant is excluded from the presence of the child, the jury must also be excluded;

. . . .

(e) The court finds that the prosecutor has made all reasonable efforts to prepare the child for testifying, including informing the child or the child's parent or guardian about community counseling services, giving court tours, and explaining the trial process. If the prosecutor fails to demonstrate that preparations were implemented or the prosecutor in good faith attempted to implement them, the court shall deny the motion;

(f) The court balances the strength of the state's case without the testimony of the child against the defendant's constitutional rights and the degree of infringement of the closed-circuit television procedure on those rights;

(g) The court finds that no less restrictive method of obtaining the testimony exists that can adequately protect the child from the serious emotional or mental distress;

(h) When the court allows the child to testify outside the presence of the defendant, the defendant can communicate constantly with the defense attorney by electronic transmission and be granted reasonable court recesses during the child's testimony for person-to-person consultation with the defense attorney;

(i) The court can communicate with the attorneys by an audio system so that the court can rule on objections and otherwise control the proceedings;

(j) All parties in the room with the child are on camera and can be viewed by all other parties. If viewing all participants is not possible, the court shall describe for the viewers the location of the prosecutor, defense attorney, and other participants in relation to the child;

(k) The court finds that the television equipment is capable of making an accurate reproduction and the operator of the equipment is competent to operate the equipment; and

(l) The court imposes reasonable guidelines upon the parties for conducting the filming to avoid trauma to the child or abuse of the procedure for tactical advantage.

The prosecutor, defense attorney, and a neutral and trained victim's advocate, if any, shall always be in the room where the child is testifying. The court in the court's discretion depending on the circumstances and whether the jury or defendant or both are excluded from the room where the child is testifying, may remain or may not remain in the room with the child.

. . . .

(3) The court shall make particularized findings on the record articulating the factors upon which the court based its decision to allow the child to testify via closed-circuit television pursuant to this section. The factors the court may consider include, but are not limited to, a consideration of the child's age, physical health, emotional stability, expressions by the child of fear of testifying in open court or in front of the defendant, the relationship of the defendant to the child, and the court's observations of the child's inability to reasonably communicate in front of the defendant or in open court. The court's findings shall identify the impact the factors have upon the child's ability to testify in front of the jury or the defendant or both and the specific nature of the emotional or mental trauma the child would suffer.

Though the statute was enacted for laudable reasons, its ability to withstand confrontation clause scrutiny was a looming question.[63] Eight years later in *Foster*, this narrow application to sexual abuse cases was challenged. The issue on appeal in *Foster* was "whether [WASH. REV. CODE §] 9A.44.150, which, in limited circumstances, permits a child witness to testify via one-way closed circuit television rather than in the physical presence of the accused, violates the guarantees of the state or federal confrontation clause."[64]

III. *STATE V. FOSTER*

A. *Facts*

In 1993, the defendant, Boyd (Spud) Foster, was convicted of first degree child molestation of a six-year-old girl under WASH. REV. CODE § 9A.44.083.[65] The trial court conducted two pretrial hearings to decide the child's competency

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The court shall determine whether the source of the trauma is the presence of the defendant, the jury, or both, and shall limit the use of the closed-circuit television accordingly.

(4) This section does not apply if the defendant is an attorney pro se unless the defendant has a court-appointed attorney assisting the defendant in the defense.

(5) This section may not preclude the presence of both the victim and the defendant in the courtroom together for purposes of establishing or challenging the identification of the defendant when identification is a legitimate issue in the proceeding.

(6) The Washington supreme court may adopt rules of procedure regarding closed-circuit television procedures.

(7) All recorded tapes of testimony produced by closed-circuit television equipment shall be subject to any protective order of the court for the purpose of protecting the privacy of the child.

(8) Nothing in this section creates a right of the child witness to a closed-circuit television procedure in lieu of testifying in open court.

(9) The state shall bear the costs of the closed-circuit television procedure.

WASH. REV. CODE § 9A.44.150 (1998).

63. *Hornbeck*, *supra* note 55, at 913 & n.3, 914.

64. State v. Foster, 957 P.2d 712, 714 (Wash. 1998).

65. WASH. REV. CODE § 9A.44.083 (1998) provides:

(1) A person is guilty of child molestation in the first degree when the person has . . . sexual contact with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.

(2) Child molestation in the first degree is a class A felony.

"Sexual contact" is defined as "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party." WASH. REV. CODE § 9A.44.010(2) (1998).

for testifying.[66] Mr. Foster was present at the first hearing and in the courtroom.[67] In the second hearing, the girl testified in the judge's chambers while a closed circuit television broadcast her testimony into the courtroom.[68]

In the first hearing, the girl stated that she had attended Kid's Court[69] and knew the difference between being truthful and lying.[70] When asked whether she would tell the truth about the alleged incident involving the defendant, the child said, "'I might' and 'I don't know.'"[71] The prosecutor, on redirect examination, asked the girl why she would not promise to tell the truth.[72] An excerpt from the proceeding follows:[73]

Q. If I ask you what happened with Spud [Defendant's nickname], will you tell me the truth or will you tell me a lie?

A. I don't know.

Q. If I tell you that you have to tell me the truth, will you tell me the truth?

A. I don't know.

Q. Is it because of the courtroom?

A. Yes.

Q. Are you feeling shy because Spud is here? . . . If you couldn't see Spud, would you be able to tell what happened?

A. Yes.

Q. If you couldn't see him, would you be able to tell me the truth about what happened?

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66. *See Foster*, 957 P.2d at 714.

67. *Id.*

68. *Id.*

69. Kid's Court, a King County program is

> designed to prepare children who are alleged victims of sexual abuse and assault for their appearance in a courtroom trial setting. The program includes elements of role playing involving a judge, prosecutor and other courtroom personnel. There is no discussion of the facts about any particular child's case. The focus of the program is to demystify the courtroom for young children who will be required to testify.

State v. Carlson, 833 P.2d 463, 464 (Wash. App. 1992).

70. *See Foster*, 957 P.2d at 714.

71. *Id.* at 714-15.

72. *Id.* at 715.

73. As one reads the girl's testimony, it becomes apparent how easy it is for counsel to "spoonfeed" testimony to child witnesses. Notice the prosecutor tells the witness the exact criteria necessary to allow the child to qualify for closed circuit testimony. WASH. REV. CODE § 9A.44.150 (1998); *Foster*, 957 P.2d at 715. This is ironic, since one argument for allowing children to testify over closed circuit television is that children are prone to suggestion. In this case, it appears the prosecutor jumped to the conclusion the defendant's presence was the reason for the child's difficulties. He never asked the child in a non-suggestive way about the source of her reluctance to tell the truth. *See Foster*, 957 P.2d at 715.

A. Yes.
Q. Is it because you can see him that you feel that you can't tell the truth?
A. Yes.
Q. You don't want to say anything about what happened, you don't want to talk about it, because you see him?
A. Yes.
Q. Are you afraid that something might happen if you tell the truth?
A. No.
Q. It's just because you see him, that makes you scared?
A. Yes.[74]

Following the hearing, she acted "unusually subdued" and "repeatedly said, 'I didn't know he was going to be there.'"[75] Since the child would not promise to tell the truth, the trial court ruled that she was not competent.[76]

The trial court used closed circuit television in a second competency hearing two days later.[77] The child, her advocate, the prosecutor, the defense counsel, the court reporter, and the equipment technician were in the judge's chambers; meanwhile, the judge, court clerk, bailiff, and Mr. Foster remained in the courtroom.[78] The judge could communicate with the attorneys by open microphone; a separate two-way system was provided for private communication between the defendant and his counsel.[79] The individuals in the courtroom could view "an accurate reproduction of the judge's chambers" on a video screen.[80]

During the second hearing, the child testified again that she knew the difference between the truth and a lie.[81] In response to the prosecutor's questions, she answered as follows:

Q. What was the first rule of Kids' Court?
A. Don't lie.
Q. Was there a second rule?
A. If you don't know something, you say you don't know.
Q. Will you promise to tell the truth today?
A. Yes.

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74. *Foster*, 957 P.2d at 715.
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*
79. State v. Foster, 957 P.2d 712, 715 (Wash. 1998).
80. *Id.*
81. *Id.*

Q. What will happen if you don't know, what will you do?
A. Say I don't know.
Q. Will you promise to tell the truth about what happened with you and Spud?
A. Yes.
Q. . . . Do you know Spud?
A. Yeah.
. . . .
Q. You promise to tell the truth about everything that happened with Spud?
A. Yes.

Testimony continued, in response to questions by defense counsel, as follows:

Q. . . . [D]o you remember when you were in the courtroom with us?
A. Yeah.
Q. Do you remember you told the judge that you might tell her the truth?
A. Yeah.
. . . .
Q. . . . Are you still going to tell her the truth, or maybe tell her the truth?
A. I will.
. . . .
Q. You will tell the judge the truth?
(Witness nods head.)
Q. . . . [A]re you afraid of Spud?
(Witness nods head.)
. . . .
Q. Has Spud ever threatened you?
(Witness shakes head.)[82]

At the end of the hearing, "the child spontaneously asked, 'Where is Spud?' The prosecutor told her that the Defendant was in another room."[83] When the child asked if Mr. Foster could hear her, "the prosecutor said, 'Yes, he can hear you, you just can't see him.' The child responded, 'I don't care if he can hear me, I just don't want to see him.'"[84] Following the second hearing, the trial court found the child was competent.[85]

The judge noted improvement in the girl's attitude and demeanor.[86] Based

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82. *Id.* at 715-16.
83. *Id.*
84. State v. Foster, 957 P.2d 712, 716 (Wash. 1998).
85. *Id.*
86. The judge stated:
I found a great deal of difference between the child that testified the other day

on the judge's observations, the trial court ruled the child would be prevented from "reasonably communicating at trial" because requiring her "to testify in front of the Defendant would cause her to suffer serious emotional or mental distress."[87] It also ruled "the prosecutor had made all reasonable efforts to prepare the child for trial . . . ."[88] Additionally, it found "the strength of the State's case would be significantly impaired without the testimony of the child . . . and that there was no less restrictive method of obtaining the child's testimony that could adequately protect her from serious emotional or mental distress."[89] Most importantly, the trial court ruled the girl would be allowed to testify via closed circuit television, as directed by WASH. REV. CODE § 9A.44.150.[90]

After the child testified via closed circuit television, the jury found Mr. Foster "guilty of first degree child molestation."[91] He "appealed his conviction

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> and the child who testified today. The child today was clearly competent. I would have found her competent at an earlier time had she promised to tell the truth. Clearly something was definitely bothering her when she testified at the first competency hearing. There was a totally different child that I observed today. What I observed today was an outgoing child. The child that I observed in the competency hearing the other day was a child who was very shy, very quiet, had to be really led by the prosecutor. A child who wouldn't promise to tell the truth, would just say maybe, and indicated she was afraid of the defendant.
>
> . . . .
>
> Furthermore, it would certainly appear that she is definitely afraid of the defendant. There is no indication that the defendant has made threats, but clearly the child is in fear. She expressed that fear the other day when she testified. She expressed the fear today. She expressed it when she was leaving my chambers. She expressed it, not only in words, but in the way that she communicated in the hearing. It is quite clear that she is afraid of the defendant. I don't know precisely how or why this fear arose, but it is quite clear to me that she would not be able to testify were she present in court and able to observe the defendant. She was looking at him the other day and it apparently figured very strongly in her mind.

Id.

87. State v. Foster, 957 P.2d 712, 716 (Wash. 1998).

88. *Id.* The prosecutor's preparation of the child for trial is questionable. In the first hearing, the child did not know the defendant would be there. *See id.* at 715. Failing to make sure the child would be aware of this and be ready to testify in his presence was a gross oversight. Preparation might have eliminated the use of closed circuit television. Furthermore, the prosecutor's failure to explain that Mr. Foster could hear the child in the second hearing opens questions on what the child had been told about that hearing as well. Despite Kid's Court and other resources, the child appears to have been ill-prepared for testifying in both instances. The trial judge's ruling that the prosecution had reasonably prepared the child is not supported by the record as presented in the opinion of the Washington appellate courts. *Id.* at 714-16; State v. Foster, 915 P.2d 520, 527 (Wash. App. 1996).

89. *Foster*, 957 P.2d at 716.

90. *Id.*

91. *Id.* at 717.

on the ground that the child's testimony by closed circuit television violated his state and federal constitutional right to confront witnesses against him 'face to face' and also violated his rights to due process and trial by jury."[92] The conviction was affirmed by the Court of Appeals,[93] and then appealed to the Washington State Supreme Court.[94]

B. *The Washington Supreme Court's Reasoning*

The Washington Supreme Court approached *Foster* by addressing and establishing the federal issue first, then it turned its analysis to the state constitution. Initially, it spelled out the reasoning of *Craig* and found the Washington statute is "substantially similar" to the Maryland statute upheld in *Craig* and, consequently, decided the statute conformed to federal constitutional requirements.[95] From there, the opinion examined whether article I, section 22, of Washington's constitution extends broader rights than its federal counterpart.[96] It did this by employing the "*Gunwall* test," a set of criteria derived from *State v. Gunwall*.[97]

The *Gunwall* test consists of six factors to assist Washington courts in determining whether a provision of the state constitution, as opposed to the federal constitution, is "an independent source for recognizing and protecting the individual rights."[98] Under *Gunwall*, a Washington court must consider:

> (1) the textual language of the state constitution; (2) significant differences in the texts of the parallel provisions of the federal and state constitutions; (3) state constitutional and common law history; (4) preexisting state law; (5) differences in structure between the federal and state constitutions; and (6) whether the subject matter of the particular constitutional provision presents a matter of particular state interest or local concern.[99]

After noting five of the six factors do not justify an independent analysis, the *Foster* majority concluded that, in this case, Mr. Foster's "state right to confrontation and his Sixth Amendment right to confrontation as being

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92. *Id.*
93. *Id.* (citing *Foster*, 915 P.2d at 520).
94. State v. Foster, 957 P.2d 712, 717 (Wash. 1998).
95. *Id.* at 718-19 (citing Maryland v. Craig, 497 U.S. 836 (1990)).
96. *Id.* at 719.
97. *Id.* (citing State v. Gunwall, 720 P.2d 808, 811 (Wash. 1996)).
98. *Id.* at 719-21.
99. State v. Foster, 957 P.2d 712, 721 (Wash. 1998) (citing *Gunwall*, 720 P.2d 808, 811).

identical."[100] The majority then cited to dictionaries that defined "confront" as meaning "bring face to face," and buttressed this definition with Supreme Court decisions, which it believed to propound the same definition.[101] Thus, the majority found "no significant difference between the language used in the parallel provisions of the state and federal confrontation clauses."[102]

The majority then considered factor three: state constitutional and common law history. The opinion noted this "factor directs the court to determine whether state constitutional history and common law reflect an intention to confer greater protection from the state government than has been afforded by the federal constitution."[103] It mentioned how little is known about the drafter's intent with relation to the state clause.[104] The majority went on to discuss how "'[f]ace to face' . . . or 'physical presence' of witnesses was generally, but not always, required under the Sixth Amendment Confrontation Clause or under common law near the time [Washington] was drafting its constitution."[105] After explaining how little is known about the history of article I, section 22, and how it appears to mandate what the federal constitution required at the time, the court concluded there was "no[] support [for] an analysis of the state confrontation clause independent of the federal right."[106]

The majority then lumped together factors four and six, and analyzed preexisting state law relevant to the confrontation issue to determine whether the confrontation right claimed by the defendant was a matter of "such singular state interest or local concern" to warrant independent state constitutional interpretation.[107] To determine the two factors, the court considered: (1) whether the right to confront witnesses face-to-face has had exceptions; "and (2) a defendant's right of confrontation as it relates to testimony of young children who are alleged to be victims of sexual or physical abuse."[108]

In deciding there was no historically-based absolute right to face-to-face confrontation, the court cited a list of cases allowing a jury to view a crime scene without the defendant present, as well as hearsay exceptions.[109] It then

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100. *See id.* at 725.

101. *Id.* at 721-22 (citing *Coy*, 487 U.S. at 1017; Mattox v. United States, 156 U.S. 237, 244 (1895); WILLIAM C. ANDERSON, A DICTIONARY OF LAW 226 (1889); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 477, 811 (1986)).

102. State v. Foster, 957 P.2d 712, 722 (Wash. 1998).

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* at 723.

107. State v. Foster, 957 P.2d 712, 723 (Wash. 1998).

108. *Id.*

109. *Id.* (citing State v. Ryan, 691 P.2d 197 (Wash. 1984) (upholding the state's child victim hearsay statute as constitutional); State v. Perkins, 204 P.2d 207, 237-38 (Wash. 1949)

held exceptions to the confrontation right have expanded, most notably with the 1982 enactment of WASH. REV. CODE § 9A.44.120, the child victim hearsay statute.[110] Consequently, the court found "[p]reexisting law does not support an independent analysis of our state confrontation clause in the context of the present case" and other states have the same interest in protecting children in child abuse cases.[111]

The majority concluded "only the textual and structural differences between the Sixth Amendment and article I, section 22 . . . provide any support for independent construction of this state's confrontation clause in the present case."[112] The majority then declared "[t]hese differences . . . do not, by themselves, generally justify an independent analysis of our constitutional provisions, and they do not justify it in this case."[113]

Having scuttled an independent analysis, the court concluded, "[f]or purposes of determining whether [WASH. REV. CODE §] 9A.44.150 comports with the confrontation clause, we view the Defendant's state right to confrontation and his Sixth Amendment right . . . as being identical."[114] Thus, Washington State's highest court adopted the Supreme Court's reasoning in *Craig*.[115] The majority also explained the need to protect children from trauma justified making an exception to the face-to-face requirement in article I, section 22, as long as the "adequate" procedures of WASH. REV. CODE § 9A.44.150 are followed.[116]

IV. ANALYSIS OF *FOSTER*

Two major aspects of the *Foster* majority opinion are worth examining: (1) its application of the *Gunwall* test; and (2) the anti-textual reasoning it adopted

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(holding jury view of crime scene outside presence of defendant does not violate article I, section 22); State v. Ortego, 157 P.2d 320, 325-26 (Wash. 1945) (holding reproduction of testimony given by witnesses at former trial where defendant was present did not violate article I, section 22); State v. Johnson, 78 P.2d 561, 566 (Wash. 1938) (holding the admission of documentary evidence did not violate article I, section 22); State v. Bolen, 254 P. 445, 449 (Wash. 1927) (holding right to confront witnesses did not apply to documentary evidence of victim's fingerprints)).

110. State v. Foster, 957 P.2d 712, 724 (Wash. 1998).

111. *Id.* at 725.

112. *Id.*

113. *Id.*

114. *Id.* This parallel interpretation of the federal and state confrontation clauses applies only to the statute in question, which implicitly leaves open the question of whether the federal and state confrontation right are always the same. *See id.*

115. State v. Foster, 957 P.2d 712, 725 (Wash. 1998) (citing Maryland v. Craig, 497 U.S. 836, 850 (1990)).

116. *Id.* at 725-26 (citing *Craig*, 497 U.S. at 855).

from the Supreme Court's *Craig* decision. This analysis asserts the text and other factors that play into construing the Washington confrontation clause demand a more expansive reading of *Gunwall* than the guarantees found in the *Craig* federal counterpart. The *Craig* hearsay-based framework and balancing test are inadequate under the plain meaning of the Washington State constitution's confrontation clause. Further, the *Foster* court should have deferred to the constitutional amendment process and allowed statutes to reach the result of protecting child witnesses instead of amending the confrontation clause by judicial fiat. In *Foster*, policy alternatives could have upheld the integrity of the state constitution's guarantee of face-to-face confrontation while alleviating the trauma a child witness experiences.

A. *The* Gunwall *Test*

Washington has a history of independent constitutional analysis that has often given criminal defendants greater protections than those afforded by the federal Constitution.[117] For instance, the Washington Supreme Court has interpreted the state constitutional search and seizure provisions to provide greater protection than the Fourth Amendment.[118] Under the *Gunwall* test, Washington courts have established a generally predictable and well-reasoned approach to finding divergence in parallel state and federal constitutional provisions.[119]

The *Foster* court inadequately explored the *Gunwall* factors and erroneously concluded the federal and state constitutions' confrontation clauses are identical. To demonstrate the court's errors, this Article explores the first four of the six *Gunwall* factors.[120]

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117. Laura L. Silva, Comment, *State Constitutional Criminal Adjudication in Washington Since* State v. Gunwall*: "Articulable, Reasonable and Reasoned" Approach?*, 60 ALB. L. REV. 1871, 1907 (1997).

118. *Id.*

119. *Id.* at 1906-07.

120. The fifth factor, which analyzes differences in structure between the federal and state constitutions, "supports an independent state constitutional analysis in every case" where differences are found. State v. Foster, 957 P.2d 712, 721 (Wash. 1998). Such differences do not exist in this case, so there is no need to address the fifth factor. The sixth factor, "whether the subject matter of the particular constitutional provision presents a matter of particular state interest or local concern," also does not warrant further treatment because all states have the same interest in protecting children in child abuse cases. *See id.* at 723, 725.

1. Factor One—Textual Language of the State Constitution

The first error the *Foster* majority made in its analysis was combining *Gunwall* factors one and two. In doing so, the court failed to sufficiently analyze the meaning of the phrase "face-to-face." Instead, it looked to the wording of the federal Constitution and explained definitions of the word "confront."[121] As the dissent points out, the majority's "[f]ocus on the term 'confront' is . . . misplaced."[122] Indeed, the issue of the case was not whether Mr. Foster had the right to confront witnesses against him; rather, the issue was the "manner . . . in which [an accused] is entitled to exercise that fundamental right."[123] In an effort to analyze the meaning of this right, dictionary definitions of face-to-face provide a starting point.

First, according to one dictionary, face-to-face means, "[i]n each other's presence; in direct communication; *We finally spoke face to face.*"[124] Second, the same dictionary analogizes the phrase with the word confrontation.[125] Another dictionary defines the phrase as:

> *adv.* 1. in a position with the fronts or faces turned toward each other, esp. when close together. 2. in a way involving close contact or direct opposition. —*adj.* 3. with the fronts or faces toward each other, esp. when close together. 4. involving close contact or direct opposition.[126]

Since the face-to-face phrase in article I, section 22, takes the form of an adverb, the first two definitions from the latter dictionary apply most directly. Still, no matter which dictionary is consulted, two elements reappeared in the definitions of face-to-face—confrontation and physical presence or proximity.

In *Foster*, the majority and the dissent failed to acknowledge both aspects of the common definition of face-to-face. The dissent recognized two definitions of face-to-face, which included physical presence or proximity, but the entire opinion ignores a broader meaning of face-to-face.[127] Indeed, its common meaning embodies both confrontation and physical proximity.[128] Ignoring this

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121. *Foster*, 957 P.2d at 721.

122. *Id.* at 734 (Johnson, J., dissenting).

123. *Id.*

124. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 469 (William Morris ed., 1970).

125. *Id.*

126. THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 473 (Laurence Urdang ed., College ed. 1968).

127. State v. Foster, 957 P.2d 712, 721, 733-34 (Wash. 1998).

128. *Id.* at 734.

ignores the unique meaning of the phrase. The plain meaning of the textual phrase face-to-face requires something more than a simple confrontation; it must include physical presence.

2. Factor Two—Differences Between the Parallel State and Federal Provisions

The majority's merging of factors one and two caused problems in sorting out its factor two reasoning. In its argument, the majority claimed "the United States Supreme Court has consistently interpreted the language of the Confrontation Clause to mean 'face-to-face' confrontation."[129] If face-to-face and confrontation mean the same thing, then there was no need for the majority to modify the word confrontation with face-to-face.[130] Yet, the majority acknowledged face-to-face may be "significantly distinctive" from confrontation.[131] Thus, the majority undermined its own argument by declaring "the meaning of the words used in the parallel clauses [a]s substantially the same."[132]

In 1994, the Supreme Court of Pennsylvania determined the constitutionality of closed circuit television testimony or videotaped testimony in court.[133] The court looked at the Pennsylvania Constitution's confrontation clause language.[134] The court found that the Pennsylvania Constitution did "not reflect a 'preference' but clearly, emphatically and unambiguously require[d] a 'face to face' confrontation."[135] The Pennsylvania court then stated, "[t]his distinction alone would require that we decline to adopt the . . . Supreme

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129. *Id.* at 721-22.

130. Interview with Dr. Woodruff Thomson, Professor of English Emeritus, Brigham Young University, in Provo, Utah (October 16, 1999). Dr. Thomson explained the phrase face-to-face is more specific in its requirement of physical proximity than the word confront, and the court apparently recognized this fact by using face-to-face to "adjectively clarify what the court means by the word confront." *Id.* So, in its intentional effort to emphasize the requirement of physical presence in confrontation, the court actually acknowledged that the phrase face-to-face more commonly depicts physical presence than does the word confrontation. *Id.* As Professor Thomson said, "I can confront you by writing a letter. To be face-to-face I must be near to you." *Id.*

131. *See* State v. Foster, 957 P.2d 712, 722 (Wash. 1998).

132. *Id.* at 721.

133. Pennsylvania v. Louden, 638 A.2d 953, 954 (Pa. 1994) (holding statutes that allow videotaped and closed circuit television testimony are unconstitutional under the Pennsylvania Constitution); Pennsylvania v. Ludwig, 594 A.2d 281, 281-82 (1991) (holding the use of closed circuit television testimony by an alleged child abuse victim violates the confrontation clause of the Pennsylvania Constitution).

134. *Ludwig*, 594 A.2d at 281-82.

135. *Id.* at 284.

Court's analysis and reasoning in *Maryland v. Craig*."[136] This same distinction applies to the text of the Washington State Constitution and mandates an independent analysis.

Indeed, the textual language of the federal Confrontation Clause and Washington's confrontation clause are significantly different. This difference requires Washington's provision to be interpreted separate from its federal counterpart, despite the *Foster* majority's view.[137] The *Foster* dissent recognized that "significant textual differences *do* require a different interpretation of the state constitution."[138] This is so because a constitution is a collection of words and phrases, and if words and phrases in a constitution are given no meaning, then there is no point in having a collection of words. Opposite from the *Foster* majority, which seemed intent on getting around the state confrontation clause, the dissent correctly recognized its role as one that required giving meaning to the specific words in article I, section 22.[139]

3. Factor Three—State Constitutional and Common Law History

Both the majority and dissent noted that little is known about the history behind the drafting of Washington's confrontation clause.[140] Based on a lack of relevant history, the majority concluded that nothing can be construed about the drafters' intent.[141] When coupled with the fact that common law in the late 1890s recognized the requirement of face-to-face confrontation, the court concluded there is no support for a separate analysis.[142]

However, the dissent took a different approach to the history behind the confrontation clause and reached a different conclusion.[143] Following the Massachusetts Supreme Court, the *Foster* dissent began its approach with the presumption that "the framers of our State Constitution were aware of the other States' provisions and chose more explicit language to convey unequivocally their meaning."[144]

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136. *Id.*

137. State v. Foster, 957 P.2d 712, 734 (Johnson, J., dissenting).

138. *Id.* (citing Maylon v. Pierce County, 935 P.2d 1272 (Wash. 1997) (finding the difference between article I, section 11, and the First Amendment demand a different interpretation)).

139. *Foster*, 957 P.2d at 735 (Johnson, J., dissenting).

140. *Id.* at 722, 734-35.

141. *Id.* at 722-23.

142. *Id.*

143. *Id.* at 734-35.

144. Commonwealth v. Bergstrom, 524 N.E.2d 366, 371 n.9 (Mass. 1988), *cited in Foster*, 957 P.2d at 735 (declaring "[w]e know the Sixth Amendment existed at the time the

Though intent cannot be assumed, it may be inferred. Indeed, intent, as used in torts, "can seldom be proved by direct evidence," like observation or documentation of all historical events, "but must ordinarily be proved by circumstances from which it may be inferred."[145] This is also applicable when determining the intent of the drafters of Washington's confrontation clause.

Washington borrowed its article I, section 22, language from the constitutions of Oregon and Indiana.[146] However, before doing so, it had three choices: (1) adopt the common "to be confronted with" or "to confront" language; (2) adopt "to meet the witnesses against him face to face" language;[147] or (3) not adopt any comparable provision. In choosing the second option, the drafters of the Washington Constitution did not adopt "to be confronted with" or "to confront" language.[148] However, the words face-to-face appear in article I, section 22.[149] Thus, some drafters intended the phrase to have the same meaning as it did in Indiana and Oregon.

In *Foster*, the majority virtually ignored the value of looking to other states with similar confrontation clause language. In contrast, when the *Foster* dissent looked at the confrontation clause in Indiana and Oregon for guidance and instruction, it found support for an independent interpretation of the Washington clause.[150] For example, the historically-based analysis used by the Massachusetts high court is insightful.

Though the drafters of the Washington State constitution did not note the influence of Massachusetts on article I, section 22, such influence is apparent, since Article 12 of Massachusetts' Declaration of Rights "commands that 'every subject shall have a right . . . to meet witnesses against him face to face.'"[151] This language was the first of its kind and it clearly set the pattern for Washington's provision that an "accused shall have the right . . . to meet the witnesses against him face to face."[152]

Using a framers' intent analysis, the Massachusetts Supreme Court determined the Massachusetts Declaration of Rights "speaks . . . with . . . unmistakable insistence" when contrasted with the Sixth Amendment's Confrontation Clause's "brief and abstract terms."[153] Like in Massachusetts,

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Washington Constitution was debated and we know the framers chose different [language]").

145. BLACK'S LAW DICTIONARY 810 (6th ed. 1990).

146. *Foster*, 957 P.2d at 736.

147. *Bergstrom*, 524 N.E.2d at 366 n.9.

148. WASH. CONST. art. I, § 22.

149. *Id.*

150. *Foster*, 957 P.2d at 729, 736-37.

151. Commonwealth v. Amirault, 677 N.E.2d 652, 660 (Mass. 1997).

152. WASH. CONST. art. I, § 22.

153. *Amirault*, 677 N.E.2d at 662.

it would have been reasonable for the Washington State Supreme Court to determine that its constitutional drafters rejected the abstraction of Sixth Amendment confrontation language and opted for a more specific text. In making this simple inference, it becomes logical to conclude the Washington clause demands independent interpretation.

In response to an argument similar to the *Foster* majority, the phrase entitling a criminal defendant "to meet the witnesses against him face to face" has "no essential meaning," the Massachusetts high court stated "[c]onstitutional language more definitively guaranteeing the right to a direct confrontation between witness and accused is difficult to imagine."[154] This statement supports an independent interpretation of the Washington clause, since Massachusetts and Washington's constitutions have identical confrontation clause language.

4. Factor Four—Preexisting State Law

The majority's method for tying *Gunwall*'s distinct fourth and fifth factors together has serious analytical problems. The majority relied on a preexisting 1881 law that allowed "depositions taken at an earlier time . . . [to] be introduced at trial."[155] This law served as the majority's conclusion that preexisting state law did not guarantee an absolute right for actual face-to-face confrontation.[156] Meanwhile, the dissent noted the 1881 law did require relevant depositions be taken in the presence of the defendant.[157] This statute dispensed with the face-to-face requirement only at the trial stage.[158] Such a move away from the strictest conformity to the right was acceptable only if the witness was absent and the deposition was the best evidence available.[159] Thus, precedential exceptions to the face-to-face requirement of the confrontation clause were not supported by factor four.

When factors one through four are weighed, it becomes apparent that the Washington confrontation clause demanded interpretation independent from the federal clause. Since the *Foster* majority erroneously decided the state clause is the same as the federal clause, it adopted the reasoning of *Craig*, which is ill-fitted to the Washington State Constitution.

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154. *Id.* at 660 (quoting Commonwealth v. Bergstrom, 524 N.E.2d 366, 371 (Mass. 1988)).

155. State v. Foster, 957 P.2d 712, 723 n.9 (Wash. 1998).

156. *Id.* at 723.

157. *Id.* at 739 (Johnson, J., dissenting).

158. *Id.*

159. *Id.*

B. *The* Craig *Court's Reasoning*

1. Misapplication of the Hearsay Framework

In *Maryland v. Craig*,[160] the Supreme Court held a Maryland statute permitting the use of one-way, closed circuit television during trial testimony of a child witness was constitutional.[161] In support of its holding, the *Craig* Court declared a literal reading of the federal Confrontation Clause would "'abrogate virtually every hearsay exception, a result long rejected as unintended and too extreme.'"[162] To avoid the possibility of diminishing the availability of hearsay evidence, as well as to provide support to the states' desire to protect children, the Court applied an admission of hearsay evidence analysis.[163]

The hearsay rule, and its exceptions, ensures only reliable evidence to be heard in a courtroom.[164] In contrast, "[t]he [federal C]onfrontation [C]lause does not guarantee reliable evidence but rather it guarantees specific trial procedures that were thought to assure reliable evidence."[165] However, the *Craig* Court failed to differentiate the confrontation rights hearsay exceptions and non-hearsay exceptions.[166] In doing so, it mistakenly applied the *Craig* rule as a hearsay exception.

As Justice Scalia noted in dissent, "[s]ome of the Court's analysis seems to suggest that the children's testimony . . . was itself hearsay" and permitted under the Confrontation Clause.[167] This is not allowed since the Sixth Amendment "Confrontation Clause conditions for the admission of hearsay have long included 'a general requirement of unavailability' of the declarant."[168] The *Craig* majority confused witness unavailability with the unwillingness to "undergo hostile questioning."[169] Furthermore, this "unwillingness cannot be a valid excuse under the Confrontation Clause, whose very object is to place the witness under the sometimes hostile glare of the defendant."[170]

For hearsay purposes, "a witness is unavailable if he is dead, insane or

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160. 497 U.S. 836 (1990).
161. *Id.* at 860.
162. *Id.* at 848 (quoting Ohio v. Roberts, 448 U.S. 56, 63 (1980)).
163. *Id.* at 847-48.
164. 29 AM. JUR. 2D *Evidence* § 658 (1994).
165. Commonwealth v. Ludwig, 594 A.2d 281, 283 (1991).
166. *See generally* Maryland v. Craig, 497 U.S. 836 (1990).
167. *Craig*, 497 U.S. at 865 (Scalia, J. dissenting).
168. *Id.* at 865.
169. *Id.* at 866.
170. *Id.*

beyond reach of a summons," or the holder of a privilege against testifying regarding particular evidence.[171] The *Craig* majority erroneously relied on *California v. Green*[172] as precedent and found unavailability based on an unwillingness or inability to testify, which justified using closed circuit child testimony.[173] However, as Justice Scalia observed in his *Craig* dissent, *Green* did not hold that when a witness is unwilling to answer a question then the witness should be removed and allowed to make out of court statements over a video transmission.[174] Indeed, *Green* "is not precedent for such a silly system."[175]

Rather, *Green* held that when a sworn witness refuses to answer for reasons unknown to anyone but the declarant, prior testimony may be admitted without offending the Confrontation Clause.[176] Conversely, *Craig* made an exception to allow new testimony from a witness who refuses to speak for a known reason.[177] This misapplication of *Green* occurred because the Court was trying to inject a non-hearsay case into a hearsay analysis.

Worse yet, the *Craig* majority never established a premise upon which to build a confrontation right separate from the rules governing the admission of hearsay testimony. Justice O'Connor claimed to have properly built her majority opinion on an "understanding of [the Clause's] historical roots," but instead she clearly combined hearsay rules with the history behind the Confrontation Clause.[178]

2. *Craig*'s Balancing Test: A Lack of Judicial Fortitude

At the beginning of the twentieth century, the United States was facing domination of a "judicial oligarchy" controlled by "oppressive monopolies and . . . the domination of property interests" whereby "barrier after barrier [was] placed across the way of progress by the courts."[179] In the spirit which epitomized the Progressive Era, Robert M. LaFollette wrote: "A . . . problem [has] entered into the movement toward democracy—the problem of removing the dead hand of precedent from the judiciary and infusing into it the spirit of

171. BLACK'S LAW DICTIONARY 1523 (6th ed. 1990).
172. 399 U.S. 149 (1970).
173. *Craig*, 497 U.S. at 866 (Scalia, J., dissenting).
174. *Id.*
175. *Id.*
176. California v. Green, 399 U.S. 149, 162-64 (1970).
177. *Craig*, 497 U.S. at 866.
178. *Id.* at 844.
179. Robert M. LaFollette, *Introduction* to GILBERT E. ROE, OUR JUDICIAL OLIGARCHY v, vii (1912).

the times."[180] As a stalwart Progressive, he clearly favored forcing judges to align opinions with current popular will and the dictates of science.[181] Today, progressive ideals have voluntarily grown and surpassed proper limits.[182] Simply, the judiciary's faith in science and popular will, reflected in "currently favored public policy," has been used as leverage to override the federal constitutional guarantee of face-to-face confrontation.[183]

The effort to supplant constitutional rights with popular opinion becomes evident as one reads the *Craig* majority's recurrent variations of this theme: "[T]he Confrontation Clause reflects a *preference* for face-to-face confrontation at trial . . . a preference that 'must occasionally give way to considerations of public policy and the necessities of the case.'"[184] While public policies often support a good cause, the Confrontation Clause was enshrined in the Constitution "to assure that none of the many policy interests from time to time pursued by statutory law could overcome a defendant's right to face his or her accusers in court."[185] The *Craig* majority cited "widespread belief in the importance of . . . a public policy" that subordinates "a defendant's rights to face his or her accusers in court" to "a State's interest in the physical and psychological well-being of child abuse victims" as justification for following that belief.[186]

This reliance on current trends is a troubling precedent because the latter right, not the former policy, is a constitutional guarantee. Courts should not degrade the constitutional rights of the accused.[187] It is the function of the legislature, not the court, to follow popular trends.[188] Conversely, it is the

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180. *Id.* at v.

181. *Id.* at v-x.

182. FRANK W. FOX & CLAYNE L. POPE, AMERICA: A STUDY IN HERITAGE 567-81 (7th ed. 1993) (explaining the history of the Progressive Era and progressive thought, while highlighting its faith in science, experts, democracy, and social progress). The Supreme Court of Washington is democratically elected, which demonstrates the progressive idea that judges should be responsive to changes in public will. How much public opinion should influence the judiciary is a complex question that deserves much more treatment than it receives in contemporary academic and political discourse.

183. Maryland v. Craig, 497 U.S. 836, 861 (1990) (Scalia, J., dissenting).

184. *Id.* at 849 (citing Mattox v. United States, 156 U.S. 237, 243 (1895)).

185. *Craig*, 497 U.S. at 861 (Scalia, J., dissenting).

186. *Id.* at 853.

187. *See* THE FEDERALIST NO. 78 (Alexander Hamilton) (declaring that "where the will of the legislature declared in its statutes, stands in opposition to that of the people declared in the constitution, the judges ought to be governed by the latter, rather than the former").

188. *See* THE FEDERALIST NO. 78 (Alexander Hamilton).

proper role of courts to strike down statutes, such as those the *Craig* Court cited to explicate the trend it followed[189] when it ran afoul of the "irreducible literal meaning of the [Confrontation] Clause."[190]

Though *Mattox v. United States*[191] is over one hundred years old, it provides a succinct interpretation of the meaning and purpose of the Confrontation Clause, which continues to require

> personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of *compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.*[192]

The *Craig* majority declined to uphold this emphasized requirement of face-to-face confrontation.[193] Consequently, Justice Scalia was correct when he stated in dissent: "Seldom has this Court failed so conspicuously to sustain a categorical guarantee of the Constitution against the tide of prevailing current opinion."[194]

C. *The Washington Court's Use of the* Craig *Reasoning*

If *Craig* appears to be a failure when viewed in the light of the implied federal right to face-to-face confrontation, its conclusions fair even worse when applied to Washington's explicitly worded state guarantee. The Washington State Supreme Court's application of *Craig* to the state constitution was grievous.

As Justice Brennan described, the proper application of Supreme Court decisions to state constitutions, in general terms, serves state courts as a guideline:

> [T]he decisions of the Court are not, and should not be, dispositive of questions regarding rights guaranteed by counter-part provisions of State Law. Accordingly, *such decisions are not mechanical[ly] applicable to state law issues*, and state court judges and the members of the bar seriously

189. *Craig*, 497 U.S. at 853-54 nn.2-4.
190. Coy v. Iowa, 487 U.S. 1012, 1021 (1988).
191. 156 U.S. 237 (1895).
192. *Mattox*, 156 U.S. at 242-43 (emphasis added).
193. *Craig*, 497 U.S. at 857.
194. *Id.* at 860 (Scalia, J., dissenting).

> err if they so treat them. Rather, state court judges, and also practitioners do well to scrutinize constitutional decisions by federal courts, for only if they are found to be *logically persuasive* and *well-reasoned, paying due regard to precedent* and *the policies* underlying specific constitutional guarantees, may they properly claim persuasive weight as guide posts when interpreting counter-part state guarantees.[195]

In *Foster*, the court not only failed to properly determine the state confrontation clause requires an independent analysis, but the court also failed to: (1) properly analyze the logic and reasoning of the *Craig* decision; and (2) adequately address the policies underlying the state-guaranteed confrontation right. Thus, the Washington Supreme Court seriously erred when it mechanically applied *Craig* to its state constitution. In doing so, the court's reasoning undermines the policies underlying the state constitutional face-to-face confrontation right.

When the *Foster* majority applied the reasoning of *Craig* to the Washington State confrontation clause, the "antitextual"[196] reasoning of *Craig* only created more absurdities. Two pillars of the *Craig* Court's analysis—hearsay based reasoning and a misapplied balancing test—weakened the meaning of the Washington State Constitution's explicit guarantee to face-to-face confrontation, basically nullifying the plain meaning of the words. Like *Craig*, the *Foster* court first discussed reliable evidence when it should have focused on trial procedures, and then incorporated an inappropriate balancing test to subvert a clearly spelled-out constitutional right under the heel of a popular trend.[197]

The Washington Supreme Court's interpretation of its confrontation clause in *Foster* is like a Picasso painting: The artist's interpretation of the subject is captivating, but upon closer inspection, it is difficult to reconcile an interpretation with the actual subject. Much like Picasso, who recurrently abstracted from his subjects to achieve his own end and then eliminated the subject through interpretation, the borrowed reasoning of the *Craig* majority "abstracts from the [confrontation] right to its purposes, and then eliminates the right."[198]

The *Craig* framework dispositively damaged the federal and Washington State confrontation clauses simply by confusing its policy foundation with hearsay. This is evident in the appellate court's reasoning, which was upheld by the Washington Supreme Court in *Foster*.

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195. Commonwealth v. Ludwig, 594 A.2d 281, 283 (Pa. 1991) (emphasis added); *see also* Commonwealth v. Sell, 470 A.2d 457, 459 (Pa. 1983).

196. *Craig*, 497 U.S. at 863 (Scalia, J. dissenting).

197. State v. Foster, 957 P.2d 712, 725-26 (Wash. 1998).

198. *Craig*, 497 U.S. at 862.

The Washington appellate court concluded that the *Craig* threshold was a matter of unavailability "in the constitutional sense."[199] The court determined unavailability can be shown when "the child's emotional distress is sufficiently serious that she cannot reasonably communicate at trial while in the physical presence of the defendant."[200] If this unavailability is demonstrated, then "the trial court must . . . 'balance[ ] the strength of the State's case without the testimony of the child against the defendant's constitutional rights and the degree of infringement of the closed circuit television procedure on those rights . . . .'"[201]

In its opinion, the court incorporated a degenerate version of the hearsay unavailability exception and erroneously gave it constitutional stature to favorably balance the right to confront accusers face-to-face. *Foster* reasoned that if the state needed the emotionally unstable child to make its case against the accused, then the defendant's constitutional safeguard could be discarded.[202] In the end, the reasoning and logic of *Foster* not only failed to properly apply the hearsay framework, but it also initiated an unnecessary balancing test.

The balancing test announced in *Foster* boils down to the basic premise "that the presence of the defendant may undermine the truth-finding function of the trial . . . ."[203] This is untrue, since the defendant's absence during testimony risks undermining the truth-finding function of the trial, which is built on the presumption a defendant is innocent until proven guilty.[204] However, the presumption of innocence completely disappeared in the *Craig* and *Foster* decisions. Rather, the *Craig* and *Foster* decisions attacked the rights of a defendant to root out deceiving accusers, to have the jury take proper notice of untruthful testimony, and eliminated the presumption of innocence.[205]

In a jury trial, the presumption of innocence is difficult and taking a witness' testimony out of the courtroom has a deleterious effect. For "[t]he jury's opportunity to observe the witness testifying in front of the defendant has value that should not be easily dismissed."[206] One of the few tools the jury has to determine veracity is the witness' demeanor in the presence of the defendant.[207] The presence of the defendant and the witness in the same room

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199. State v. Foster, 915 P.2d 520, 525 (Wash. Ct. App. 1996).

200. *Id.*

201. *Id.* at 525-26.

202. *Id.* at 526.

203. State v. Deuter, 839 S.W.2d 391, 395 (Tenn. 1992).

204. William S. Laufer, *The Rhetoric of Innocence*, 70 WASH. L. REV. 329, 336 (1995).

205. *Id.* at 349-50.

206. Eldonna M. Ruddock, Note, *Something More Than A Generalized Finding: The State's Interest in Protecting Child Sexual Abuse Victims in* Maryland v. Craig *Outmuscles the Confrontation Clause*, 8 T. M. COOLEY L. REV. 389, 406 (1991) (footnotes omitted).

207. Elizabeth J.M. Strobel, Note, *Play It Again, Counsel: The Admission of*

serves as the foundation of the right to confront.[208] It is also the reason why out of court statements are considered less reliable for hearsay purposes.[209] This is because

> [m]any people [including children,] possess the trait of being loose tongued or willing to say something behind a person's back that they dare not or cannot truthfully say to his face .... It was probably for this reason, as well as to give the accused the right to cross-examine his accusers and thereby enable the jury to better determine the credibility of [accusing] witnesses and the strength of the [State's] case, that this important added protection was given to every person accused of a crime.[210]

It is true "'[f]ace-to-face presence may, unfortunately, upset the truthful... abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by the malevolent adult.'"[211] If a court is to give proper attention to the right of confrontation, in the presence of an accuser, then the court must reject balancing the right to confrontation against popular public policy, no matter how appealing.

As the *Craig* and *Foster* majorities make clear, such judicial fortitude can be difficult to sustain when the right being defended is an alleged child abuser and the popular policy is to protect the alleged abuse victims.[212] No matter how difficult, a free citizenry requires such an "uncommon portion of fortitude in the judges to do their duty as faithful guardians of the constitution, where legislative invasions of it ha[ve] been instigated by the major voice of the community."[213] When the face-to-face right to confrontation is at issue, a judge's duty as protector does not diminish.[214]

If confrontation clause analysis degenerates to the point of equating the right of confrontation with the hearsay rule, the purpose of the hearsay framework—guaranteeing the truthfulness of out of court statements—cannot

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Videotaped Interviews in Prosecutions for Criminal Sexual Assault of a Child, 30 LOY. U. CHI. L.J. 305, 309 (1999).

208. *Id.* at 307-08.

209. *Id.* at 313.

210. Bergdoll v. Kane, 731 A.2d 1261, 1264 (Pa. 1999) (quoting Commonwealth v. Russo, 131 A.2d 83, 88 (Pa. 1957)). The possibility of a child witness being led to say something contrary to the truth, like fabricating a story of abuse, is real. Karen J. Saywitz & Gail S. Goodman, *Interviewing Children in and out of Court: Current Research and Practice Implications*, APSAC HANDBOOK ON CHILD MALTREATMENT 297, 299-300 (John Briere et al. eds., 1996).

211. Ruddock, *supra* note 206, at 406.

212. *Id.* at 403.

213. THE FEDERALIST NO. 78 (Alexander Hamilton).

214. *Id.*

be satisfied by the balancing test. Judges must remember that "[f]rom the legal perspective of our traditional criminal jurisprudence, we do not know whether the child is telling the truth until the trial is over and the verdict rendered."[215] For "a child's televised testimony is only more reliable if the child has been abused by the defendant. Without establishing that fact, there is no inherent reliability in or special circumstances surrounding the out of court testimony to enhance the value of the evidence."[216] Since guilt is determined at the end of the trial, a child's out of court testimony is unreliable.

Two elements of the Washington court's erroneous reasoning are apparent: The majority's decision was based on a hearsay framework derived from the unavailability standard and it relied on the *Craig*-derived balancing test. Both elements skew the meaning of the Washington confrontation clause even worse than they distort the federal clause. This is especially so since the text of the state clause specifically guarantees the right to physical, face-to-face confrontation.[217] Furthermore, the reasoning adopted in *Foster* failed to uphold the necessity of truthful testimony offered by children witnesses.[218]

When a constitutional provision speaks as clearly as Washington's confrontation clause, no court should feel "free to ignore it nor . . . mitigate its rigors by balancing countervailing considerations and approving alternatives that may seem to serve the values behind those words well enough."[219] In *Foster*, the court ignored the clear language of article I, section 22, when concluding the state's confrontation clause did not warrant an independent analysis.[220] Subsequently, it diminished the requirements of the confrontation clause by considering public policy interests.[221] As the Supreme Court did in *Craig*, the Washington high court "applied 'interest-balancing' analysis where the text of the Constitution simply does not permit it."[222] In the end, the *Foster* court sidestepped the constitutional amendment process and amended the state constitution by "judicial fiat."[223]

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215. Ruddock, *supra* note 206, at 406.
216. *Id.*
217. Commonwealth v. Amirault, 677 N.E.2d 652, 662 (Mass. 1997).
218. State v. Foster, 957 P.2d 712, 731-32 (Wash. 1998).
219. *Amirault*, 677 N.E.2d at 662.
220. *Foster*, 957 P.2d at 733 (Johnson, J., dissenting).
221. *Id.* at 720.
222. Maryland v. Craig, 497 U.S. 836, 870 (1990) (Scalia, J. dissenting).
223. *Foster*, 957 P.2d at 738 (Johnson, J., dissenting).

D. *Alternatives to the* Foster *Approach*

1. Proper Amendment Procedures

The words Alexander Hamilton wrote about the United States Constitution apply to state constitutional theory:

> Until the people have by some solemn and authoritative act annulled or changed the established [constitutional] form, it is binding upon themselves collectively, as well as individually; and no presumption, or even knowledge, of their sentiments, can warrant their representatives in a departure from it, prior to such an act.[224]

If the people of Washington disapproved of the clear language of Washington's confrontation clause or wanted to create a confrontation clause exception for alleged child abuse victims, then they should change its meaning and application through the amendment process. The people of Pennsylvania and Illinois took such action when the highest courts ruled their confrontation clauses' language, similar to Washington's, did not allow child abuse victims to testify.[225]

The people of Pennsylvania added the following language to article I, section 9, of their constitution: "Notwithstanding the provisions of this section, the General Assembly may by statute provide for the manner of testimony of child victims or child material witnesses in criminal proceedings, including the use of videotaped depositions or testimony by closed circuit television."[226] In

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224. THE FEDERALIST NO. 78 (Alexander Hamilton).

225. *See* State v. Dean, 677 N.E.2d 947, 952 (Ill. 1997); Commonwealth v. Campion, 672 A.2d 1328, 1332 (Pa. Super. Ct. 1996).

226. PENN. CONST. art. I, § 9 (amended 1995). The wisdom of adopting a constitutional amendment or utilizing a statute to allow testimony of any witness, especially that of an alleged child abuse victim, must be questioned by those advocating the rights of children. Even though using closed circuit television or videotapes may save a child from the trauma of being in a defendant's presence, the use of such protective devices reduces the likelihood that a jury will convict. *See* David F. Ross et al., *The Impact of Protective Shields and Videotape Testimony on Conviction Rates in a Simulated Trial of Child Sexual Abuse*, 18 LAW AND HUM. BEHAV. 553, 564 (1994). In one study, the conviction rate dropped from 76.7% when testimony took place in the open courtroom to 60.8% when the same testimony was seen through a video monitor. *Id.* at 563. Such conviction rate reductions occur because a video monitor "is a less direct form of communication than being in the courtroom facing the defendant directly or from behind a shield." *Id.* at 565.

If any balancing test is appropriate with relation to the use of video technology in the courtroom, it should be the difference between the length and breadth of damage an acquitted yet actual child abuser could do to a child who just testified against him or her and the short term trauma a child faces when testifying in the presence of an accused defendant.

Illinois, "the 'face to face' language from the [state] confrontation clause . . . [was] replaced . . . with language giving the accused the right 'to be confronted with the witness against him or her.'"[227] The courts of Pennsylvania and Illinois properly upheld the meaning of the states' constitutional guarantee of face-to-face confrontation, and the people exercised their right to amend their constitution.

The Washington high court should reverse *Foster* and allow the people of Washington to decide the appropriate balance between the rights of defendants and alleged child victims. If the people side with the latter, then a constitutional amendment like that of Pennsylvania or Illinois is appropriate. Such a process preserves the integrity of the state confrontation clause and the constitutional amendment process, while still protecting alleged child abuse victims.

2. Possible Reforms

Before courts of any state attempt to alter the meaning or text of constitutional guarantees, courts should first seek to reform the justice system, especially when dealing with child witnesses in abuse cases. The *Foster* court should not have dispensed with established modes of confrontation until steps were taken to alleviate anxiety factors for child witnesses.

The fact that a child feels uncomfortable in the courtroom with a defendant accused of abusing the child is not necessarily the accused's fault. Other contributing factors stress a child witness.[228] The *Foster* court should have recognized the need to mitigate the impact of other detrimental forces before suspending a constitutional guarantee. The court could have encouraged or even mandated the incorporation of certain reforms into the way child witnesses are treated. These reforms include moving proceedings out of the courtroom entirely, utilizing court schools and other special methods to prepare child witnesses for court, and mandating training for attorneys, investigators, and social workers in "scientifically based techniques for interviewing children . . . ."[229]

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227. *Dean*, 677 N.E.2d at 952 (quoting 1994 Ill. Laws 3148).

228. *See* Saywitz & Goodman, *supra* note 210, at 307 (stating that "[r]esearch indicates that such factors as lack of maternal support, the need to testify multiple times, harsh cross-examination, victim age, and fear of the defendant should be considered in predictions that children may suffer stress from the legal process itself").

229. *Id.* at 307.

a. Move Out of the Courtroom

The courtroom is an intimidating place for young child witnesses. However, being in a familiar setting alleviates fears and helps children testify freely with less anxiety.[230] Judges involved in child abuse cases should seek to have the witnesses questioned in a familiar place, such as a classroom. Put simply, judges should move elements of a child abuse trial that involve child witnesses out of the courtroom.

b. Full Preparation of Child Witnesses Needed

In addition to courtroom anxiety, many children also have difficulty when encountering the legal system, the laws, and understanding their role within the system as witnesses.[231] Thus, they often "possess misunderstandings and unrealistic as well as realistic fears of the legal process . . . ."[232] With age, misunderstandings subside, and by the age of ten "most children understand the basics of the investigative and judicial process."[233] Children under the age of ten, however, "have little conception of invisible abstractions, such as laws, rules of evidence, or trial procedures."[234] Additionally, "[c]hildren under ten years of age do not fully understand the decision-making role of the jury or judge, often assuming that jurors are mere spectators."[235] A child's lack of understanding can create "anxiety associated with fear of the unknown [that] disrupts memory performance."[236] To alleviate this fear and to cure unreliable testimony, the court should require all child witnesses to be properly prepared for court by their attorney and those representing the various state interests.

Attorneys have a responsibility to properly prepare witnesses for trial.[237] When preparing child witnesses, they can either alleviate or add to a child's anxiety. Attorneys must help prepare testifying children by providing tours of court and reviewing the facts of the case with them. These steps help children become more comfortable with their surroundings and what they will be

230. *Id.* at 310.

231. *Id.* at 305.

232. Saywitz & Goodman, *supra* note 210, at 305.

233. *Id.*

234. *Id.*

235. *Id.* Four to seven year-old children are at a developmental level where they "are aware of court personnel, but their conceptualizations are based on observations of overt behavior (e.g., 'The judge is there to sit at a high desk and bang the hammer. He wears a black gown; I don't know why.')." *Id.*

236. Saywitz & Goodman, *supra* note 210, at 306.

237. A.S. CUTLER, SUCCESSFUL TRIAL TACTICS 20 (1949).

discussing when they testify.[238] Attorneys can also help children understand who is going to be attending proceedings and what each attendee's role will be. Unlike what happened in *Foster*, attorneys should inform child witnesses when the defendant or other people the child knows will be present. These steps can help child witnesses alleviate fear and enhance credibility.

In *Foster*, the child witness participated in a program, Kid's Court, which was designed to prepare her for trial.[239] The program taught her elements of role playing, which involved "a judge, prosecutor and other courtroom personnel."[240] However, the program does not provide discussion on the facts about a case and the dynamics specific to it.[241] This program probably helped the child in *Foster* understand some courtroom basics and demystified some elements of the process. Still, it did not address problems stemming from pressures the child felt when seeing Mr. Foster face-to-face.

Court schools, like Kid's Court, have also developed around the country.[242] They vary in methods for preparing children for court, especially in regards to discussing case specifics.[243] Some programs not only educate children about court, but also teach anxiety reduction methods.[244] Though few studies of such programs have been conducted, one study in Canada found that children who engaged in education about the process and learned anxiety reduction methods "gained more knowledge of the legal system, showed less generalized fears, and less abuse-specific fears . . . ."[245] Despite such positive signs, fear relating to testifying in court remained unchanged.[246] Additionally, the Canadian study could not determine whether classroom testimony altered the child's accuracy.[247]

While court schools probably have some positive effects on child witnesses, they must be studied further. Yet, even without more studies in place, judges, the bar, and social services should support and develop these programs. These programs represent just one part of a comprehensive plan that should be

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238. *See* Saywitz & Goodman, *supra* note 210, at 307.
239. State v. Foster, 957 P.2d 712, 714-15 n.2 (Wash. 1998).
240. *See* State v. Carlson, 833 P.2d 463, 464 (Wash. App. 1992).
241. *Id.*
242. *See* Saywitz & Goodman, *supra* note 210, at 307.
243. *Id.* 307-08.
244. *Id.* at 308.
245. *Id.*
246. *See* Saywitz & Goodman, *supra* note 210, at 308.
247. *Id.* It is very difficult to determine the effect of any preparation procedures, type of questioning, investigative techniques, or other variable the justice system places before a child between the time period of alleged abuse and the time of testimony in court. This is because there is no record of actual events that a researcher can use as a basis for comparison. *Id.*

implemented before courts erode the confrontation right by allowing the use of one-way, closed circuit television.

c. Appropriate Language and Questioning Techniques

Interviewing and questioning may also cause trauma and confusion for the child witness.[248] The question and answer methods employed in court and preliminary investigation often follow "unique and unfamiliar rules for sociolinguistic interaction in an unfamiliar setting. Given these conditions, the communications demands of the system can be poorly matched to the child's stage of language development."[249]

Children become confused by adult linguistics, vocabulary, and subject matter.[250] Adults also fail to realize that children do not comprehend the difference between normal conversation and the "unique sociolinguistic rules for exchanging evidentiary information."[251] Though they can usually be counted on to give truthful information, children can be misled by something as simple as an attorney repeating a question after the child has already answered it.[252] Repetitive questioning can give the child the impression that her response was wrong, leading the child to change her response to what she thinks will please the questioner.[253] Another problem relating to comprehension is that child witnesses often answer questions they fail to understand, instead of asking for clarification.[254]

One way to bridge the gap between adult courtroom language and a child's comprehension is to have the court appoint an advisor who, with the court's permission, explains to the child the nature of the questions asked during examination.[255] An additional, more proactive approach is for judges and attorneys to learn the differences between the linguistic capabilities of children at various developmental stages.[256]

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248. *Id.* at 303-04.

249. *Id.* When discussing language development, it is important to note that each child develops differently, despite the fact that certain stages of development are found generally in specific age ranges. *Id.* at 310-13.

250. Saywitz & Goodman, *supra* note 210, at 304.

251. *Id.*

252. Judge Donald J. Eyre, *The Child Witness: An Ever-Increasing Fact of Life in Utah Courts*, UTAH B.J., Feb. 1998, at 38, 41.

253. *Id.*

254. *See* Saywitz & Goodman, *supra* note 210, at 304-05.

255. *See, e.g.*, UTAH CODE ANN. § 77-38-8(2) (1995).

256. *See* Saywitz & Goodman, *supra* note 210, at 310.

The *Foster* court should have mandated that judges presiding over cases where children are to be witnesses, and attorneys who will be questioning the child witnesses, must receive formal training about the linguistic limitations of children. Additionally, the *Foster* court should have required judges and attorneys to be taught how to question children within the confines of these limitations.[257] Legislative or executive authorities should also mandate similar training for all social workers and investigators involved in child abuse cases. Proper training will alleviate some of the stress and problems encountered when children are faced with courtroom testimony.

d. Reforms Should Have Been Attempted

Preparing the *Foster* child witness in Kid's Court was a proper step for the Washington State authorities. But, this program alone insufficiently prepared the child witness for the hearings. When combining anxiety resulting from factors such as an unfamiliar setting and system with confusing and leading questioning and general fear of the unknown, anxiety overload is likely for a young witness while in the defendant's presence.

Instead of allowing the *Foster* prosecutor to "spoonfeed" the child witness the idea that the defendant was the problem causing her inability to speak, age-appropriate methods for mitigating anxiety should have been used. Other stressors should be eliminated before the defendant's right to confrontation is abridged. Incorporating anxiety-reducing reforms before the girl in *Foster* reached the courtroom would have prepared her to testify truthfully in the presence of the defendant. If the girl was more prepared, there may have been no need to consider allowing testimony via closed circuit television.

Even if being in the presence of the defendant caused the child in *Foster* to feel some trauma and all of the above-mentioned reforms had been utilized, the defendant's confrontation right should not have been dispensed with. In *Coy v. Iowa*,[258] the Supreme Court held:

> The State can hardly gainsay the profound effect upon a witness of standing in the presence of the person the witness accuses . . . . That face-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo a false accuser, or reveal the child coached by a malevolent adult. It is a truism that constitutional protections have costs.[259]

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257. *Id.* at 304.
258. 487 U.S. 1012 (1988).
259. *Id.* at 1020.

Eliminating the right to confrontation is wrong. The price of eliminating Mr. Foster's right to challenge the witness face-to-face was too high: His liberty was on the line.

V. CONCLUSION

In *Foster*, the Washington State Supreme Court erroneously held the Washington Constitution's confrontation clause requires the same interpretation as the Sixth Amendment's Confrontation Clause. When utilizing the *Gunwall* test, the Washington court used strange anti-reasoning to wiggle free from the clear strictures of the state confrontation clause. The face-to-face language in article I, section 22, of the Washington Constitution "is 'even more specific' than its federal counterpart," which signifies "a preference for live testimony ...."[260] Furthermore, there are significant differences in the texts of the parallel provisions. Given the emphatically clear language and the force of the other *Gunwall* factors, the *Foster* court should have interpreted the Washington confrontation clause independently from its federal counterpart. In adopting the *Craig* Court's reasoning, the Washington Supreme Court failed to guarantee what should have been construed as a more expansive state-guaranteed right.

The distorted hearsay framework and balancing test of *Craig* should not have been applied to the state clause's more specific language. Even when viewed in the light of the Sixth Amendment's less specific language, the use of a hearsay rules-based analysis fails to uphold the purposes of the right to confront a witness face-to-face. This framework fairs even worse under Washington's clearer face-to-face language. Moreover, the *Foster* court's use of the *Craig* balancing test shifted attention away from where the focus of any confrontation right should be—on the accused. In the end, the court anti-textually reasoned its way to giving the face-to-face guarantee little meaning.

If the people of Washington want to support the policies behind Revised Code of Washington section 9A.44.150 and allow child witnesses to testify using one-way, closed circuit television, then they should be allowed to use the constitutional amendment process. Other states have successfully legislated in response to a court ruling on this subject. By abruptly amending the Washington State Constitution by judicial fiat, the Washington State Supreme Court robbed its citizens of the right to determine their own constitutional rights and privileges.

The *Foster* court all too quickly assumed that the child witness was properly prepared for trial in a manner sufficient to minimize her trauma. The court failed to look into alternatives to avoid abridging the defendant's confrontation right. Instead of analyzing the suggestive dialogue of the

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260. State v. Foster, 957 P.2d 712, 736 (Wash. 1998) (Johnson, J., dissenting).

prosecutor, moving proceedings out of the courtroom, or recommending other trauma-reducing measures, the court simply decided to eliminate with Mr. Foster's constitutional guarantee. Protecting victims of child abuse is desirable; however, the *Foster* majority should have deferred to the state constitutional amendment process before curtailing the accused's constitutional right to wage a proper defense.