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**Articles**

**On Truth and Shielding in Child Abuse Trials**

by

JEAN MONTOYA*

**Introduction**

In recent years, substantial attention has been given to the appropriate testimonial procedures to be used when children testify in child abuse cases. Concern has been expressed for the mental well-being of the child confronted in a courtroom setting with the alleged perpetrator. This concern for the child raises important issues for a society that has deemed face-to-face confrontation crucial to the search for truth and has determined that an accused is entitled to be confronted with the witnesses against him or her.

The sensationalism surrounding the early stages of the McMartin case in the mid-1980s¹ led to an explosion of state legislation designed to...

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¹ In March 1984, Ray Buckey, his sister, his mother, and his grandmother were arrested along with three teachers on charges of child sexual abuse that allegedly occurred at the family-run McMartin Pre-School. Lois Timnick & Carol McGraw, *McMartin Verdict: Not Guilty*, L.A. TIMES, Jan. 19, 1990, at A1, A19. A county grand jury had indicted them on 115 counts. In May 1984, a criminal complaint superseded the indictment and charged them with 208 counts involving 41 children. The case alleged various sex crimes, "pornographic photography sessions, 'naked games,' field trips away from the school for illicit purposes, animal mutilation, threats and satanic-like ritual and sacrifice." *Id.* After an 18-month preliminary hearing, a judge ordered all seven defendants to stand trial on 135 counts. Nevertheless, the district attorney dropped all charges against five of the defendants in January 1986. Only Ray Buckey and his mother, Peggy McMartin Buckey, were tried. *Id.* On January 18, 1990, a jury acquitted Ray Buckey on 40 counts and deadlocked on 13 other counts. Peggy Buckey was...
protect child witnesses. An assortment of statutory features emerged from this legislative activity. For example, a number of statutes provide for videotaped depositions or the recording of testimony for later use at trial, but only some of these statutes provide for shielding the child from the defendant during taping of the testimony. Some statutes provide for the live transmission of the child's testimony into the courtroom from a separate testimonial room by one-way closed circuit television, but again, not all of these provide for shielding the child from the defendant.


Other statutes provide for the live transmission of the child's testimony by two-way closed circuit television, where the defendant's image is simultaneously transmitted to the child. Legislatures and courts applying those statutes then looked to the United States Supreme Court for guidance.

The semblance of guidance was forthcoming in *Maryland v. Craig.* In *Craig,* the Court held that the Constitution does not require a child to face the defendant in child abuse trials where trauma would result from the confrontation. The Court determined that the child may testify by one-way closed circuit television upon an individualized showing that such a procedure is "necessary" to protect the child from the trauma that would otherwise result from testifying in the defendant's presence. At
issue was the Sixth Amendment's Confrontation Clause, which provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." In reaching its decision, the Court recognized the state's compelling interest in protecting children. It also relied on social science findings that this special testimonial procedure may actually better serve the truth-seeking function of confrontation than the typical face-to-face meeting because the child will be less upset and flustered and therefore more communicative when testifying.

Although the Craig Court adopted a "necessity test," requiring a case-specific showing that the use of one-way closed circuit television is necessary to avoid trauma to the child, it left a number of questions unanswered. For example, how can courts and legislatures be sure that shielding children serves the search for truth? How can they be sure that they are protecting injured children and not facilitating children who are lying or otherwise misreporting the facts? Despite its ruling that shielding the child witness does not violate the Confrontation Clause when there is a case-specific showing of necessity, Craig gives little guidance on if and when the special testimonial procedures should be invoked. As a result, state courts and legislatures continue to struggle with these issues. Some state courts have declined to embrace Craig, concluding instead that their state constitutions will not tolerate the use of one-way closed circuit television and the concomitant absence of physical confrontation between the child witness and the criminal defendant. In sharp con-

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9. U.S. CONST. amend. VI. The Confrontation Clause of the Sixth Amendment applies to the states through the Fourteenth Amendment. Pointer v. Texas, 380 U.S. 400, 403 (1965). The Members of Congress who drafted the Bill of Rights apparently included it without debate. California v. Green, 399 U.S. 149, 175-76 (1970) (Harlan, J., concurring). Of course, when the Confrontation Clause was proposed and ratified, television did not exist. Commonwealth v. Willis, 716 S.W.2d 224, 230 (Ky. 1986); cf. State v. Daniels, 484 So. 2d 941, 944 (La. Ct. App. 1986) ("Admittedly, the United States Supreme Court has used the words 'face to face' to describe the guarantee of the confrontation clause . . . . [T]he court's choice of words may have resulted from its inability to foresee technological developments permitting cross-examination without physical presence."). In addition, although children were no longer categorically excluded as witnesses as they had been at early canon law, see 4 W.F. FINLASON, REEVES' HISTORY OF THE ENGLISH LAW 80 (Philadelphia, M. Murphy 1880), they were nevertheless considered a suspect class of witness, see JOHN E.B. MYERS, CHILD WITNESS LAW AND PRACTICE § 3.3, at 60-61 (1987 & Supp. 1991) (citing Rex v. Brasier, 1 Leach 199, 200, 168 Eng. Rep. 202, 202-03 (1779)); NANCY W. PERRY & LAWRENCE S. WRIGHTSMAN, THE CHILD WITNESS 37-41 (1991). We can assume, therefore, that the drafters did not consider either the appropriateness of transmitting testimony by closed circuit television or the special testimonial needs of child witnesses.

10. See Craig, 110 S. Ct. at 3167-68.

11. Id. at 3169-70; see also Coy v. Iowa, 487 U.S. 1012, 1032 (1987) (Blackmun, J., dissenting).

trast, some state legislatures have responded to Craig by revising their statutory law to expand the screening options available to child witnesses.\textsuperscript{13}

This Article explores the use of alternative testimonial procedures that shield child witnesses from criminal defendants. Part I examines what Craig says about how a prosecutor can demonstrate a child's need for special testimonial procedures. It also compares the Craig standards with those developed by the various courts and legislatures that allow shielding procedures. These sources suggest that the protection of child witnesses depends on how we balance the needs of the child against the benefits of confrontation. How we strike that balance depends on what we know about those needs and benefits in general (as a matter of experience, common sense, and social science) and in the particular case (through hearings). Accordingly, Part II considers the reliability of the social science findings undergirding Craig, and Part III explores the implications of compromising the courtroom confrontation that would otherwise occur between defendants and child witnesses.

Finally, Part IV proposes legislative change and makes recommendations for exercising judicial discretion. Specifically, this Article argues that we should maintain traditional adversarial safeguards except in the most compelling of circumstances, and at least until social science can provide us with more definitive findings. This Article further posits that alternative testimonial procedures should be implemented only after the court conducts a balanced inquiry that considers any case-specific needs for shielding and for confrontation.

I. The Vague Craig Showing of Necessity

Out of the mouth of babes and nursing infants you have perfected praise.

Matthew 21:16

A. Coy, Precursor to Craig

The Supreme Court first addressed whether special testimonial procedures could be used in child abuse cases in *Coy v. Iowa,* decided two years before *Craig.* The Court in *Coy* considered an Iowa statute which included a provision allowing children to testify from behind a screen that blocked their view of the defendant. The defendant was charged with sexually assaulting two thirteen-year-old girls while they were camping out in his neighbor's backyard. The trial court permitted a large screen to be placed between the defendant and the witness stand during the girls' testimony. The defendant could dimly see the witnesses through the screen, but the witnesses could not see the defendant at all. The girls testified under oath and were subject to cross-examination. The screen did not prevent the girls from seeing and being seen by the judge, counsel, and jury, and it did not prevent the jury from seeing the defendant's demeanor while the girls testified. By blocking the girls' view of the defendant, however, the screen precluded the jury from observing the girls' demeanor as it might have been had they testified in the defendant's unobstructed presence.

The defendant in *Coy* appealed on two grounds: First, that the procedure violated his Sixth Amendment right to face-to-face confrontation; and second, that the procedure deprived him of due process of law by making him appear guilty and thereby eroding the presumption of innocence. The Court held that the defendant's right to face-to-face confrontation had been violated. The opinion, delivered by Justice Scalia, described the "irreducible literal meaning" of the Confrontation Clause as the "right to meet face to face all those who appear and give evidence at trial." The Court acknowledged that "rights conferred by the Con-

15. Id. at 1014 (citing IOWA CODE ANN. § 910A.14 (West 1987)).
16. Id.
17. Id. at 1014-15.
18. Id. at 1027 (Blackmun, J., dissenting).
19. Id. at 1015.
20. Id. at 1022. In light of its ruling on the Confrontation Clause argument, the Court found it unnecessary to reach the Due Process argument. Id.
frontation Clause are not absolute, and may give way to other important interests."

But it noted that cases so stating have dealt with rights that are only implied in the Clause (such as the right to cross-examine and the right to exclude hearsay) and not with "the right narrowly and explicitly set forth in the Clause." In seeming contradiction, the Court stated in dicta that any exceptions to the "irreducible literal meaning" of the Confrontation Clause "would surely be allowed only when necessary to further an important public policy." The State argued that it had established necessity because the Iowa statute implied a legislative finding that child witnesses suffer trauma from testifying in their assailant's presence. The Court rejected this argument and indicated that necessity could be shown only after "individualized findings that... particular witnesses needed special protection." Such specific findings had not been made in Coy.

B. Craig

In Maryland v. Craig, however, an individualized showing of trauma had been made to the trial court. Craig involved a Maryland statute that allowed children to testify by one-way closed circuit television if the judge first found that the child would suffer "serious emotional distress such that the child cannot reasonably communicate" at trial. The defendant in Craig was charged with child abuse, first and second degree sexual offenses, perverted sexual practice, assault, and battery. The al-

22. Id. at 1020.
23. Id.
24. Id. at 1021. This dicta appears to have been a compromise to hold the swing votes of Justices O'Connor and White, who joined in a concurring opinion. In the subsequently decided case of Maryland v. Craig, 110 S. Ct. 3157 (1990), where there were individualized findings that the child victims would suffer severe trauma, Justice O'Connor (writing for a majority that included Chief Justice Rehnquist and Justices White, Blackmun, and Kennedy) approved of child testimony by one-way closed circuit television. Id. at 3169-70. Justice Scalia (joined by Justices Brennan, Marshall, and Stevens) dissented on the ground that the “text of the Sixth Amendment is clear” and requires face-to-face confrontation. Id. at 3172 (Scalia, J., dissenting).
26. Id.
27. Justice Blackmun, in a dissent joined by Chief Justice Rehnquist, trivialized the right to physical confrontation by describing the defendant's "complaint" as "the very narrow objection that the girls could not see him while they testified." Id. at 1027 (Blackmun, J., dissenting). He added that the defense enjoyed "unrestricted cross-examination," and that the jury was able to observe the girls' demeanor as they testified. Id.
28. Craig, 110 S. Ct. at 3161.
30. Id. at 3160.
Leged victims had attended a child care facility owned and operated by the defendant. After receiving expert testimony, the trial court made the requisite findings and allowed the children to testify in a separate room in the presence of the attorneys but outside the presence of the judge, jury, and defendant, all of whom remained in the courtroom where a television displayed the children's testimony. As with the Iowa screening procedure used in Coy, the child witnesses testified under oath, were subject to cross-examination, were observable by the judge, jury, and defendant (albeit by television), and the jury was able to observe the defendant's demeanor while the children testified. Also as in Coy, the child witnesses could not see the defendant while they testified and the jury consequently could not observe what the children's demeanor might have been had they testified in the defendant's presence. Unlike the situation in Coy, however, the child witnesses in Craig did not testify in the presence of the judge and jury—with all the officiality and solemnity which that might invoke—but rather were separated from the judge and jury as well as the defendant.

The Craig Court upheld the constitutionality of the Maryland procedure inasmuch as it required a showing of necessity to protect the particular child witness and, unlike the Iowa procedure in Coy, did not rely on a "legislatively imposed presumption of trauma." Justice O'Connor, writing for a five-member majority, reasoned from cases that upheld the admission of hearsay statements against a criminal defendant and denied the defendant a face-to-face meeting with the declarant, and found that the defendant's right to physical confrontation was not absolute. Her opinion further asserted that the state's interest in protecting


32. Craig, 110 S. Ct. at 3160.

33. Id. at 3161-62.

34. Id. at 3166.

35. Respondent's Brief at 6, Craig (No. 89-478).

36. Craig, 110 S. Ct. at 3163 (quoting Coy v. Iowa, 487 U.S. 1012, 1021 (1988)). The Court's holding resembles that of Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982). In Globe, the Court acknowledged the state's compelling interest in protecting minor victims of sex crimes from the further trauma and embarrassment of testifying in open court, but held that a Massachusetts statute barring press and public access to criminal sex-offense trials during the testimony of minor victims violated the First Amendment because the statute mandated uniform closure rather than selective closure based on a case-by-case determination of the particular child's needs. Id. at 607-08, 610-11 & n.27.

child witnesses from the trauma of testifying in a child abuse case was sufficiently important to outweigh the right to a face-to-face meeting, "at least in some cases." The question is, in which cases?

C. An Analysis of the Craig Directives

The Craig Court attempted to outline what the state must demonstrate to make an "adequate showing of necessity." In particular, Craig allows shielding to protect the child witness from trauma caused by the defendant's presence, at least when that trauma impairs the child's ability to communicate and is more than de minimis. Craig also requires that the trauma be demonstrated in an evidentiary hearing. Nevertheless, the Court left many questions unanswered by declining to establish any "categorical evidentiary prerequisites." Craig therefore provides little guidance to the states, which have widely varying requirements for showing necessity. The various state practices are examined below in light of the too few and vague Craig directives.

(1) Defendant's Presence Triggers the Trauma

Craig specifies that the trial court must find that the child's trauma stems from testifying in the physical presence of the defendant, as distinguished from the trauma of testifying in the courtroom generally (including the potentially unnerving effect of the presence of a jury, courtroom staff, the public, and perhaps the media). The Court reasoned that in the latter situation, the child's needs can be accommodated without denying the defendant face-to-face confrontation. Although it considered the source of the trauma critical, the Court concluded that the Constitution does not require the trial judge either to observe the child's behavior in the defendant's presence or to try two-way closed circuit television before ordering the one-way closed circuit television procedure. The Court thereby sanctioned the sort of predictive evidence presented by the State in Craig:

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38. Id. at 3167.
39. Id. at 3169.
40. Id. at 3169-70.
41. Id. at 3169.
42. Id. at 3171.
43. Id. at 3169.
44. Id. In this situation, the defendant would be present in the testimonial room with the child and the attorneys, while the judge, jury, and public would remain in the courtroom to observe the testimony on video monitors. Id.
45. Id. at 3171.
The expert testimony in each case suggested that each child would have some or considerable difficulty in testifying in Craig's presence. For example, as to one child, the expert said that what "would cause him the most anxiety would be to testify in front of Mrs. Craig . . . ." The child "wouldn't be able to communicate effectively." As to another, an expert said she "would probably stop talking and she would withdraw and curl up." With respect to two others, the testimony was that one would "become highly agitated, that he may refuse to talk or if he did talk, that he would choose his subject regardless of the questions" while the other would "become extremely timid and unwilling to talk."46

The Court nevertheless acknowledged that observing the child's behavior in the defendant's presence before invoking the special testimonial procedure "could strengthen the grounds for use of protective measures."47 Several courts have opted for this type of showing48 rather than

46. Id. at 3161 (quoting Craig v. State, 316 Md. 551, 568-69, 560 A.2d 1120, 1128-29 (1989)) (omission by court).
47. Id. at 3171.
48. See, e.g., Commonwealth v. Willis, 716 S.W.2d 224, 226 (Ky. 1986) ("When the child was asked why she would not respond to certain questions, she stated: A. I don't want him—hurt me . . . . Q. Somebody here you don't want to see? A. (witness nods affirmatively) Q. Who's that? A. Uncle Leslie . . . . Q. Are you going to talk for us? A. I don't want him here.") (citation omitted) (omissions by court); Wildermuth v. State, 310 Md. 496, 524, 530 A.2d 275, 289 (1987) (Personal observation by the judge "should be the rule rather than the exception."); Commonwealth v. Tufts, 405 Mass. 496, 524, 530 A.2d 275, 587-88 (1989) (The judge observed the unresponsiveness of the child on the witness stand in the presence of the jury and defendants. The judge then observed the child in the lobby outside the defendants' presence but in the presence of the attorneys, where the child related in detail the abuse he had suffered.; State v. Conklin, 444 N.W.2d 268, 275 (Minn. 1989) (The defendant's presence had a marked effect on the child's testimony. "Before the defendant was removed, L.C. said nothing in her testimony to implicate appellant. She denied or could not remember whether appellant had engaged in the conduct on which he was charged. Only after appellant was excluded did L.C. say that he 'punched her in the vaginal area.'"); State v. Ross, 451 N.W.2d 231, 234 (Minn. Ct. App.) (The child was unresponsive while testifying in the defendant's presence and then slightly more responsive while testifying outside his physical presence by two-way closed circuit television.), cert. denied, 111 S. Ct. 109 (1990); State v. Warford, 223 Neb. 368, 370-71, 389 N.W.2d 575, 578 (1986) (After responding to preliminary questions in the defendant's presence, the child became uncooperative and refused to answer any questions about what had happened. "The prosecuting attorney then asked if she could show him what happened if all the people were not there, to which the child replied, 'Yes.' " The child and her therapist were taken into chambers to resume direct examination. The jury and defendant viewed the examination on video equipment in the courtroom.; State v. Taylor, 562 A.2d 445, 450 (R.I. 1989) ("Once Sally was on the witness stand, she froze with fear and was unable to communicate."). see also Michael H. Graham, Indicia of Reliability and Face to Face Confrontation: Emerging Issues in Child Sexual Abuse Prosecutions, 40 U. MIAMI L. REV. 19, 88-89 (1985) [hereinafter Graham, Indicia of Reliability] ("A dress rehearsal to test Alice's actual unwillingness or inability to testify in Sam's presence will most often be appropriate."). But see CAL. PENAL CODE § 1347(d)(2) (West Supp. 1992) ("[T]he court, in determining the merits of the motion, shall not compel the minor to testify at the hearing; nor shall the court deny the motion on the ground that the minor has not testified."); IDAHO CODE § 19-3024A.3(b) (Supp. 1991) (same); N.Y. CRIM. PROC. LAW § 65.20.6 (McKinney Supp. 1992) ("the child witness who is alleged
simply relying on predictive evidence, because a *Craig* showing requires at least two predictions—that the child witness will suffer trauma, and that the defendant's presence will cause the trauma—and predictive evidence is by its very nature speculative.49 It may be difficult to predetermine the cause of any testimonial trauma when so many variables are operating in the courtroom setting. Testifying in itself might produce trauma for a child witness who relives the abuse when relating the details in court.50 Testifying in close proximity to twelve jurors or in front of a large courtroom audience might also traumatize the child witness. Indeed, the expert testimony in *Craig* was particularly equivocal in this regard. As the Maryland Court of Appeals observed:

The difficulty here is that the testimony in this case was not sharply focused on the effect of the defendant's presence on the child witnesses. For example, as to one witness, the expert thought the child "coming into the courtroom where she would be faced with the alleged perpetrator and *a courtroom of strangers* would be unable to talk about what happened to her." As to another: "he would have great difficulty in talking in front of people, particularly in front of Mrs. *Craig*...." With respect to the third child, this dialogue occurred:

Q. What do you think the reaction of Jessie ... would be if brought into the courtroom to testify?

to be vulnerable may not be compelled to testify at such hearing"); State v. Albert, 13 Kan. App. 2d 671, 676, 778 P.2d 386, 389 (Ct. App. 1989) (The trial court noted: "I'm very reluctant to bring in a young child just—just to watch and see if she's [going to] freeze and fall apart on the stand' and 'I have confidence in the ability and expertise of the mental health center to be able to make that judgment.'") (alteration in original).

49. As one authority on child witnesses has noted,

Mental health professionals often provide expert testimony regarding the impact on a child of testifying in the presence of the defendant. Unfortunately, in some cases, such expert testimony is almost completely speculation on the part of the expert. Professionals sometimes offer little more than conclusions which lack meaningful facts and data upon which the trial [sic] judge can predicate a decision. *MYERS, supra* note 9, § 6.4, at 244 (Supp. 1991).

50. Testifying in itself was a traumatic event for the child witnesses in State v. Twist, 528 A.2d 1250 (Me. 1987). There the children's foster parent, who was a qualified expert in the field of pediatric psychiatry, "testified that when the children arrived at his home they 'acted out' sexually about 95 percent of the time .... [A]fter they had been in his home for about three months, this behavior started to subside." The children then testified before the grand jury, presumably not in the defendant's presence. After they testified before the grand jury, the children again "began acting out sexually about 90 percent of the time .... It took another three or four months for the children's sexual behavior to subside after they gave their testimony before the grand jury." The testimonial experience apparently caused the children to "regress." *Id.* at 1253. The trial court consequently ordered that the children's testimony be videotaped in such a manner that the defendant would not be visible to the witnesses. *Id.* at 1254.
A. I [think] that she would probably—Jessie would probably
look around and become extremely timid and unwilling to
talk.51 Thus, determining whether the defendant is the source of the child’s trauma promises to be a controversial matter and the subject of much litigation.

(2) The Child’s Diminished Ability to Communicate

In addition to requiring a finding that the defendant’s presence causes the trauma, the Craig Court indicated that at least where the child’s ability to communicate is impaired, special testimonial procedures are appropriate.52 Thus, Craig addressed something more than the psychic harm that results from a child testifying in the physical presence of the alleged assailant. The Maryland statute at issue in Craig requires the child to be “suffering serious emotional distress such that the child cannot reasonably communicate”53 at trial—a specific sort of distress. The Court approved this statutory feature when it remarked that a child witness’s trauma could override a defendant’s right to physical confrontation “at least where such trauma would impair the child’s ability to communicate.”54 Citing, inter alia, the amicus brief submitted by the American Psychological Association55 and the work of Gail S. Goodman,56 a psychologist and child witness advocate, the Court observed: “[W]here face-to-face confrontation causes significant emotional distress in a child witness, there is evidence that such confrontation would in fact disserve the Confrontation Clause’s truth-seeking goal”57 inasmuch as “face-to-face confrontation ‘may so overwhelm the child as to prevent the possibility of effective testimony.’”58 The Court thereby placed a premium on obtaining the child witness’s testimony and couched its concern in terms of promoting the “truth-seeking goal” of the Confrontation Clause.59

54. Craig, 110 S. Ct. at 3170.
55. See Brief for Amicus Curiae American Psychological Association in Support of Neither Party at 18-24, Craig (No. 89-478), cited with approval in Craig, 110 S. Ct. at 3169.
57. Craig, 110 S. Ct. at 3169 (emphasis in original).
58. Id. (quoting Coy v. Iowa, 487 U.S. 1012, 1032 (1988) (Blackmun, J., dissenting)).
59. The Court’s emphasis on the “truth-seeking goal” of the Confrontation Clause is problematic and has engendered sharp criticism. See, e.g., Philip Halpern, The Confrontation Clause and the Search for Truth in Criminal Trials, 37 BUFF. L. REV. 165, 200 (1988-89)
What if the child would suffer mental or emotional injury by testifying in the defendant's presence, but could effectively articulate the details of the abuse suffered? This is an open question. Craig does not say that a child witness can be shielded on the basis of trauma alone, but there certainly is a tension between the Court's truth-seeking and child protection rationales. The Court specifically declared that "a State's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh . . . a defendant's right to face his or her accusers in court." The Court also determined that one-way closed circuit television is not prohibited by the Confrontation Clause "where necessary to protect a child witness from trauma that would be caused by testifying in the physical presence of the defendant, at least where such trauma would impair the child's ability to communicate." The "at least" language may indicate that circumstances other than an impaired ability to communicate can justify the use of one-way closed circuit television. It may also connote that an impaired ability to communicate is the minimal showing required to override the defendant's otherwise controlling right to be confronted with adverse witnesses.

Not surprisingly, the states disagree as to the type of injury that will suffice. Most statutes focus on the child's inability to communicate. Others recognize both the psychic harm that results from testifying and the harm that impairs the child's ability to communicate. Some state

("[T]he emphasis on reliability marks a dangerous trend in criminal adjudication. Unqualified truth concerning facts disputed in litigation cannot consistently, if ever, be attained."); Toni M. Massaro, The Dignity Value of Face-To-Face Confrontations, 40 U. FLA. L. REV. 863, 888 (1988) ("The confrontation guarantee is a defendant-centered right and cannot reasonably be read as a general assurance of trials based on reliable evidence.").

60. Craig, 110 S. Ct. at 3167.
61. Id. at 3170.
62. See, e.g., ALASKA STAT. § 12.45.046(a)(2) (1990) ("normal court procedures would result in the child's inability to effectively communicate"); GA. CODE ANN. § 17-8-55(a)(2) (Supp. 1991) (GA. CODE ANN. § 81-1006.2(a)(2) (Harrison Supp. 1991)) ("serious emotional distress such that the child cannot reasonably communicate"); KAN. STAT. ANN. § 22-3434(b) (Supp. 1991) (to require the child to testify in open court would "so traumatize the child as to prevent the child from reasonably communicating to the jury"); MD. CODE ANN.,CTS. & JUD. PROC. § 9-102(a)(1)(ii) (1989) ("serious emotional distress such that the child cannot reasonably communicate"); VT. R. EVID. 807(c) ("trauma to the child which would substantially impair the ability of the child to testify"); WYO. STAT. § 7-11-408(c)(iiii) (1987) (physical or psychological harm "which would effectively render the child incapable to testify at the trial").

63. See, e.g., UTAH R. CRIM. P. 15.5(2)(a) ("the child will suffer serious emotional or mental strain if he is required to testify in the defendant's presence, or the child's testimony will be inherently unreliable if he is required to testify in the defendant's presence"); VA. CODE ANN. § 18.2-67.9.B (Michie 1988) (the child's persistent refusal to testify, the child's substantial inability to communicate about the offense, or a finding that the child will suffer severe emotional trauma from so testifying).
courts, however, emphasize the psychic harm that results from the testimonial experience, irrespective of the child's ability to communicate.\textsuperscript{64}

It might be argued that the relevant inquiry should focus on the potential psychic harm to the child witness. This approach identifies children's welfare as the primary social value at stake, a compelling state interest emphasized in \textit{Craig}. This rationale would support screening a child witness who is traumatized by testifying in the defendant's presence, regardless of the child's ability to testify in that situation. Nevertheless, as a practical matter it may be difficult to demonstrate that the defendant's presence harms the child—one of the elements of a \textit{Craig} showing—if the child is capable of testifying in the defendant's presence.\textsuperscript{65}

\textit{Craig} also justified the compromise of physical confrontation on the ground that screening may advance the discovery of truth where child witnesses are unable to communicate otherwise. Clearly, the truth-seeking rationale would not support screening when the child may suffer some psychic injury but can effectively testify, because screening is not necessary to advance the reliability of the proceedings unless the defendant's presence will impair the child's ability to communicate. Nevertheless, \textit{Craig}'s focus on the child witness's ability to communicate appears to be aimed at assisting the prosecution in the presentation of its case—an arguably less noble purpose than protecting children, and a questionable basis for compromising a criminal defendant's constitutional right.

It has been argued that physical confrontation makes sense only if it increases the reliability of a child's testimony.\textsuperscript{66} Although this approach

\textsuperscript{64} See, e.g., Thomas v. People, 803 P.2d 144, 150 n.13 (Colo. 1990) (acknowledging that the \textit{Craig} opinion is vague on this point, but concluding that the Court's reasoning "suggests that its holding would apply in cases in which the trauma would be injurious to the child but would not have the specific adverse effect of impairing the child's ability to communicate"); People v. Cintron, 75 N.Y.2d 249, 265-66, 551 N.E.2d 561, 571, 552 N.Y.S.2d 68, 78 (1990) (The statute requires more than findings on "the ease with which the child victim is able to testify or to the usefulness or effectiveness of the testimony the victim is able to give. The findings must relate to the effect that testifying in court will have on the mental or emotional well-being of the child.").

\textsuperscript{65} For instance, the states of Colorado and Mississippi require necessity findings to be based on specific behavioral indicators exhibited by the child. COLO. REV. STAT. ANN. § 18-6-401.3 (West 1990); MISS. CODE ANN. § 13-1-405 (Supp. 1991). Although these statutes make important headway in rendering a psychic harm determination less speculative by requiring objectively verifiable criteria, these standards may not satisfy \textit{Craig}. Such behavioral indicators might include nightmares, bed-wetting and acting out sexually. But it may be difficult to demonstrate that the defendant's presence causes the trauma—thus allowing shielding—because presumably these manifestations of psychic trauma are taking place outside the defendant's presence.

\textsuperscript{66} See \textit{McGough}, supra note 2 (manuscript ch. 7, at 7-8).
may be superior to a pure harm analysis that disregards the asserted truth-seeking purpose of confrontation, it too is problematic. Acknowledging physical confrontation’s role in reducing the risk that a witness will lie, the Craig Court observed that “face-to-face confrontation enhances the accuracy of fact-finding by reducing the risk that a witness will wrongfully implicate an innocent person.” The Court cited no authority or social science evidence for the proposition that physical confrontation does not also decrease the risk of false testimony by child witnesses, and it made no attempt to resolve the contradiction in its reasoning that physical confrontation might at once undermine and enhance the accuracy of fact-finding when children are witnesses. Perhaps a child cannot communicate effectively because he or she is silenced by fear of the defendant, or possibly physical confrontation is inhibiting the communication of a deliberately untruthful or otherwise inaccurate report.

Protective procedures might reduce false recantations and stymied deliveries, but facilitate untruthful and otherwise inaccurate accusations. Under these circumstances, to shield is to prejudge the facts because it facilitates the child’s testimony on the assumption that the testimony will be truthful.

(3) More Than De Minimis Impairment

In further describing the sort of emotional distress that will suffice to permit the use of the one-way closed circuit television procedure, the
Court added that the trauma must be “more than de minimis, i.e., more than ‘mere nervousness or excitement or some reluctance to testify.’”

The Court declined to specify how much more than a de minimis showing is required, noting only that the Maryland statute, which required a determination that the child witness will suffer “serious” emotional distress, “clearly” sufficed.

Thus, Craig neglects to provide courts and legislatures with any meaningful guidance on the quantum of trauma that may trigger the use of protective procedures. Some statutes are couched in terms of a child’s unavailability to testify otherwise. Many statutes require a showing of serious or severe harm. Others simply call for a showing of harm. Only the state of Florida expressly permits shielded testimony on a showing of something less than serious harm.

It is also unclear how these standards might translate into a child’s ability or inability to communicate—the harm at issue in Craig. What sort of impairment of a child’s ability to communicate should suffice? We know that mere nervousness, excitement or some reluctance to testify is not enough. But what about fidgeting? Stammering? Unresponsiveness? Recanting? Crying? Whimpering? It has been suggested that a showing should be made that a child’s testimony would be practically impossible to elicit without the protective procedures. This approach

72. Craig, 110 S. Ct. at 3169 (quoting Wildermuth v. State, 310 Md. 496, 524, 530 A.2d 275, 289 (1987)).

73. Id.

74. See, e.g., CAL. PENAL CODE § 1347(b)(2) (West Supp. 1992); COLO. REV. STAT. ANN. § 18-6-401.3(3) (West 1990) (finding of unavailability should turn “on specific behavioral indicators exhibited by the child”); IDAHO CODE § 19-3024A.2(b) (Supp. 1991); MINN. STAT. ANN. § 595.02(4)(c) (West 1988); TEX. CODE CRIM. PROC. ANN. art. 38.071, § 6(a) (Vernon Supp. 1992).


77. See FLA. STAT. ANN. § 92.53(1) (West Supp. 1992) (“at least moderate emotional or mental harm”).

provides for shielding only under the most compelling of circumstances, yet ensures that the child witness will be heard. It also would be easier to administer than other approaches, because the prescribed showing is less ambiguous than one that requires assessing a child's ability to communicate "reasonably" or "effectively," or a child's "substantial" inability to communicate.

(4) The Manner of Proof

The Craig Court held that the finding of necessity must be case-specific and focus on a particular child's needs, and that "the trial court must hear evidence" in making that determination. The Court did not indicate, however, what type of evidence would be required. In support of its motion to invoke the one-way closed circuit television procedure, the State in Craig had presented the expert testimony of Mary Burke, a child therapist, and Dr. Gladys Sweeney, a psychologist. Both had extensively counseled the children. Thus, the State's evidence consisted of the testimony of highly qualified experts who were intimately familiar with each of their child patients.

inafter Graham, The Confrontation Clause]; Graham, Indicia of Reliability, supra note 48, at 83-84, 95.


81. See, e.g., VT. R. EVID. 807(c), (f); VA. CODE ANN. § 18.2-67.9.B.2 (Michie 1988).

82. Maryland v. Craig, 110 S. Ct. 3157, 3169 (1990). Several pre-Craig courts had ruled otherwise, holding that a hearing was not necessary to establish the requisite finding of trauma. See, e.g., People v. Schmitt, 204 Ill. App. 3d 827, 825-26, 562 N.E.2d 377, 382 (App. Ct. 1990) ("[T]he statute does not require a hearing to determine whether the best interest of the child would be served by allowing him to testify via closed-circuit television. . . . [T]he representations of the prosecutor to the court provided a sufficient basis for the finding of the court."), appeal denied, 137 Ill. 2d 670, 571 N.E.2d 154 (1991); State v. Daniels, 484 So. 2d 941, 943 (La. Ct. App. 1986) ("The procedure as enacted does not require an evidentiary hearing."); People v. Cintron, 75 N.Y.2d 249, 265, 551 N.E.2d 561, 571, 552 N.Y.S.2d 68, 78 (1990) ("[T]he statute does not specify that a hearing is required. . . . But given the high threshold established by the statute for the protection of a defendant's confrontational rights, an article 65 order will ordinarily require testimony in a hearing . . . "). The Maryland statute under review in Craig also did not explicitly require a hearing.

83. Brief for Petitioner at 5, 7, Craig (No. 89-478). "Ms. Burke held a Bachelor's Degree in Child Behavior and Development and a Master's Degree in Counseling Psychology and Human Development. She had been working full time with abused children since 1981, providing victims and their families with counseling and support services." Id. at 5 n.5 (citation omitted). "Dr. Sweeney held a Ph.D. in Counseling Psychology and a Master's Degree in Rehabilitation Counseling. She was formerly a faculty member of the Johns Hopkins School of Medicine's Department of Child Psychiatry." Id. at 7 n.8 (citation omitted).

84. Id. at 5-8.
Craig left two questions open: Is expert opinion necessary? And if not, who else may render an opinion on the needs of a particular child? The state of Oregon, for example, specifically provides by statute that proof of trauma must be shown by expert testimony.\(^8\) Other statutes identify expert testimony as one method, among others, of demonstrating the requisite trauma.\(^8\) Moreover, statutory law regarding the role of expert testimony is complemented (or perhaps complicated) by decisional law. Some courts have concluded that expert testimony is not necessary;\(^8\) others, that it may be necessary.\(^8\) In the vast majority of cases, however, expert testimony is presented.\(^8\)

Despite this trend, some courts also look to a few other sources, such as parents and grandparents, in determining if the requisite showing is made.\(^9\) The American Psychological Association believes that scien-


\(^{86}\) See, e.g., 18 U.S.C.A. § 3509(b)(i)(B)-(ii) (West Supp. 1991) (expressly requiring expert testimony to establish a substantial likelihood of emotional trauma from testifying, but not requiring expert testimony to establish the child's inability to testify because of "fear"); COLO. REV. STAT. ANN. § 18-3-413(3) (West 1990) ("Such finding shall be based on, but not be limited to, recommendations from the child's therapist or any other person having direct contact with the child . . . ."); IND. CODE ANN. § 35-37-4-8(e)(1)(B)(ii) (Burns Supp. 1991) (allowing the testimony of a physician or psychologist to establish a substantial likelihood of emotional or mental harm from testifying, and alternatively allowing "evidence" of the effect upon the child of testifying in court); N.Y. CRIM. PROC. LAW § 65.20.7(a) (McKinney Supp. 1992) ("any physician, psychologist, nurse or social worker who has treated a child witness may testify"); VA. CODE ANN. § 18.2-67.9.B (Michie 1988) (expressly requiring expert testimony to establish a substantial likelihood of severe emotional trauma from testifying, but not requiring expert testimony to establish the child's substantial inability to communicate about the offense).


\(^{88}\) See, e.g., State v. Conklin, 444 N.W.2d 268, 274 (Minn. 1989) (expert testimony "may be necessary where the cause of the child's testimonial difficulties and trauma is not clear"); State v. Sorensen, 152 Wis. 2d 471, 486, 449 N.W.2d 280, 286 (1989) (medical basis necessary "absent a disabling emotional breakdown on the stand").

\(^{89}\) See, e.g., Thomas v. People, 803 P.2d 144, 149 (Colo. 1990) (experts who had interviewed the children); Leggett v. State, 565 So. 2d 315, 316-17 (Fla. 1990) ("a licensed, well-trained, and experienced clinical social worker who had counseled the child at weekly intervals for more than a year"); State v. Albert, 13 Kan. App. 2d 671, 672-73, 778 P.2d 386, 387 (Cr. App. 1989) (a clinical social worker who counseled the child); State v. Twist, 528 A.2d 1250, 1253 (Me. 1987) (The state presented the testimony of the children's foster parent, who was a medical doctor and a qualified expert in the field of pediatric psychiatry.); People v. Guce, 164 A.D.2d 946, 947-48, 560 N.Y.S.2d 53, 56 (App. Div.) ("a certified social worker who specialized in working with sexually abused children and their families"), appeal denied. 76 N.Y.2d 986, 564 N.E.2d 524, 563 N.Y.S.2d 775 (1990); State v. Self, 56 Ohio St. 3d 73, 74, 564 N.E.2d 446, 448 (1990) (the child's psychotherapist); State v. Taylor, 562 A.2d 445, 450 (R.I. 1989) ("Both the State's expert and the defense's expert performed a psychological examination of Sally.").

\(^{90}\) See, e.g., McGuire v. State, 288 Ark. 388, 391, 706 S.W.2d 360, 361 (1986) (The
scientific knowledge of child abuse dynamics can adequately inform a determination of the need to shield a particular child witness.\textsuperscript{91} It concedes, however, that the testimony of an expert witness might appropriately be "bolstered" with testimony from parents, teachers, or others who have had an opportunity to observe the child.\textsuperscript{92}

Other related issues include whether to use court-appointed experts and whether to allow defense experts to have access to the child witness for purposes of psychological or psychiatric examination.\textsuperscript{93} On the one hand, the Nebraska statute provides that "[t]he court may order an independent examination by a psychologist or psychiatrist if the defense requests the opportunity to rebut" the prosecution's showing of necessity.\textsuperscript{94} On the other hand, New York's law states that the child may not be compelled to submit to a psychological or psychiatric examination.\textsuperscript{95} It would seem, however, that in order for the defense to counter the prosecution's showing—which typically will rely on expert evaluation of the child—the defense may need to have its own expert evaluate the child.

\textsuperscript{91} See Brief for Amicus Curiae American Psychological Association in Support of Neither Party at 17, Maryland v. Craig, 110 S. Ct. 3157 (1990) (No. 89-478). The APA's amicus brief in \textit{Craig} identifies four relevant factors: traumatic sexualization (whether the abuse involved the use of force); betrayal (whether the child was vitally dependent on the alleged abuser); powerlessness (whether and how the child was coerced or manipulated); and stigmatization (whether the child experienced shame and guilt about the abuse). \textit{Id.} at 15-16.

\textsuperscript{92} \textit{Id.} at 17.

\textsuperscript{93} See, e.g., State v. McCutcheon, 234 N.J. Super. 434, 443, 560 A.2d 1303, 1308 (Super. Ct. Law Div. 1988) (Because it did not find the prosecution's expert testimony to be "particularly conclusive," the court ordered that the child be evaluated by a psychiatrist.); State v. Taylor, 562 A.2d 445, 450 (R.I. 1989) (Both the state's expert and the defense's expert performed a psychological examination of the child. The state presented Dr. Barry Nurcombe, M.D. Although the child did meet with a defense psychiatrist, his or her testimony was not presented.). But see, e.g., Gilpin v. McCormick, 921 F.2d 928, 931 (9th Cir. 1990) (A victim or witness may volunteer to be examined by a psychiatrist for the state, but "since the state does not possess the authority to compel examination, the defense lacks no reciprocal authority, and there [is] no denial of due process.").

\textsuperscript{94} \textsc{Neb. Rev. Stat.} § 29-1926(9) (1989).

\textsuperscript{95} \textsc{N.Y. Crim. Proc. Law} § 65.20.6 (McKinney Supp. 1992).
Moreover, to the extent that the prosecution's expert witness has also been in a therapeutic or other relationship with the child, his or her testimony may be biased. Indeed, therapy for suspected child abuse victims is typically "feeling-expressive . . . [and] may well have the effect of teaching a child to be afraid of a defendant." This sort of therapy often entails "talking about how bad the defendant is, hitting a bobo doll identified as the defendant, drawing pictures of the defendant and burning them, making clay figures of the defendant and putting them in jail, or throwing darts at a picture of the defendant." This type of therapy may engender bias in the therapist who later serves as his or her client's expert witness, giving rise to the need for a neutral or defense-retained expert.

Craig also did not discuss the standard of proof to be applied. Seven state statutes, however, do include standard of proof provisions. Five of these require the judge to apply a "clear and convincing" evidence standard, while two call for a "preponderance" of the evidence standard. Most statutes do not explicitly provide for a standard of proof, but some require a showing of "substantial likelihood" of harm, and at least one

96. See, e.g., State v. Self, 56 Ohio St. 3d 73, 80, 546 N.E.2d 446, 454 (1990) (Appellee argued that the expert's testimony was not credible due to bias caused by her "therapeutic relationship" with the child and further argued that the court should have appointed an independent expert to evaluate the child.).


98. Id. at 23.


101. See, e.g., 18 U.S.C.A. § 3509(b)(1)(B)(i)-(ii) (West Supp. 1991) (requiring "a substantial likelihood, as established by expert testimony," of "emotional trauma," but setting no standard for a court's finding that "fear" prevents the child from testifying); FLA. STAT. ANN. §§ 92.53(1), 92.54(1) (West Supp. 1992) ("a substantial likelihood" of "at least moderate emotional or mental harm"); IND. CODE ANN. § 35-37-4-8(e)(1)(B)(i), (ii) (Burns Supp. 1991) (either an expert has certified or a court finds it more likely than not that there is "a substantial likelihood of emotional or mental harm"); MISS. CODE ANN. § 13-1-405(4) (Supp. 1991) ("a substantial likelihood of traumatic emotional or mental distress"); N.J. STAT. ANN. § 2A:84A-32.4.b (West Supp. 1990) ("An order under this section may be made only if the court finds that the witness is 16 years of age or younger and that there is a substantial likelihood that the witness would suffer severe emotional or mental distress . . . ."); OHIO REV. CODE ANN. § 2907.41(E)(3) (Anderson 1987) (a "substantial likelihood that the child victim will suffer serious emotional trauma"); OR. REV. STAT. § 40.460(24) (Supp. 1990) (a "substantial likelihood, established by expert testimony, that the child will suffer severe emotional trauma"); Va. Code Ann. § 18.2-67.9.B.3 (Michie 1988) (a "substantial likelihood, based on expert opinion testimony, that the child will suffer severe
court has concluded that such language (and other language of similar strength) requires "clear and convincing" evidence. Another state court has concluded that testimony could be taken outside the presence of the jury (but in the presence of the defendant) only where the requisite showing was made beyond a reasonable doubt.

In conclusion, by leaving open a number of practical issues, Craig creates uncertainty as to when special testimonial procedures are appropriate. What kind and amount of trauma is necessary before special procedures are invoked? Is psychological harm to the child sufficient, or does the harm have to impair the child's ability to communicate? How convinced must the court be of the requisite harm to the child? Should expert testimony be required? Is predictive evidence of a child's trauma advisable, or would actual confrontation with the defendant be a more appropriate means of determining whether special testimonial procedures are necessary?

Underlying all of these issues is the fundamental matter of whether the purposes of the Confrontation Clause can be served through special testimonial procedures. Central to this concern is whether the Court was correct in relying on social science literature to support the proposition that truth-seeking is better advanced by shielding the child witness than by requiring the child to testify in a confrontational setting. Accordingly, Part II discusses the role of social science in shaping the law of confrontation in child abuse cases. It is also essential to analyze what the loss of physical confrontation through the use of one-way closed circuit television means to the defendant at trial and to the jury that must assess the evidence. Part III therefore illustrates the problems associated with compromising physical confrontation, including the possibility that the seemingly narrow exception for children will lead to exceptions for adults.

emotional trauma"); WASH. REV. CODE ANN. § 9A.44.150(1)(c) (West Supp. 1991) (court may make order if it finds by "substantial evidence" that requiring the child to testify in the presence of the defendant will cause the child to suffer "serious" emotional or mental distress).

102. In State ex rel. B.F., 230 N.J. Super. 153, 553 A.2d 40 (Super. Ct. App. Div. 1989), the court held that where the defendant objects to the alternative statutory procedure, the party seeking the statutory alternative should carry the burden of satisfying the statutory criteria by "clear and convincing" evidence. We hold that this conclusion necessarily follows because of the importance historically attached to face-to-face confrontation as documented by Justice Scalia in Coy, as well as by reason of the Legislature's use of language . . . .

Id. at 159, 553 A.2d at 43. See also State v. Taylor, 562 A.2d 445, 453 (R.I. 1989) ("Because the right to be physically present during the victim's testimony is a core value under the Confrontation Clause of the Rhode Island Constitution, . . . [the harm] must be shown by clear and convincing evidence.").

in various situations, and the impact that compromise will have on both the defendant's ability to defend and the reliability of jury verdicts—even if the compromise of physical confrontation is limited to cases where children are witnesses.

II. The Reliability of the Social Science Evidence

... then we will no longer be infants tossed back and forth by the waves and blown here and there by every wind of teaching and by the cunning and craftiness of men and their deceitful scheming.

Ephesians 4:14

Craig is not the only Supreme Court case to appeal to social science evidence on the matter of protective child witness procedures. In Globe Newspaper Co. v. Superior Court, the Court reviewed a Massachusetts statute requiring the exclusion of the press and general public from the courtroom during the testimony of child victims of sexual abuse. One of the Commonwealth's asserted interests in Globe was to encourage minor victims of sex crimes to come forward and provide accurate testimony. The Court rejected this assertion:

The Commonwealth has offered no empirical support for the claim that the rule of automatic closure ... will lead to an increase in the number of minor sex victims coming forward and cooperating with state authorities. Not only is the claim speculative in empirical terms, but it is also open to serious question as a matter of logic and common sense.

Most modern scholars would agree that some reliance on empirical evidence is inevitable and necessary in constitutional law. When and to what degree such reliance is justified is a different question. The Craig

105. Id. at 609.
106. Id. at 609-10 (footnote omitted).
107. See, e.g., David L. Faigman, "Normative Constitutional Fact-Finding": Exploring the Empirical Component of Constitutional Interpretation, 139 U. PA. L. REV. 541, 612 (1991) ("[E]mpirical research compels the Court to face up to the ramifications of its constitutional law-making."); Kenneth L. Karst, Legislative Facts in Constitutional Litigation, 1960 SUP. CT. REV. 75, 100 (In the seminal article on the subject, Professor Karst notes: "When the judge must make a decision 'about scientific or social processes' he [or she] needs expert help.") (footnote omitted); John Monahan & Laurens Walker, Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law, 134 U. PA. L. REV. 477, 477 (1986) ("Once heretical, the belief that empirical studies can influence the content of legal doctrine is now one of the few points of general agreement among jurists."); Rachel N. Pine, Speculation and Reality: The Role of Facts in Judicial Protection of Fundamental Rights, 136 U. PA. L. REV. 655, 657 (1988) ("[S]tandards of constitutionality should be informed by empirical truth . . .."); Fred C. Zacharias, Rethinking Confidentiality II: Is Confidentiality Constitutional?, 75 IOWA L. REV. 601, 602 (1990) (Based on a survey of lawyers and clients, the author advocates further empirical study of the rationales for confidentiality.).
Court relied on social science findings in concluding that shielding child witnesses may further truth-seeking better than physical confrontation. We must ask: When is it appropriate to rely on specific empirical evidence, and in particular, was the Craig Court’s reliance on the social science evidence justified? Only to the extent that we have confidence in the social science data on child witnesses can we have confidence in the shielding procedures developed from that data.

Some social science evidence suggests that a child’s ability to testify may be impaired by the traditional courtroom setting. For instance, in reporting the results of a study that examined the effects of criminal court testimony on a sample of 218 alleged child sexual assault victims, psychologist and child witness advocate Gail S. Goodman observed:

"Children’s attitudes about testifying in front of the defendant were reliably associated with their ability to answer the prosecutors' questions . . . and to provide a detailed response when they did answer . . . . The children who were most upset about testifying in front of the defendant had a more difficult time answering the prosecutors' questions."

Other studies have resulted in similar observations. In a Michigan study involving seventeen girls and twenty boys between the ages of seven and nine, the children watched a simulated father-daughter confrontation on videotape. Half the children were questioned by an unfamiliar male interviewer in a private setting. The other half were questioned by two “attorneys” in a courtroom. A “judge” presided over the proceedings, and the ill-tempered father in the videotape sat at counsel’s table.

The results, which either indicated a trend toward, or actually attained statistical significance, indicated that, compared to children in a courtroom, children in a small room tend to (1) relate more central
items in free recall; (2) answer specific questions correctly more often; and (3) say "I don't know" or give no answer when asked specific questions significantly less often.\textsuperscript{112}

Along the same vein, a study by Douglas P. Peters concluded that "child witness-defendant confrontations can have a substantial negative effect on the child's ability or willingness to be accurate."\textsuperscript{113} Half the children in this study witnessed a simulated theft of money and, to identify the perpetrator, later viewed either a photograph lineup or a live lineup.\textsuperscript{114} The responses of children who viewed a target-present photograph lineup were seventy-five percent correct, and eight percent were false non-identifications (that is, the child incorrectly asserted that the "thief" was not in the lineup).\textsuperscript{115} The responses of children who viewed a target-present live lineup were thirty-three percent correct, and fifty-eight percent were false non-identifications.\textsuperscript{116} These studies suggest that live, in-court testimony by children in the defendant's presence may be unreliable because such presence may impair the child's ability to communicate and promote inaccurate testimony.

Empirical data is seductive because it holds the promise of objective truth. Relying on particular social science evidence to shape the law of confrontation may nevertheless be inappropriate for at least four reasons: The data may lack ecological validity; the leading experts may disagree on the conclusions that can be drawn from the data; the scientist may lack objectivity; and the research may fail to answer significant, relevant questions.

\textsuperscript{112} Id. at 814-15 (footnotes omitted). Again, the significance of these findings is unclear. Craig, however, is clear that shielding the child witness from the defendant will not be allowed unless the defendant's presence causes the trauma. Although we can be sure that the children in the small room were testifying more accurately than those in the courtroom because their testimony can be compared to the film, we cannot be sure which courtroom variable impaired the children's ability to communicate. The presence in the courtroom of the ill-tempered father from the film may have impaired the testimony of some, but the physical setting of the courtroom and the presence of a judge and lawyers may have made the difference for others.


\textsuperscript{114} Id. at 68.

\textsuperscript{115} Id. at 69.

\textsuperscript{116} Id. The study is particularly interesting for two reasons: We can be sure which children were reporting more accurately because their reports can be compared to the staged events; and the defendant's physical presence appears to be isolated as the controlling variable. However, the experiment does not provide the child witness with any motive to accuse falsely, so we do not know if the confrontational setting inhibits false reports as well as truthful reports. It is, nevertheless, interesting to note that there were fewer false identifications (where the child incorrectly asserted that the thief was in the lineup) when children viewed live lineups. Id. at 69.
First, the relevance of social science evidence depends on its ecological validity—the ability to generalize from the research context to conditions in the "real world." It has been argued that before research findings can appropriately be generalized to some real-world context, a comparison should demonstrate that the research context is the social, cognitive, and emotional equivalent of the real-world context.

For example, Gail Goodman has been critical of studies that purport to demonstrate the suggestibility of children in abuse investigations. She theorizes and attempts to demonstrate in her research that children are not suggestible when they are participants in activities of personal significance to them, such as traumatic experiences. Based on this hypothesis, Goodman has criticized experimentation that examines the suggestibility of children as spectators (i.e., where children were questioned after observing a film or staged event). Instead, Goodman devised experiments that examine children who are physically handled by others, sometimes under traumatic conditions, but in circumstances that better approximate child sexual abuse conditions. In one such experiment, the children were introduced to a male confederate with whom they engaged in the following activities: playing "Simon Says"


Moreover, in the quest for ecological validity, social scientists are bound by ethical considerations. For instance, although one theory suggests that children may be particularly subject to pressure from one parent to implicate the other parent in sexual abuse during divorce and custody proceedings, social scientists have concluded that it would be unethical to involve young children in a situation where they are encouraged to tell a lie by one of their parents. See, e.g., Jeffrey J. Haugaard et al., Children's Definitions of the Truth and Their Competency as Witnesses in Legal Proceedings, 15 LAW & HUM. BEHAV. 253, 269 (1991). Similarly, although crimes against children are often traumatic, it would be unethical to terrorize children for clinical purposes. Gail S. Goodman et al., Child Sexual and Physical Abuse: Children's Testimony, in CHILDREN'S EYEWITNESS MEMORY 1, 7 (Stephen J. Ceci et al. eds., 1987) [hereinafter Goodman et al., Child Sexual and Physical Abuse].


119. See Gail S. Goodman et al., Children's Concerns and Memory: Issues of Ecological Validity in the Study of Children's Eyewitness Testimony, in KNOWING AND REMEMBERING IN YOUNG CHILDREN 249 (Robyn Fivush & Judith A. Hudson eds., 1990) [hereinafter Goodman et al., Children's Concerns] (arguing that former research on children's testimony is likely to have underestimated the ability of children to provide accurate reports).

120. See id. at 258-67; Goodman et al., Child Sexual and Physical Abuse, supra note 117, at 12.

121. See Goodman et al., Children's Concerns, supra note 119, at 256-57.

122. See id. at 258-67, 271-77; Goodman et al., Child Sexual and Physical Abuse, supra note 117, at 11-19.
and in the course of the game touching each other's knees, dressing the child in a clown costume that was placed over the child's clothes, lifting the child onto a table and photographing the child, thumb wrestling, and playing a game that involved such actions as the child tickling the confederate. In other, more notable experiments, Goodman studied children following the more stressful experiences of having blood drawn and receiving inoculations.

With an eye toward finding false reports of abuse, the children were questioned about the events they had experienced at some point after each of the manipulations. In an effort to ensure ecological validity, an attempt was made to ask questions similar to those asked in abuse investigations. In the study where the children engaged in various activities with a male confederate, Goodman observed that the children "evidenced considerable accuracy in answering specific abuse questions and even in resisting strongly worded suggestions about actions associated with abuse." In those studies involving venipuncture and inoculations, Goodman observed that "across the studies, children never made up false stories of abuse even when asked questions that might foster such reports."

In yet another effort to achieve improved ecological validity, Karen Saywitz, Gail Goodman, and others conducted an experiment in which five- and seven-year-old girls received physical examinations. Midway through the exam, half of the children received genital and anal examinations, while the other half received examinations for scoliosis (curvature

123. Goodman et al., Children's Concerns, supra note 119, at 259-60.
124. Goodman et al., Child Sexual and Physical Abuse, supra note 117, at 12-19. The researchers did not impose the medical procedures on the children; rather, the children had been previously scheduled for the procedures. Id. at 12.
125. Id. at 13-16; Goodman et al., Children's Concerns, supra note 119, at 260.
126. Goodman et al., Child Sexual and Physical Abuse, supra note 117, at 9, 17; Goodman et al., Children's Concerns, supra note 119, at 260.
127. Goodman et al., Children's Concerns, supra note 119, at 266. The seven-year-olds answered 93% of the "abuse" questions correctly, and the four-year-olds answered 83% correctly. Id. at 262. "Commission" errors (saying that something occurred when it actually did not), as opposed to "omission" errors (neglecting to report something that did occur), were rare. Id. at 262-65.
128. Goodman et al., Child Sexual and Physical Abuse, supra note 117, at 18.
of the spine). These children also proved highly resistant to suggestive questioning.

Notwithstanding the noteworthy attempts at ecological validity represented in this research, psychologist Stephen Ceci cautions against taking the leap of faith and concluding that children simply do not lie about sexual abuse. Rather, Ceci argues that the research lacks ecological validity because the experiments do not provide the children with any motivation to lie. He writes:

Unlike the real world of sexual abuse, there are no motives at work in these studies that could prompt children to commit errors, that is no inducements, bribes, threats, or worries. What then do these studies tell us about children's suggestibility? It seems that the message is a clear and potentially important one: children may be resistant to misleading questions when there is no motivation to distort the truth, and when the truth is less threatening than a distortion.

Ceci's research examines specifically what might motivate children to lie. In one case study involving three- to four-year-old children, several researchers cultivated close relationships with the children over a period of twenty hours. The children were then included in several experiments exploring distinct motivations. The first experiment explored the motivation to protect a loved one. There the beloved researcher pretends to break a forbidden toy and exclaims, "I hope I don't get into trouble!" The second experiment explored the motivation to lie for personal aggrandizement. In this manipulation, the beloved researcher asks the child to pick up some building blocks and then leaves. During her absence, another person enters the room and picks up all the blocks. The child is subsequently informed that whoever picked up the

130. Id. at 3.
131. Id. at 8-9. Three children in the scoliosis condition falsely claimed that the doctor had touched their genitals or buttocks. Although two of them could not provide details on further questioning, one child described being touched on the buttocks with "a long stick," noting that "it tickled." Id. at 8. This false-positive report demonstrates that suggestive questioning can lead to false allegations of the sort that may prompt a child abuse investigation.
132. See Stephen J. Ceci et al., The Suggestibility of Children's Recollections, in CHILD ABUSE, CHILD DEVELOPMENT, AND SOCIAL POLICY (Dante Cicchetti & Sheree Toth eds., forthcoming 1993) (manuscript at 4-5, on file with the Hastings Law Journal) [hereinafter Ceci et al., Suggestibility].
133. Id. (manuscript at 4-5, 9). Goodman concedes as much when she notes, "the children had no reason to lie to us as they might if they were trying to protect a loved one." Goodman et al., Children's Concerns, supra note 119, at 280, and, it might be added, if they had been coached by a malevolent loved one. See also Saywitz et al., supra note 129, at 9 ("Although this study is an attempt at ecological validity . . . children in the scoliosis condition did not have a motive to lie to the interviewer.").
134. Ceci et al., Suggestibility, supra note 132 (manuscript at 9).
135. Id. (manuscript at 19).
blocks will receive a prize. In the third experiment, the motivation to sustain a game is explored. The beloved researcher pretends to find a watch and tells the child that they are going to play a secret game of hiding the watch from its owner. The fourth experiment explored the desire to avoid embarrassment. In this manipulation, the children were kissed by a parent while they were bathed and dressed. The next day, the children were informed that it was very bad to let someone kiss them when they were naked. They were later told that it was not bad to be kissed by a parent. In a second case study involving a larger group of nursery school children, the children played musical chairs and hot potato. During the experiment, which was designed to explore lying for personal aggrandizement and lying to protect a loved one, a researcher who had developed an affectionate bond with most of the children pretended to break the tape recorder that was required to play the games.136

Following the various experiments in both studies, the children were questioned about what had transpired.137 Ceci acknowledged that none of the experiments "were even remotely reminiscent of the powerful emotional and material pressures which are often placed on children who testify in court proceedings."138 He nevertheless concluded that "children will indeed consciously and willingly distort the truth, given the proper motivations."139 In fact, over fifty percent of the nursery school children lied to obtain a gumball.140
This examination of Goodman's and Ceci's research demonstrates that the ability of social science to tell us about the real world, including the world of child witnesses, may be limited. Its value will depend on the ability of researchers to approximate the various dimensions of the real-world context in their experiments, because the data may turn on which real-world variables are manipulated and which ignored. Douglas Peters, for instance, obtained startling results about the way child witnesses reacted to being confronted with the "thief" in his experiment.\textsuperscript{141} It might be argued on the basis of Peters' results that child witnesses must be shielded from criminal defendants because a confrontational setting significantly increases the likelihood that a child witness will fail to accuse the criminal. However, without more it may be inappropriate to draw that conclusion, because the confrontational setting in the experiment cannot be compared to a courtroom setting. In the study, children who witnessed the simulated theft were presented with five lineup suspects or five color photos only two minutes after the "theft."\textsuperscript{142} This obviously was a highly stressful situation. Court proceedings rarely, if ever, follow a crime report this quickly. Usually days and maybe even weeks intervene between a crime report and a court proceeding. Moreover, the protective trappings of a traditional courtroom—such as the presence of a judge and bailiff and the furniture that normally separates a witness from the other courtroom players—apparently were not duplicated in this experiment, and the child witnesses certainly did not enjoy the benefit of any witness preparation in the time between observing the simulated theft and being confronted with the "thief."

A second reason why it may be inappropriate to rely on particular social science evidence in shaping confrontation is that its relevance also turns on there being a consensus among the experts.\textsuperscript{143} It is particularly striking that two respected social scientists in the field of developmental psychology could reach seemingly opposite conclusions: Goodman, that children generally will not make false reports of sexual abuse;\textsuperscript{144} and

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\textsuperscript{141} See supra notes 113-116 and accompanying text.
\textsuperscript{142} Peters, supra note 113, at 68.
\textsuperscript{143} See J. Alexander Tanford, The Limits of a Scientific Jurisprudence: The Supreme Court and Psychology, 66 IND. L.J. 137, 144, 167 (1990) (criticizing the Supreme Court's failure to assimilate social science evidence, but the analysis assumes that the evidence to be assimilated is supported by a consensus of expert opinion). But cf. Paul C. Giannelli, The Admissibility of Novel Scientific Evidence: Frye v. United States, a Half-Century Later, 80 COLUM. L. REV. 1197, 1250 (1980) (arguing that the requirement of Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), that novel scientific techniques be generally accepted by the relevant scientific community, is an unworkable standard).
\textsuperscript{144} Gail S. Goodman & Alison Clarke-Stewart, Suggestibility in Children's Testimony: Implications for Sexual Abuse Investigations, in The Suggestibility of Children's Recol-
Ceci, that “children often will lie when the motivational structure is tilted toward lying.”

Under the circumstances, it is no wonder that the Craig Court divided over the import of the social science literature. The Craig majority observed:

To be sure, face-to-face confrontation may be said to cause trauma for the very purpose of eliciting truth . . . [but] where face-to-face confrontation causes significant emotional distress in a child witness, there is evidence that such confrontation would in fact disserve the Confrontation Clause’s truth-seeking goal.

Just as assuredly the dissent responded:

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

The Craig Court acknowledged the role of social science in informing the debate over the need to protect children as witnesses, but ignored the debates raging within the social science community. Interestingly, the Court specifically relied upon the American Psychological Association’s (APA’s) amicus brief, purportedly submitted in support of neither party and co-authored by Gail Goodman. Not surprisingly, that brief did not represent a consensus of the social science community, as evidenced by the submission of another amicus brief by the Institute for Psychological Therapies. This latter brief charged that the APA brief presented “a pattern of selective citation and selective reporting that requires caution and wariness.” The brief also argued that because the linchpin of the APA brief was an unpublished study—also written by Gail Goodman—the greater social science community had had little opportunity to evaluate its conclusions.

A third reason why it may be inappropriate to rely on particular social science evidence in shaping confrontation springs from the difficulty of separating any bias from the science. Science—with its connota-

145. Ceci et al., Suggestibility, supra note 132 (manuscript at 24).
147. Id. at 3175 (Scalia, J., dissenting).
148. See id. at 3168-69.
149. See Brief of Amicus Curiae Institute for Psychological Therapies in Support of Sandra Ann Craig, Respondent, Craig (No. 89-478).
150. Id. at 20.
151. Id. at 8.
tions of objectivity and accuracy—is the perfect mask for an agenda.\textsuperscript{152} Indeed, in a scathing indictment of the social science community, Ceci observed that modern research on child witnesses suffers from a lack of effort on the part of investigators to disconfirm their own hypotheses—in part because of their strong advocacy positions. Science is best conceptualized as "proof by disproof," meaning that scientists have a responsibility to attempt to disprove alternative hypotheses, rather than to exclusively amass data consistent with their own pet theories. The latter tendency has, unfortunately been the modus operandi in this politically charged arena in which scientific findings have a way of turning up in newspapers and congressional hearings with great rapidity.\textsuperscript{153}

Of course, the social science community is not alone in yielding to the emotionality of the issues. Lawyers, judges, and legislators are similarly affected,\textsuperscript{154} and all thus contribute to a recipe for hasty and deceptively attractive remedies.

To illustrate, advocacy is evident in Gail Goodman's work.\textsuperscript{155} She writes that "[t]he fields of psychology and law share, in principle, at least one common goal—to find the truth about social events."\textsuperscript{156} Given that goal, she proposes shielding child witnesses from the adversary system.\textsuperscript{157} Her justification for shielding the child is that "children may be more easily confused than adults and may consequently suffer a loss

\textsuperscript{152} See Karst, supra note 107, at 105 ("When experts help the courts make policy, they are not likely to shed their attitudes on the ultimate policy issues."). One observer has attempted to minimize the role of bias in scientific inquiries, arguing that science is concerned with the advancement of knowledge generally, regardless of whether any group, other than science itself, benefits from it. Although individual scientists may be motivated by personal interests in fame, fortune, funding, or politics, these interests are largely filtered out by institutionalized procedures that reasonably assure objectivity and unbiased interpretation of data. Tanford, supra note 143, at 158-59 (footnote omitted).

\textsuperscript{153} Ceci et al., Suggestibility, supra note 132 (manuscript at 5) (citation omitted).

\textsuperscript{154} See, e.g., Maryland v. Craig, 110 S. Ct. 3157, 3172 (1990) (Scalia, J., dissenting) ("[T]he Constitution is meant to protect against, rather than conform to, current 'widespread belief' . . . ."); Long v. State, 742 S.W.2d 302, 324 (Tex. Crim. App. 1987) ("This area of the law is dominated by emotion, which is understandable in light of the interests society wants to protect—abused children. But . . . of greater concern should be the adherence to our constitutional rights. We cannot ever permit emotion-charged issues to erode our fundamental liberties.").

\textsuperscript{155} The charge of advocacy could be hurled at any number of social scientists on all sides of the child witness debate. Goodman is used as an example here, not because her work stands alone in its inclination towards advocacy or her advocacy is particularly egregious, but because the influence of her work in the public policy arena is probably unrivaled. See, e.g., supra text accompanying notes 56, 148.


\textsuperscript{157} Goodman & Helgeson, Child Sexual Assault, supra note 56, at 204-05.
of confidence ... plac[ing] them at a disadvantage within the adversary system. Jurors tend to believe witnesses who are confident and do not appear confused.”

The truth justification, however, seems insincere when we consider Goodman’s further observation that “the child’s perceived confidence correlated significantly with the child’s perceived credibility ... and with the jurors’ impressions of the defendant’s guilt ... . In reality, however, the children’s perceived confidence and their accuracy in answering the attorneys’ questions were not reliably related ... .” Thus, Goodman advocates shielding child witnesses so that they may project more confidence in their testimony, yet she acknowledges that this confidence is misleading to jurors. How this furthers truth is not clear. How it furthers the conviction rate is.

Finally and most importantly, it is inappropriate to rely on particular social science evidence when any reliance is premature because critical questions remain unanswered. For instance, the issue of whether children will falsely report abuse has received much debate. If they do not falsely report, then arguably the Confrontation Clause can be compromised to allow shielded testimony. Nevertheless, one cannot reasonably contend that children never make false reports of abuse. The better question is: When do children falsely report abuse? We also need to know if and when physical confrontation deters the lying or otherwise misreporting child, and if and when shielding facilitates false reporting by providing the child with a relatively informal and relaxed atmosphere in which to relate any untruth. The APA brief in Craig conceded that critical research on these issues remains incomplete.

The constitutional guarantee of a face-to-face meeting is entitled to a presumption of validity that should be disproved before we dispense with
it. If physical confrontation prevents false positives (allegations) as well as false negatives (recantations and stymied deliveries), it may be necessary to rethink the appropriateness of shielding child witnesses. Until it is proved that physical confrontation has no value in promoting its truth-seeking goal when children are witnesses, caution is warranted in shielding child witnesses—at least when the circumstances surrounding the allegations of abuse are known to foster inaccurate reporting. These issues are important because the Craig Court’s emphasis on assuring the truth-seeking goal of confrontation surely should benefit the defense at least as much as the prosecution.

There is undoubtedly a place for social science in shaping constitutional law. But while “scientific truth . . . must come about by controversy,”¹⁶³ the Constitution may require something more. If anything, the limitations on ecological validity, the divergence of scientific opinion, the emotionality of the issues, and the unresolved but critical questions in child witness research all indicate that Craig was at best premature and make clear the need for courts and legislatures to proceed with restraint.¹⁶⁴

III. The Compromise of Physical Confrontation

It is not the manner of the Romans to deliver any man up to die before the accused has met his accusers face to face, and has been given a chance to defend himself against the charges.

Acts 25:16

Only to the extent that we can appreciate the benefits of physical confrontation and the possible consequences of its compromise can we establish informed and meaningful procedural standards for shielding child witnesses. Prior to Coy and Craig, the Court’s Confrontation Clause analysis focused on the admission of hearsay statements¹⁶⁵ and

¹⁶⁴. Cf John F. Wigmore, Professor Muensterberg and the Psychology of Testimony, 3 ILL. L. REV. 399 (1909) (an amusing criticism of applying social science developments to the law).
¹⁶⁵. See, e.g., Mattox v. United States, 156 U.S. 237 (1895). In Mattox, [u]pon the trial it was shown by the government that two of its witnesses on the former trial . . . had since died, whereupon a transcribed copy of the reporter’s stenographic notes of their testimony upon such trial, supported by his testimony that it was correct, was admitted to be read in evidence, and constituted the strongest proof against the accused.

Id. at 240. The Court reasoned that “[t]he substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination.” Id. at 244.
other restrictions on cross-examination, and not specifically on the element of a face-to-face meeting. Still, the cases are replete with remarks to the effect that the Clause embodies the feature of physical confrontation. To be sure, the hearsay cases implicate physical confrontation because the hearsay declarant typically does not testify at trial. Nevertheless, it seems that because the person who transmits the hearsay statement does stand face-to-face with the defendant, the value of physical confrontation (as opposed to cross-examination) did not crystallize until special testimonial procedures were implemented specifically to shield child witnesses from defendants.

Once the precise issue of physical confrontation came into focus in Coy, the Court did not hesitate to acknowledge its significance. The Court observed:

It is always more difficult to tell a lie about a person "to his face" than "behind his back." In the former context, even if the lie is told, it will often be told less convincingly. . . . [F]ace-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult.

166. See, e.g., Davis v. Alaska, 415 U.S. 308 (1973). In Davis, the Court stated that the right of confrontation is paramount to the State's policy of protecting a juvenile offender. Whatever temporary embarrassment might result to Green or his family by disclosure of his juvenile record—if the prosecution insisted on using him to make its case—is outweighed by petitioner's right to probe into the influence of possible bias in the testimony of a crucial identification witness.

Id. at 319.

167. See, e.g., Pennsylvania v. Ritchie, 480 U.S. 39, 51 (1987) ("The Confrontation Clause provides two types of protections for a criminal defendant: the right physically to face those who testify against him, and the right to conduct cross-examination."); California v. Green, 399 U.S. 149, 157 (1970) ("[T]he privilege to confront one's accusers and cross-examine them face to face is assured to a defendant by the Sixth Amendment . . . ."); Snyder v. Massachusetts, 291 U.S. 97, 106 (1933) ("[T]he privilege to confront one's accusers and cross-examine them face to face is assured to a defendant by the Sixth Amendment . . . .").

168. Coy v. Iowa, 487 U.S. 1012, 1024 (1988) (O'Connor, J., concurring). In his dissent in Craig, however, Justice Scalia asserted:

Much of the Court's opinion consists of applying to this case the mode of analysis we have used in the admission of hearsay evidence. The Sixth Amendment does not literally contain a prohibition upon such evidence, since it guarantees the defendant only the right to confront "the witnesses against him." . . . The phrase obviously refers to those who give testimony against the defendant at trial.


169. Although physical confrontation was distinctly at issue in the earlier case of Kentucky v. Stincer, 482 U.S. 730 (1987), the Court sidestepped the issue there because physical confrontation was denied only for purposes of the children's competency hearing and was otherwise enjoyed during the trial. Id. at 740-44.

In *Craig*, the Court reiterated that observation, but concluded that face-to-face confrontation was not an absolute right. The implications of compromising that right are discussed below in light of the Court's two-fold purpose: protecting children and furthering truth.

A. Carving Out A Narrow Exception

In *Craig*, the Court indicated that physical confrontation may be compromised only "in certain narrow circumstances." The Court carved out a narrow exception for protecting children, at least when it would serve the pursuit of truth. Nonetheless, a "slippery slope" problem is alive and well in this area. Children are different from adults, and those differences may necessitate the use of special procedures in certain cases. But adults differ from each other as well, and those differences may also compel the use of special procedures in certain cases. Indeed, the distinction between adult and child becomes blurred by statutes that protect teenagers.

As one scholar has observed:

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

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171. *Craig*, 110 S. Ct. at 3164.
172. *Id.* at 3163-66.
173. *Id.* at 3165.
174. *Id.* at 3167-70.
175. Apparently anticipating the argument that a change in confrontation law could open the floodgates, the American Psychological Association's brief in *Craig* made a point of distinguishing the type of harm a child may suffer as a result of testimonial stress from the type of harm an adult might suffer under the same circumstances. The APA wrote: "Stressors in childhood can slow the course of normal cognitive and emotional development such that stressed children do not advance at the same pace as their unstressed peers. Temporary development regressions may even appear. Although adults too may suffer distress from legal involvement, their development is more complete." Brief for Amicus Curiae American Psychological Association in Support of Neither Party at 7-8, *Craig* (No. 89-478).
could offer other equally compelling reasons for "excusing" confrontation, such as fear for the safety of witnesses who testify against defendants in drug cases, or in trials of terrorists or members of other violent organizations.\textsuperscript{177}

In fact, during oral argument in \textit{Coy}, the State conceded that the principle exempting child witnesses from physical confrontation also applied to other categories of witnesses.\textsuperscript{178} This is so because the state arguably has a compelling interest in protecting all crime victims, not just children, from trauma induced by testifying.\textsuperscript{179} Indeed, the Federal Victims' Rights and Restitution Act of 1990 cryptically provides that "[v]ictims of crime should be reasonably protected from the accused throughout the criminal justice process."\textsuperscript{180}

Providing protection for all crime victims—and not just children—from the trauma of testifying further compromises the confrontation right and creates mounting costs for the criminal justice system. Even if only those crime victims that received psychological or psychiatric counseling following the crime sought alternative testimonial procedures,\textsuperscript{181}
the expense to the system could be significant. These special testimonial procedures cost money and require the expenditure of human and other resources on hearings to determine the appropriateness of the alternative procedures.

In any event, Craig was concerned with something more than protecting witnesses from testimonial trauma. Craig recognized the state's interest in protecting children, and the law is replete with examples where we distinguish between children as children and adults in ways that we do not distinguish among adults. For example, we prohibit the sale of cigarettes and pornography to children but not to adults,\textsuperscript{182} even though age may not be a reliable predictor of maturity. Thus, there may be a ready-made case for drawing the line at children—who are after all a special class in the eyes of the law. There is every indication, however, that the line will be tested.\textsuperscript{183}

to depose Ms. Cady and ordered that the defendant be outside the vision of Ms. Cady. \textit{Id.} at 817. The subsequent conviction was reversed on appeal. \textit{Id.} at 822.

\textsuperscript{182} See, e.g., \textsc{Cal. Penal Code} §§ 308(a), 313.1(a) (West 1988) (regulating, respectively, cigarettes and pornography).

\textsuperscript{183} Indeed, various legislatures have already begun to extend the use of alternative testimonial procedures to other groups. In California, for instance, people under 16 years of age and people developmentally disabled as a result of mental retardation can have their preliminary hearing testimony recorded and preserved on video tape. \textsc{Cal. Penal Code} § 1346(a) (West Supp. 1992). Similarly, in Indiana, children under 14 years of age and mentally disabled individuals may be entitled to have their testimony videotaped for use at trial or transmitted to the courtroom by closed circuit television. \textsc{Ind. Code Ann.} § 35-37-4-6(b) (Burns Supp. 1991). And in Michigan, the same special testimonial procedures are available to children under 15 years of age and to any person 15 years of age or older with a developmental disability. \textsc{Mich. Comp. Laws Ann.} § 600.2163a(1)(b) (West Supp. 1991). The statute with the most expansive scope, however, is that of South Carolina, which provides: "\textsc{Victims and Witnesses Who Are Very Young, Elderly, Who Are Handicapped or Who Have Special Needs, Have a Right to Special Recognition and Attention by All Criminal Justice, Medical, and Social Service Agencies. The Court Shall Treat 'Special' Witnesses Sensitive, Using Closed or Taped Sessions When Appropriate.}" \textsc{S.C. Code Ann.} § 16-3-1530(G) (Law. Co-op. 1976 & Supp. 1989) (capitalization in original).

At least one court, however, has declined to extend the use of alternative testimonial procedures without precise statutory authority for the extension. In State v. Iowa District Court, 464 N.W.2d 244 (Iowa 1990), the court stated that:

Our statutory authority for sequestering witnesses is keyed to our statutory definition of "child." That definition sets the age parameters at "any person under the age of fourteen years." Two of the victim witnesses did not meet the statutory criterion, since they were fourteen and fifteen years old. . . . The State argues that the statute was designed to protect a child's mentality from the rigors of a courtroom experience. Because these children suffered from a mental disability, the State argues their chronological age is irrelevant, their functioning level was below normal, they functioned as children and are therefore covered by the spirit and intent of [the statute].
B. Retaining Reliability and Adversarial Testing

Even if Craig's exception to the Confrontation Clause remains confined to testimony by children, it has consequences for criminal child abuse proceedings. In Craig, the Court satisfied itself that the reliability of testimony by one-way closed circuit television is practically identical to that of in-court testimony, observing that "the presence of these other elements of confrontation—oath, cross-examination, and observation of the witness' demeanor—adequately ensures that the testimony [by one-way closed circuit television] is both reliable and subject to rigorous adversarial testing in a manner functionally equivalent to that accorded live, in-person testimony."\(^{184}\) The Court makes this bold assertion in part because testimony by one-way closed circuit television retains assurances of reliability and adversariness that are in many ways superior to those required for the admission of hearsay under the Clause.\(^{185}\) Indeed, when a hearsay declarant does not testify at trial but the declarant's statement is received into evidence, the oath, cross-examination, and the opportunity to observe the declarant's demeanor are absent. All three of these checks for truthfulness are present—albeit in modified form—with testimony by one-way closed circuit television.\(^{186}\) Nevertheless, the dif-

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\(^{184}\) Id. at 247. The appellate court therefore held that the trial court's sequestering of the defendant during the testimony of the witnesses was error as there was no statutory basis for it. Id.

\(^{185}\) See id. at 3167. The Court has nevertheless recognized that the Clause excludes some evidence that would otherwise be admissible under an exception to the hearsay rule. Maryland v. Craig, 110 S. Ct. 3157, 3166 (1990).

\(^{186}\) So is it anomalous that an out-of-court statement that falls within a firmly rooted hearsay exception is admissible without a showing of unavailability, White, 112 S. Ct. at 743, while the use of one-way closed circuit television requires a case-specific showing of necessity after Coy and Craig? Maybe not. The Court has made clear that the standards for the admission of out-of-court statements under the Clause are separate and distinct from the standards that govern in-court procedures once a witness is testifying. Id. at 743-44. Although it may be that firmly rooted hearsay exceptions enjoy "the weight accorded longstanding judicial and legislative experience in assessing the trustworthiness of certain types of out-of-court statements," White, 112 S. Ct. at 3147, shielded testimony is simply not well understood. To the extent that a lying or otherwise misreporting child is thereby equipped to testify confidently, it may be misleading to jurors. See supra text accompanying notes 156-159. In contrast, even a layperson understands that hearsay is inferior, secondhand information. See Peter Miene et al., Juror Decision Making and the Evaluation of Hearsay Evidence, 76 Minn. L. Rev. 683, 691-92 (1992) (a social science study demonstrating that jurors weigh eyewitness testimony more heavily than hearsay testimony in their verdict decisions). Several considerations may deter the prosecutor in child abuse trials from trying a defend-
ferences between live, in-court testimony and testimony delivered over a video monitor cannot be ignored, and those differences raise questions about how well truth-seeking is served when child witnesses are shielded.

(1) The Right to Present a Defense

Denying a criminal defendant physical confrontation by shielding the child witness may implicate the right to present a defense, compromising the reliability and adversarial nature of the proceedings. In ant on the basis of hearsay. First, the out-of-court statement must be complete enough to make out a prima facie case, and a child's out-of-court statement that "He touched my privates" may not be enough to demonstrate the element of penetration, for example. Second, even if the out-of-court statement is complete, the prosecution still has to prove the charges beyond a reasonable doubt. Placing the child on the stand may make for a much more compelling case. See Billie Wright Dziech & Charles B. Schudson, On Trial: America's Courts and Their Treatment of Sexually Abused Children 148 (1989).


The Court has previously considered the constitutionality of curtailing a defendant's right to present a defense. For example, in Rock v. Arkansas, 483 U.S. 44 (1987), the state court had excluded defendant's hypnotically refreshed testimony as unreliable per se. The Supreme Court held that "restrictions of a defendant's right to testify may not be arbitrary or disproportionate to the purposes they are designed to serve. In applying its evidentiary rules a State must evaluate whether the interests served by a rule justify the limitation imposed ...." Id. at 55-56. Similarly, in Washington v. Texas, 388 U.S. 14 (1967), a state statute prevented persons charged as principals, accomplices, or accessories in the same crime from being introduced as witnesses for one another. The Supreme Court held:

[T]he petitioner in this case was denied his right to have compulsory process for obtaining witnesses in his favor because the State arbitrarily denied him the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense.

Id. at 23. See generally Edward J. Imwinkelried, Exculpatory Evidence: The Accused's Constitutional Right to Introduce Favorable Evidence (1990) (exploring the constitutional right of criminal defendants to introduce favorable testimony).

188. It has been suggested that physical confrontation is dispensable if its only value to the defendant is intimidation of the child witness such that the child is rendered uncommunicative. See Commonwealth v. Willis, 716 S.W.2d 224, 230-31 (Ky. 1986); Catherine M. Mahady-Smith, Comment, The Young Victim as Witness for the Prosecution: Another Form of Abuse?, 89 DICK. L. REV. 721, 743 (1985) ("The accused hopes to capitalize on the inherent weaknesses of childhood and he relies on his presence and the system to intimidate the child witness into silence or anxiety-produced confusion."). But the defense is not necessarily interested in intimidating the child witness. For tactical reasons, the defense might actually stipulate to testimony by one-way closed circuit television if it has reason to believe that the witness is likely to break down and cry uncontrollably. What could be a stronger indictment against the defendant than the presentation of a child who is obviously terrified in the defendant's presence? In any event, that a child witness may be intimidated is not necessarily inappropriate; intimidation may induce truthfulness. Wildermuth v. State, 310 Md. 496, 518 n.8, 530 A.2d 275, 283 n.8 (1987).
United States v. Inadi, a case involving the admissibility of a co-conspirator's hearsay statement, the Supreme Court pronounced it significant that the defense was not harmed in any way by the admission of the out-of-court statement in the prosecution's case-in-chief, because the defense could still call the declarant as a witness in its own case. This scenario stands in sharp contrast to cases allowing testimony by one-way closed circuit television, because in those cases the child is effectively pronounced off-limits for purposes of physical confrontation (but not cross-examination). Once the prosecutor demonstrates that a child witness should be protected from physical confrontation during the prosecution's case, it is seemingly axiomatic that the child should also be shielded from physical confrontation during the defendant's case. Thus, the defendant is precluded from developing a defense based on a face-to-face meeting.

As much as the dissent in Coy attempted to trivialize the importance of physical confrontation, it conceded that denying confrontation could amount to a constitutionally questionable restriction of cross-examination when a defendant seeks to demonstrate that the victim cannot identify him or her. Though eyewitness identification was not an issue in Coy, consider a case where the child witness had observed the assailant, and the child's testimony is transmitted by one-way closed circuit television because the child might otherwise suffer some psychological harm or have difficulty testifying. The prosecutor connects the defendant to the crime by introducing incriminating physical evidence or by using another witness's testimony. Suppose further that had the child testified in the defendant's physical presence, the child's identification of the defendant would have been equivocal. This could be enough to raise a reasonable doubt, but the use of one-way closed circuit television would deny the jury the opportunity to consider the child's equivocation.

In cases where eyewitness identification is not an issue because the child is familiar with the alleged assailant, the defense may be denied the opportunity to explore the full range of credibility issues inasmuch as it cannot base any argument upon how the child responded to the defendant's presence. Assuming that the child responds favorably to the defendant, the defense may argue persuasively that actions speak louder than words.
than words, and that the child has been "brainwashed"—perhaps by a vindictive parent or a suggestive interviewer. The importance of this sort of demeanor evidence should not be underestimated. One example is the trial of Robert and Lois Bentz in Jordan, Minnesota, where there were widespread allegations of child sexual abuse. When their five-year-old son, Billy, who had been in foster care and therapy for months, was led into the courtroom by the prosecutor, "[h]e spied his parents, waved, smiled, and in a cheery voice called out, 'Hi Mom, Hi Dad!'" The jury in its role as judge of witness demeanor should have the opportunity to assess this sort of evidence.

_**State v. Sorenson**_ further illustrates the point. In _Sorenson_, the child complainant accused her uncle and her father of sexual assault. At the uncle's preliminary hearing, the child's testimony was videotaped, and the uncle agreed to be excluded from the courtroom during the child's testimony after the child identified him. At the uncle's trial, the court admitted the videotaped preliminary hearing testimony in lieu of the child's live testimony. At trial, defendant's counsel (who did not represent the defendant at the preliminary) argued to the jury that when L.S. first brought the sexual intercourse to the attention of the authorities, she falsely named her uncle as the perpetrator in order to protect her father, and when she later named her father, she was afraid or unwilling to change her statement about her uncle. Counsel could not cross-examine L.S. on the basis of that theory and the jury had only reports of witnesses that she feared defendant to test the theory. Yet her videotape disclosed no fear of defendant, and because L.S. was not present at the trial, it was impossible for the jury to observe her demeanor in his presence.

In other words, the uncle could not show that the child's demeanor was consistent with his theory of what occurred.

The opposite sort of demeanor evidence may also be persuasively argued by the defense. For instance, assume that a child who allegedly is the victim of abuse takes the stand. While on the stand, the child fidgets

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194. Whether or not Billy's reaction to seeing his parents was probative of any material issue is debatable. It would not be incredible for even injured children to have conflicting feelings toward a parent who may have harmed them. But Billy's reaction to seeing his parent could tip the balance for the jury that assesses the probative value of this demeanor evidence in the context of all the evidence received during the trial.

195. 152 Wis. 2d 471, 449 N.W.2d 280 (Ct. App. 1989).

196. _Id._ at 478, 449 N.W.2d at 282.

197. _Id._ at 478, 449 N.W.2d at 283.

198. _Id._ at 479, 449 N.W.2d at 283.

199. _Id._ at 496, 449 N.W.2d at 290.
in his seat, looking everywhere but at the examiner. During testimony his speech is halting, and he soon becomes unresponsive. Observing this display in the context of an entire trial, especially where exculpatory evidence has been introduced, a juror might conclude that the moral weight of the proceedings had come to bear on the child's conscience and inhibited the child from testifying falsely or otherwise inaccurately. Yet the jury may never observe the child's display of preoccupation when the child is sheltered in a special testimonial room, away from the solemnity and officiality of the courtroom. Again, the jury in its role as judge of witness demeanor should have the opportunity to assess this sort of evidence.  

The effect of precluding the development of a defense based on a face-to-face meeting by shielding the child witness is exacerbated by statutes that prohibit counsel from even commenting on the lack of physical confrontation.  

Craig itself arguably supports a jury instruction that sets forth the value in face-to-face meetings and the value in shielding child witnesses. With or without such a jury instruction, defense counsel might argue that the jury should discount the child's testimony because it has not been tested by the solemnity and officiality of the

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200. See Commonwealth v. Willis, 716 S.W.2d 224, 233 (Ky. 1986) (Leibson, J., concurring) ("If the child will not answer questions when called by the defendant, the jury is entitled to know this and evaluate this aspect of the case."); id. at 235 (Stephens, J., dissenting) ("The majority has denied the right of the accused and the jury to see the reaction of the accuser to the physical presence of the accused.").


202. See Maryland v. Craig, 110 S. Ct. 3157, 3167-70 (1990). Such a jury instruction might read:

Face-to-face confrontation enhances the accuracy of fact-finding by reducing the risk that a witness will wrongfully implicate an innocent person. Such confrontation, however, may so overwhelm a child witness that truth-seeking is actually disserved, because the child may be too overwhelmed to communicate in the courtroom. A child witness in this case has testified by one-way closed circuit television. You are the sole judges of the believability of a witness and the weight to be given the testimony of each witness.

203. Courts have at least been willing to instruct the jury that they should draw no negative inference about the defendant from the use of a shielding device. See, e.g., Joint Appendix at 17, Coy v. Iowa, 487 U.S. 1012 (1987) (No. 86-6757) (The court instructed the jury: "I would caution you . . . that you are to draw no inference of any kind from the presence of that screen. You know, in the plainest of language, that is not evidence of the defendant's guilt . . . .") (citation omitted); Wildermuth v. State, 310 Md. 496, 530, 530 A.2d 275, 292 (1987) ("The jury was instructed not to give the televised testimony any greater or lesser weight than if it had been given in the courtroom."); State v. Taylor, 562 A.2d 445, 456 (R.I. 1989) ("At the time the videotape was played for the jury, the trial judge instructed the jury that they were not to draw an inference of guilt or that the victim needed physical protection from the defendant.").
courtroom and the moral weight of testifying in the defendant’s presence. This type of argument would be especially persuasive where the prosecution’s case is based on the child’s uncorroborated allegations.

The prosecutorial advantage is particularly troubling because in many jurisdictions the relevant statutes allow the prosecution, and not the defense, to invoke the special testimonial procedures. These statutes assume that the prosecutor will act in the child’s best interest. A prosecutor, however, may be motivated to invoke these statutes for strategic reasons, not just to protect the child. The prosecutor may not want the jury to see the child’s reaction to the defendant’s physical presence for fear of undermining his or her presentation. Of course, if the de-

204. See, e.g., ALA. CODE § 15-25-2(a) (Supp. 1991) (on prosecutor’s motion); ARIZ. REV. STAT. ANN. § 13-4253.A (1989) (on prosecutor’s motion); ARK. CODE ANN. § 16-44-203(b) (Michie 1987) (on prosecutor’s motion); CAL. PENAL CODE § 1347(b) (West Supp. 1992) (on prosecutor’s motion or on court’s own motion); COLO. REV. STAT. ANN. § 18-6-401.3(1) (West 1990) (on prosecutor’s motion); DEL. CODE ANN. tit. 11, § 3511(a) (1987) (on prosecutor’s motion); IND. CODE ANN. § 35-37-4-8(c) (Burns Supp. 1991) (on prosecutor’s motion); NEV. REV. STAT. ANN. § 174.227.1 (Michie 1986) (on prosecutor’s motion or on court’s own motion); N.M. STAT. ANN. § 30-9-17.A (Michie 1984) (on prosecutor’s motion); OHIO REV. CODE ANN. § 2907.41(A)(1) (Anderson 1987) (on prosecutor’s motion); 42 PA. CONS. STAT. ANN. § 5985(a) (Purdon Supp. 1991) (“The child victim or material witness, through his parent or guardian, or, where applicable, the child’s advocate or the attorney for the Commonwealth may move . . . .”); UTAH R. CRIM. P. 15.5(2) (on prosecutor’s motion); WASH. REV. CODE ANN. § 9A.44.150(1) (West Supp. 1991) (on prosecutor’s motion).

205. Compare Justice Scalia’s dissent in Craig: The State’s interest here is in fact no more and no less than what the State’s interest always is when it seeks to get a class of evidence admitted in criminal proceedings: more convictions of guilty defendants. That is not an unworthy interest, but it should not be dressed up as a humanitarian one. And the interest on the other side is also what it usually is when the State seeks to get a new class of evidence admitted: fewer convictions of innocent defendants. Maryland v. Craig, 110 S. Ct. 3157, 3175 (1990) (Scalia, J., dissenting).

Accordingly, some jurisdictions have provided an attorney, separate from the prosecutor, to represent the interests of child witnesses in criminal proceedings. See, e.g., 18 U.S.C.A. § 3509(b)(1)(A) (West Supp. 1991); ALASKA STAT. § 12.45.046(a)(1) (1990); FLA. STAT. ANN. § 92.53(2)(a) (West Supp. 1992); MISS. CODE ANN. § 13-1-405(2) (Supp. 1991); 42 PA. CONS. STAT. ANN. § 5983 (Purdon Supp. 1991). See also Jacqueline Y. Parker, The Rights of Child Witnesses: Is the Court a Protector or Perpetrator?, 17 NEW ENG. L. REV. 643, 665-66 (1982) (advocating court appointment of specially trained attorneys to represent child witnesses). But see CAL. PENAL CODE § 1348.5 (West Supp. 1992) (providing for court appointment of a children’s representative, but also providing that the court shall not appoint attorneys). The necessity for such attorneys may be obviated by the fact that Craig was not simply concerned with protecting child witnesses; Craig was concerned with the protection of child witnesses to the extent that the child’s ability to communicate would otherwise be impaired. Prosecutors, rather than specially appointed children’s attorneys, are probably in the best position to determine whether a child can effectively communicate at trial, since the prosecution’s case stands to suffer otherwise. If the protection of children were the paramount interest, then pragmatism would indicate that specially appointed children’s attorneys are necessary, because prosecutors might very well have a conflict in simultaneously representing both
fense also could invoke the special testimonial procedures, it might do so where a highly emotional child could be prejudicial to the presentation of its case.

(2) Problems Endemic to the Video Medium

Testimony transmitted simultaneously by closed circuit television and testimony recorded on videotape have spawned their own set of problems that call into question the reliability and adversariness of these testimonial procedures. A prominent concern related to reliability is the unavoidable editorialization of what the jury observes. As one court has recognized, "there are serious questions about the effects on the jury of using closed-circuit television to present the testimony of an absent witness since the camera becomes the juror's eyes, selecting and commenting upon what is seen."

The case of Strickland v. State illustrates a particularly blatant exploitation of the opportunity to editorialize. In that case, "[t]he person operating the camera was an investigator in the district attorney's office and, thus, obviously not completely disinterested in the proceedings." The operator "panned" the camera from the witness to the attorneys and the defendant at least once, "and when the child was asked the critical question of what the defendant had done to her, the camera focused or zoomed-in on her face."

Maintaining a stationary lens and utilizing only disinterested camera operators only begins to address the editorialization problem. A more subtle, and perhaps unintentional, aspect of the problem remains because "the lens or camera angle chosen can make a witness look small and weak or large and strong." As the Supreme Court long ago observed in Snyder v. Massachusetts, "[i]t is common knowledge that a camera can be so placed, and lights and shadows so adjusted, as to give a distorted picture of reality."
Another troubling aspect of these testimonial procedures concerns the information that is kept from the jury. Although many statutes require that every voice on the video transmission or tape be identified, statutes typically do not prescribe with any particularity what shall be depicted on the television screen. Only a handful of jurisdictions specifically provide by statute that the images of all persons in the testimonial room shall be on camera. Thus, most camera operators are not obligated to capture both body language and facial expressions of the child witnesses, let alone the body language and facial expressions of questioning attorneys or others who are present. Of course, a jury could observe all of these factors were the witness to testify in open court. No doubt these factors can contribute to a jury’s assessment of a witness’s credibility in certain situations, such as where a witness is led by the questioning attorney’s facial expression.


213. See, e.g., 18 U.S.C.A. § 3509(b)(2)(B)(v) (West Supp. 1991) (“the image and voices of all persons who in any way participate in the examination”); CAL. PENAL CODE § 1347(e)(5) (West Supp. 1992) (same); IDAHO CODE § 19-3024A.4(e) (Supp. 1991) (same); N.Y. CRIM. PROC. LAW § 65.30.1 (McKinney Supp. 1992) (“the image of all other persons other than the operator present in the testimonial room”); WASH. REV. CODE ANN. § 9A.44.150(1)(j) (West Supp. 1991) (“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.”). See also State v. Sheppard, 197 N.J. Super. 411, 442-43, 484 A.2d 1330, 1349 (Super. Ct. Law Div. 1984) (“[T]he witness and counsel shall be so arranged that all three persons in the testimonial room can be seen on the courtroom monitors simultaneously.”).

214. For instance, the majority of jurisdictions allows the child witness to be accompanied into the testimonial room by a support person. See, e.g., LA. REV. STAT. ANN. § 15:283.A (West Supp. 1992) (“any person, other than a relative of the child, whose presence is determined by the court to be necessary to the welfare and well-being of the child”); TEX. CODE CRIM. PROC. ANN. art. 38.071, § 3(a) (Vernon Supp. 1991) (“any person whose presence would contribute to the welfare and well-being of the child”); UTAH R. CRIM. P. 15.5(2)(a) (“a counselor or therapist whose presence contributes to the welfare and emotional well-being of the child”).

215. Among the many cases in which the camera focused only on the child’s face and upper body was Maryland v. Craig. See Official Transcript, Proceedings Before the Supreme Court of the United States at 9, Maryland v. Craig, 110 S. Ct. 3157 (1990) (No. 89-478). Other examples abound. See, e.g., People v. Schmitt, 204 Ill. App. 3d 820, 825, 562 N.E.2d 377, 381 (App. Ct. 1990) (“[W]e reject the defendant’s argument that there was error because
example. There, the child witness was placed in the judge's office with a television camera. The defendant, attorneys, judge, and jury remained in the courtroom where they could view the television screen transmitting the child's image and hear the lawyers' questions and the child's answers. The child witness could not see them. For some reason, a state trooper, who had participated in the investigation, was present in the judge's office with the child. Since the officer was not on camera, he could have influenced the child witness—however innocently—by nodding his head or giving other signals without detection by the court or jury. Multiple cameras and multiple monitors or split screen televising can avoid these problems, but the additional technology may be costly. In any event, no arrangement of cameras and monitors can match the juror's freedom to look where he or she wants.

Another concern—one which calls into question the adversariness of the special testimonial procedures—is that testimony delivered over video monitors may give unfair advantage to the prosecution's case. As any trial attorney would agree, the use of exhibits or other visual aids during direct examination can be a powerful method of enhancing testimony and capturing the jury's attention. Similarly, the use of television

the camera failed to show the entire room and those present.

appeal denied, 371 Ill. 2d 670, 571 N.E.2d 154 (1991); Commonwealth v. Bergstrom, 402 Mass. 534, 550, 524 N.E.2d 366, 376 (1988) ("The subtle nuances of eye contact, expressions, and gestures between a witness and others in the room are for the jury to evaluate. Hearing the disembodied, off-screen voices of the judge and the attorneys is not ordinarily an adequate substitute for witnessing personal interactions. Especially where child witnesses are involved, and great leeway for leading questions is allowed, jurors must be able to choose their own focus in looking for any direct or indirect influences on a child's testimony."); People v. Cintron, 75 N.Y.2d 249, 272, 551 N.E.2d 561, 575, 552 N.Y.S.2d 68, 82 (1990) (Alexander, J., concurring) ("A closeup focus on the witness is also inadequate because it excludes from the jury's view the reactions of the attorney questioning the witness. Thus the jury may miss an attorney's look of shock or dismay in reaction to the witness' response to a question."); State v. Taylor, 562 A.2d 445, 451 (R.I. 1989) ("[P]resent in one room were: the judge, Sally, Sally's mother, defense counsel, the prosecutor, and the stenographer... [A] stationary camera was pointed at Sally... "); State v. Thomas, 150 Wis. 2d 374, 405, 442 N.W.2d 10, 24-25 (1989) (Abrahamson, J., concurring) ("The defendant argues that, because the camera remained only on the child during her testimony, the jury was unable to view the interaction between the witness and others who were present. The majority opinion does not acknowledge the unavoidable differences between live testimony and testimony on a screen. Videotape is indisputably superior, for purposes of observing demeanor, to a written transcript. But viewing a videotape is different from viewing a person live."); cert. denied, 493 U.S. 867 (1989); Respondent's Brief at 6, Craig (No. 89-478). See also Commonwealth v. Tufts, 405 Mass. 610, 617, 542 N.E.2d 586, 590-91 (1989) ("The videotape clearly shows all persons in the room, with the exception of the defendants who were out of camera range. It would have been better if jurors could have observed the reactions of the defendants to the child witness's testimony during the videotaping...").

217. Id. at 157 (Miller, J., dissenting).
218. Id. at 158 (Miller, J., dissenting).
in our video-addicted age may imbue the child witness's testimony with undeserved credibility and could even mesmerize the jury. Moreover, the use of special testimonial procedures may undermine the defendant's presumption of innocence insofar as shielding the child suggests that he or she needs protection.

A related and perhaps more serious threat to the adversariness of proceedings where alternative testimonial procedures are used arises when a deliberating jury asks the court for the opportunity to review the child's taped testimony. Although replaying the child's taped testimony may enable the jury to take greater care in evaluating the evidence, the potential prejudice to the defendant is great. Any prejudice of this kind could easily be avoided, however, by having the transcript of the

219. See Hochheiser v. Superior Court, 161 Cal. App. 3d 777, 787, 208 Cal. Rptr. 273, 279 (Ct. App. 1985) (“[I]t is quite conceivable that the credibility of a witness whose testimony is presented via closed-circuit television may be enhanced by the phenomenon called status-conferral; it is recognized that the media bestows prestige and enhances the authority of an individual by legitimizing his status.”); People v. Cintron, 75 N.Y.2d 249, 271, 551 N.E.2d 561, 575, 552 N.Y.S.2d 68, 82 (1990) (recognizing the phenomenon of “status-conferral”); Jack C. Westman, The Protection and Reliability of Children as Witnesses, in Who Speaks for the Children? 99, 104 (Jack C. Westman ed., 1991) (Televised presentations “affect jurors’ attention and their perceptions of witness credibility and attractiveness.”); see also Graham, Indicia of Reliability, supra note 48, at 75 (“While it can be argued with some force that testimony presented via closed circuit television or videotape is less persuasive than live testimony, in the average case, the possibility of enhancement of credibility nevertheless certainly exists.”).

220. See Graham, Indicia of Reliability, supra note 48, at 75-76. Although one of the grounds for appeal in Coy v. Iowa was the contention that use of the screen violated the defendant's right to due process because the procedure would make the defendant appear guilty and thus erode the presumption of innocence, 487 U.S. 1012, 1015 (1988), Justice Scalia's opinion for the Court never reached that issue, id. at 1022. The issue did not arise in Maryland v. Craig, see 110 S. Ct. 3157 (1990), and the use of one-way closed circuit television is somewhat less problematic in that respect. Although Justice Blackmun, dissenting in Coy, posited that “[u]nlike clothing the defendant in prison garb or having the defendant shackled and gagged, using the screening device did not ‘brand [appellant] . . . “with an unmistakable mark of guilt,”’” id. at 1034-35 (Blackmun, J., dissenting) (quoting Holbrook v. Flynn, 475 U.S. 560, 571 (1986) (quoting Estelle v. Williams, 425 U.S. 501, 518 (1976) (Brennan, J., dissenting))) (second alteration by court), the fact that the only person screened from the child witness's view was the defendant is highly prejudicial, irrespective of any instruction given by the court, because it indicates that the child witness had to be shielded from the defendant or that the defendant had to be cordoned off from the proceedings. In contrast, the defendant in Craig was in the same position as the judge and jury who were also outside the child witness's view. 110 S. Ct. at 3161. Arguably the procedure in the latter case suggests only that the child was uncomfortable testifying in the courtroom. But the sense that the child required protection remains and could evoke undue sympathy for the child witness.


222. As the court in Martin v. State, 747 P.2d 316 (Okla. Crim. App. 1987), noted:

When the jury retired to deliberate, a video player was set up in the jury room and
audio portion of the videotape reread for the jury, rather than replaying the videotaped testimony.

A comparison of shielded testimony and in-court testimony suggests that the two methods are not equally reliable and do not equally ensure adversarial testing in all circumstances. Shielding may make it more difficult for the jury to assess demeanor evidence and thus undermine the reliability of the proceedings. It may also deprive the defense of the opportunity to comment on the child’s reaction to the defendant’s presence and thereby undermine the adversarial nature of the proceedings.

IV. Reshaping When and How Craig Is Implemented

What we see now is like the dim image in a mirror; then we shall see face to face. What I know now is only partial; then it will be complete.
1 Corinthians 13:12

The analysis of the social science literature in Part II and the examination of the phenomenological aspects of shielding in Part III demonstrate that it would be inappropriate to reach conclusions about the reliability and adversariness of children’s shielded testimony as did the Court in Craig. We cannot be sure that truth is served when children are shielded. The social science evidence is inconclusive. Shielding may reduce false recantations and stymied deliveries, but it may also increase false allegations. Moreover, one-way closed circuit television simply cannot be equated with live, in-court testimony due to the attendant benefits of the latter for the defendant and the jury. With one-way closed circuit television, the defendant is precluded from developing a defense that relies on a face-to-face meeting, and jurors are denied the opportunity to consider the full range of demeanor evidence normally available with live, in-court testimony. These considerations provide the backdrop upon which to resolve many of the unanswered questions identified in Part I and to reshape how and when Craig is implemented. These con-

the video tape of E.M.'s testimony was sent back with the jury for additional viewing. . . .

We agree with the appellant that there is an important distinction between having parts of testimony dispassionately read to a jury and allowing the jury to hear, and see, the entire testimony of an empathetic witness, such as a child describing a painful experience in his young life. The possibility for abuse is, we believe, substantially increased with video technology.

Id. at 319. See also Chambers v. State, 726 P.2d 1269, 1277 (Wyo. 1986) (A videotaped interview was shown during the trial. Twice during deliberations the jury requested and was allowed to view the videotaped interview. “The effect was to permit her to appear twice, in color, on videotape, much as a live witness in the jury room, after the testimony was closed and the trial concluded.”).
siderations also point to the need to construe Craig narrowly and develop standards and procedures that give us more confidence in the reliability and adversariness of testimony by one-way closed circuit television.

A. Invoking the Procedure

Consistent with a narrow interpretation of Craig, one-way closed circuit television should be employed only when the defendant’s presence will render the child unable to communicate, and not because the child will be unable to testify “effectively” or because the child will suffer more nebulous psychic harm. This standard embraces those situations where the child’s testimony will otherwise be unintelligible or non-responsive, and as such is a readily verifiable criterion susceptible to objective administration. This approach also gives “voice” to a child who will otherwise go unheard—a more compelling justification for shielding than the desire to fortify testimony that will otherwise be merely less than artful.

Focusing on the child’s ability to communicate may also be the most practical and fair criterion. Prosecutors have an interest in ensuring that a child witness can communicate at trial because communication aids the prosecutor in obtaining a conviction. Prosecutors may have no interest or a conflict of interest in protecting a child witness from more nebulous psychic harm, especially if protecting the child witness means jeopardizing a conviction. Requiring a showing of inability to communicate in the defendant’s presence would also prevent prosecutors from invoking shielding for the mere purpose of polishing the child’s presentation.

With the child’s ability to communicate in the defendant’s presence properly identified as the threshold issue, the appropriate standard and method of proof remain to be resolved. The lack of statutory direction on the appropriate standard of proof indicates that numerous jurisdictions have simply left this critical matter to the trial court’s discretion. However, it is important to give trial courts more guidance where constitutional rights are at stake and novel procedures are being used.

223. Cf. The Supreme Court, 1989 Term—Leading Cases, 104 HARV. L. REV. 129, 137 (1990) (advocating individualized findings that focus on the child’s ability to give meaningful testimony rather than the harm that the child would likely suffer in the defendant’s presence, but not recommending a procedure).

224. See Goodman & Helgeson, Child Sexual Assault, supra note 56, at 200 (“Prosecutors are sometimes reluctant to use videotaped testimony because they fear that it will not be as effective as live testimony.”); Goodman, Emotional Effects, supra note 109, at 80 (“[S]ome prosecutors expressed concern that the use of techniques such as testimony via videotape or closed-circuit television would reduce the judge’s or jury’s sympathy for the child.”).

225. See supra notes 99-103 and accompanying text.
Lego v. Twomey\textsuperscript{226} is instructive in establishing a standard of proof where preliminary fact-finding—as opposed to guilt—is at issue. In Lego, the Court held it permissible to judge the admissibility of a confession in a criminal case by a preponderance of the evidence standard—the standard typically applied in civil proceedings to resolve questions of liability.\textsuperscript{227} Since Lego declined to apply an elevated standard of proof to a hearing in a criminal case implicating the constitutional right against self-incrimination, it could be argued that a preponderance of the evidence standard is appropriate when a judge in a criminal case is deciding whether or not to shield a child witness—a hearing implicating the constitutional right of physical confrontation. But other factors come into play.

In Lego, the Court reasoned that a hearing to determine the voluntariness of a confession was prophylactic in purpose—that is, aimed at deterring unlawful police conduct, and not concerned with the “reliability of jury verdicts.”\textsuperscript{228} The Court also intimated that where the reliability of jury verdicts is at stake, In re Winship’s\textsuperscript{229} mandate of a reasonable doubt standard applies.\textsuperscript{230} In contrast, the Court has clearly indicated that the Confrontation Clause addresses the reliability of jury verdicts.\textsuperscript{231} This position implies that more than a preponderance of the evidence standard is appropriate when a court is considering compromising physical confrontation. But the Court has also stated that physical confrontation might actually “disserve the . . . truth-seeking goal” of the Confrontation Clause where the child is so overwhelmed by the defend-

\begin{itemize}
  \item \textsuperscript{226} 404 U.S. 477 (1972).
  \item \textsuperscript{227} Id. at 489.
  \item \textsuperscript{228} Id. at 484-86.
  \item \textsuperscript{229} 397 U.S. 358 (1970).
  \item \textsuperscript{230} See Lego, 404 U.S. at 486. Professor Stephen A. Saltzburg has argued that the suppression of involuntary confessions is based in part on their unreliability, and the Court's unwillingness to acknowledge this fact and apply the reasonable doubt standard foreshadows “an unyielding preponderance standard” for preliminary fact matters in criminal cases. Stephen A. Saltzburg, Standards of Proof and Preliminary Questions of Fact, 27 Stan. L. Rev. 271, 280-81 (1975). That prediction was partially borne out by the ruling in Bourjaily v. United States, 483 U.S. 171 (1987), where the Court approved the use of a preponderance of the evidence standard for the admission of a co-conspirator's hearsay statement, id. at 175-76, even though the unreliability of this sort of statement is generally acknowledged, see Imwinkelried, supra note 187, at 44. Lego, nevertheless, also notes that the states are free to apply a higher standard. 404 U.S. at 489.
  \item \textsuperscript{231} Indeed, in Craig, the Court noted: “The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact.” Maryland v. Craig, 110 S. Ct. 3157, 3163 (1990). The Court also acknowledged that the more specific right of physical confrontation “enhances the accuracy of fact-finding by reducing the risk that a witness will wrongfully implicate an innocent person.” Id. at 3164.
\end{itemize}
ant's presence that the child is unable to testify effectively. The argument would be that rather than undermining In re Winship's mandate, we are actually furthering it by protecting children from testimonial stress. This argument must fail, however, because the state of the empirical data is such that we cannot be sure in a particular case whether protective procedures are comforting an injured child or fortifying a lying or otherwise misreporting child. This weakness in the argument underscores the fact that the social science data informing the confrontation question is in flux and warrants cautious decision-making.

The purpose of a criminal trial is to do justice, and the value of truth-seeking in a criminal trial is the value of promoting justice. An important element of justice is that we prefer to allow some guilty to go free than convict the innocent. Child witness procedures that increase the number of defendants correctly found guilty may be unacceptable if they also increase the number of defendants wrongfully found guilty. While shielding procedures may convict more guilty defendants—an especially desirable result given the recidivism rate for child abuse—they may also convict more innocent ones—an especially undesirable result given the stigma and severe penalties associated with such a conviction.

Until we know more about these protective procedures, the prosecution should bear the risk. Proof by clear and convincing evidence is an elevated standard and provides the defendant with the extra measure of protection warranted by the current state of the empirical data. It is also a relatively manageable burden for the prosecution. Before ordering

232. Id. at 3169.
233. See supra Part II.
235. We will not always be confronted with the question of guilt or innocence in absolute terms, because often the degree of guilt will be at issue. The latter arises whenever there are lesser-included and lesser-related offenses charged against the defendant.
237. See, e.g., CAL. PENAL CODE § 667.6(d) (West 1988 & Supp. 1992) (providing for mandatory consecutive sentencing); id. § 290 (requiring convicted sex offenders to register their presence, fingerprints and photograph with local authorities). In addition, it is a matter of common knowledge that incarcerated sex offenders are at risk for violence from other inmates and sometimes need to be segregated from the general prison population.
238. Professor C.M.A. McCauliff conducted a survey that asked federal judges to identify the percentage of certainty required by various standards of proof. C.M.A. McCauliff, Burdens of Proof: Degrees of Belief, Quanta of Evidence, or Constitutional Guarantees?, 35 VAND. L. REV. 1293, 1325 n.184 (1982). The average percentage for proof beyond a reasonable doubt was 90.28% certainty. The average percentage for proof by clear and convincing evidence was
alternative testimonial procedures, therefore, the trial court should determine on the basis of clear and convincing evidence that the child witness will not be able to communicate in the defendant's presence.\textsuperscript{239}

The best way to determine whether a child will be able to communicate in the defendant's presence is to observe the child on the witness stand in the defendant's presence. Given the dissatisfying nature of predictive expert testimony,\textsuperscript{240} the elevated standard of proof may require as much.\textsuperscript{241} If the child is able to communicate in the defendant's presence, then the system avoids both the expense of the special testimonial procedures and the less quantifiable loss of physical confrontation's benefits. Moreover, if the child is unable to communicate in the defendant's presence, the jury still benefits from having observed the child's demeanor in the defendant's presence before the child is removed for shielding.\textsuperscript{242}

This procedure may sound insensitive to the child. In \textit{Craig} the State argued that requiring a face-to-face meeting adds "the unconscionable requirement that child victims of physical and sexual abuse be traumatized further before they can be deemed in need of special protection."\textsuperscript{243} But such an argument assumes guilt inasmuch as it assumes a victim, and our system is grounded on a presumption of innocence. Moreover, especially where the critical inquiry is the child's ability to communicate (in contrast to a showing of general psychological trauma), the potential harm is limited in quality and duration—notably a

\begin{footnotesize}
\begin{enumerate}
\item It might be argued that the state's interest in the protection of child witnesses should be considered in formulating the appropriate burden of proof. But \textit{Craig} suggests that the state's interest in protecting children is weighty enough to overcome the defendant's right to physical confrontation only insofar as it serves the truth-seeking function of confrontation. See Maryland v. Craig, 110 S. Ct. 3157, 3167-70 (1990).
\item Until social science develops a protocol based on reliable data, and unless the expert can render a fact-based opinion which follows that protocol, the elevated standard of proof will militate against the use of predictive testimony (i.e., the "battle of experts") to resolve the threshold question of the child's ability to communicate.
\item Judges often reserve ruling on motions in limine until they see how the evidence unfolds at trial. Except where the evidence at the pretrial hearing is overwhelming, judges would similarly reserve ruling on a motion to shield a child witness until after observing the child's performance on the witness stand.
\item If the child is unable to communicate under normal courtroom conditions, the judge should observe the child witness in the defendant's presence but outside the presence of the jury and the public. This approach would permit the judge to ascertain that the child is reacting to the defendant's presence and not to the courtroom generally. If the child's inability to communicate stems only from the jury's and public's presence, the defendant should be able to accompany counsel into the special testimonial room with the child.
\item Brief for Petitioner at 30, \textit{Craig} (No. 89-478).
\end{enumerate}
\end{footnotesize}
harm we are willing to permit when the prosecution summons the child into the defendant's presence for the limited purpose of identification.  

This procedure would be even more valuable if as a preliminary matter the prosecutor had to demonstrate that efforts were made to prepare the child for the testimonial experience, because preparation would eliminate the possibility that a child's poor showing stemmed from a lack of familiarity with the process. The prosecutor can help prepare the child witness the way any trial lawyer might prepare a naive witness: by taking the child to the courtroom when it is not in session to show the child the physical layout of the room and to demonstrate where the various courtroom players will be situated; by returning with the child when the court is hearing a trial so that the child can see what actually occurs in a courtroom; and by introducing the child to the various members of the courtroom staff and explaining their various functions. Not only would such preparation better equip the child witness to testify, but it may also blunt any psychological trauma that a child would otherwise experience in the courtroom.

Most social scientists agree that while some children are traumatized by the courtroom experience, others are empowered by it. Many


245. This would be similar to the requirement that prosecutors demonstrate a good faith effort to obtain the presence of the witness at trial before prior testimony (hearsay) may be introduced. See Ohio v. Roberts, 448 U.S. 56, 74 (1980).

246. See Karen J. Saywitz, Children's Conceptions of the Legal System: “Court Is a Place to Play Basketball,” in PERSPECTIVES ON CHILDREN'S TESTIMONY, supra note 159, at 131, 153 (“Child witnesses have a limited and at times faulty understanding of the system in which they are participating. Often, they do not accurately understand what is happening around them. They require age-appropriate preparation regarding the people, places, and procedures of the legal system.”).

247. By statute, the state of Washington requires such a showing. Wash. Rev. Code Ann. § 9A.44.150(1)(e) (West Supp. 1991) (“The court [must find] 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.”).

248. See, e.g., Lucy Berliner, The Child Witness: The Progress and Emerging Limitations, 40 U. Miami L. Rev. 167, 174-75 (1985) (“Counselors have found that children sometimes psychologically benefit by participating in the criminal justice system.”); Lucy Berliner & Mary K. Barbieri, The Testimony of the Child Victim of Sexual Assault, 40 J. Soc. Issues No. 2, at 125, 135 (1984) (“Some children report feeling empowered by their participation in the process. Some have complained, when the offender pled guilty, that they did not have an
social scientists who identify the courtroom experience as potentially cathartic link the positive aspects of the experience to adequate preparation of the child.\textsuperscript{249} Indeed, although Gail Goodman, in examining the effects of criminal court testimony on a sample of 218 child sexual assault victims, concluded that “[o]n average, the short-term effects were traumatic rather than cathartic,”\textsuperscript{250} she also observed that “systematic attempts to prepare the children were only infrequently made.”\textsuperscript{251} This suggests that the first line of attack in promoting the welfare of child witnesses should lie not during trial through reliance upon special testimonial procedures, but before trial with conscientious preparation of the child by the prosecutor\textsuperscript{252} and others.\textsuperscript{253}

\textsuperscript{249} See, e.g., Berliner & Barbieri, supra note 248, at 130 (“The attorney who may present the child as witness should do everything possible from the outset to give the child emotional support and accurate information about what will ensue.”); Eth, supra note 248, at 225 (“The child's experience as a witness can be affected by pretrial preparation by a mental health professional, child advocate, or witness assistance program.”); Melton, supra note 248, at 63 (“High levels of anxiety adversely affect recall and cognitive functioning. Thus, interventions designed to reduce ambiguity about the situation (e.g., visiting the courtroom prior to testimony) and the scariness of testimony itself (e.g., a friendly word from the judge) may improve the quality of children's testimony.”).

\textsuperscript{250} Goodman, Emotional Effects, supra note 109, at 104. Significantly, she further concluded: “In contrast, by the time the cases were resolved, the mental health of most children who testified was similar to that of children who did not take the stand.” Id. This finding suggests that long term trauma from testifying may not be a pervasive problem.

\textsuperscript{251} Id. at 110.

\textsuperscript{252} This requirement should not prove unduly burdensome to prosecutors. Many prosecution agencies are subdivided into specialization units where prosecutors concentrate on particular types of crimes, such as drug-related crimes, gang-related crimes, or sex crimes. This type of organization allows prosecutors to develop an expertise in handling certain types of evidence and witnesses. Prosecutors who are part of a sex crimes unit would receive training on the special needs of child witnesses.

\textsuperscript{253} A specialized witness assistance program might prove invaluable and would shift some of the burden from the prosecutor to the courts and the community. See Westman, supra note 219, at 109 (arguing for “the use of child advocacy teams that are assembled on the initiation of legal actions and support the children through the entire process”). Compassion from a designated support person could help transform the testimonial experience from a traumatic one to an empowering one. Alternative methods of preparing children for the testimonial experience also might be developed—including illustrated books, cartoons, and mock proceedings.

These suggestions identify empowerment and not protectionism as the primary goal. As C.S. Lewis observed, “the ravenous need to be needed will gratify itself either by keeping its
In conclusion, consistent with Craig, the courts should focus on the child’s ability to communicate and find by clear and convincing evidence that the child is not able to communicate when confronted with the defendant in the courtroom. The procedure utilized to determine whether the child is unable to communicate should involve actual confrontation after preparation of the child witness. This procedure provides the judge with reliable evidence of the child’s situation, obviating the need to rely on predictive and potentially biased expert testimony. In addition, it provides the jury with useful information concerning the child’s demeanor when confronted by the defendant.

B. Reframing the Inquiry

Although the focus on the child’s ability to communicate is most consistent with a narrow interpretation of Craig, the law may develop differently. Craig’s requirement of only “more than de minimis” emotional distress in the defendant’s presence invites a lesser standard. Courts and legislatures may adopt a broader reading of Craig that permits them to focus on the psychological well-being of the child irrespective of the child’s ability to communicate, or that allows them to consider any “more than de minimis” impairment of the child’s ability to communicate. In doing so, however, courts and legislatures should reframe the inquiry to take into account case-specific factors that go beyond the child witness’s needs to consider the reliability and adversariness of the proceedings both with and without shielding. Indeed, courts should always consider these factors—even where the child witness may be silenced by the defendant’s presence in the traditional courtroom setting.

objects needy or by inventing for them imaginary needs. It will do this all the more ruthlessly because it thinks (in one sense truly) that it is a Gift-love and therefore regards itself as ‘unselﬁsh.’” C.S. Lewis, THE FOUR LOVES 76-77 (1960). He adds: “But the proper aim of giving is to put the recipient in a state where he [or she] no longer needs our gift.” Id. at 76. This is not to say that all children at all ages will be readily empowered or that some children will not need protection, but that we might be able to give these children an enduring sense of self-conﬁdence by preparing them for the courtroom experience and not sacriﬁce physical confrontation.

254. It should not be our policy to obtain the child’s testimony at all costs. The more relaxed atmosphere provided by shielding may facilitate false reports, and a child’s silence is preferable to unreliable testimony. Achieving optimal reliability and adversariness should be the paramount concern in each instance.

A recent case in San Diego, California illustrates the point. An eight-year-old girl complained that her father had excessively kissed and hugged her during his weekly visits (the girl’s natural parents were divorced and she was living with her mother, stepfather, and younger brother at the time). John Wilkens & Jim Okerblom, Molesting Conviction Tossed Out, SAN DIEGO UNION, June 20, 1992, at B-1, B-7. A counselor discussed molestation with the girl, read to the girl from two books, I Told My Secret and No More Secrets, and then
In prescribing whether or not to compromise a defendant’s confrontation right and allow the special testimonial procedures, most statutes—to the extent that they specifically delineate the relevant inquiry—focus exclusively on the child’s needs.255 The “truth-seeking” goal of the Confrontation Clause is compromised, however, if we ignore the other side of the equation—that is, if the judge does not also take into consideration aspects of the particular case that may underscore the defendant’s need for physical confrontation.

The facts of Craig present a perfect example. The alleged child victim, Brooke Etze, attended Craig’s preschool when she was between four and six years old from August 1984 through June 7, 1986, and Brooke’s parents were entirely satisfied with the school during that time.256 Apparently, nothing that Brooke said or that the parents observed suggested any foul play. On June 21, 1986, Brooke’s parents read a newspaper article recounting the complaints of children who had been abused at reported suspected sexual abuse to county authorities. The State moved for a continuance based on the counselor’s testimony that the stress of testifying at the father’s preliminary hearing had caused the girl to recant, and that it would take “a couple of months” to “loosen some of the denial.” Id. at B-7. The trial court continued the trial over the objection of the defense. Id. After three months of additional counselling, the girl repeated the allegations of abuse. The subsequent conviction was reversed on appeal. Id. at B-1.

This case is troubling because it involves priming a witness to say what we want the witness to say. What if the trial had not been delayed, the prosecutor had moved instead to present the girl’s testimony by one-way closed circuit television, and in this more relaxed testimonial environment the child repeated the abuse allegations? Should we be any less troubled? It would seem that shielding in the face of recantation raises serious questions about the reliability and adversariness of the proceedings, particularly if the jury never sees the recantation.

255. For example, the Alaska statute provides:

   In making a determination . . . the court shall consider factors it considers relevant, including (1) the child’s chronological age; (2) the child’s level of development; (3) the child’s general physical health; (4) any physical, emotional, or psychological injury experienced by the child; and (5) the mental or emotional strain that will be caused by requiring the child to testify under normal courtroom procedures.

ALASKA STAT. § 12.45.046(b) (1990). Similarly, the Connecticut law states that the court may order the defendant excluded from the room or screened from the sight and hearing of the child only if the state proves, by clear and convincing evidence, that the child would be so intimidated, or otherwise inhibited, by the physical presence of the defendant that a compelling need exists to take the testimony of the child outside the physical presence of the defendant in order to insure the reliability of such testimony.

CONN. GEN. STAT. ANN. § 54-86g(a) (West Supp. 1991). See also MICH. COMP. LAWS ANN. § 600.2163a(9) (West Supp. 1991) (“[T]he court shall consider the following: (a) The age of the witness. (b) The psychological maturity of the witness. (c) The nature of the offense or offenses. (d) The desire of the witness or his or her family or guardian . . . .”).

Craig's school.257 A week or two later, they received an invitation to a meeting sponsored by the county's sexual assault center and social services and health departments.258 Brooke's parents attended the meeting and, as a result of what they learned there, arranged to have Brooke evaluated by a therapist at the sexual assault center. It was not until the fourth or fifth session with the therapist that Brooke said things that suggested she had been the victim of abuse. The therapist contacted the police and social services departments, which joined in the investigation of Brooke's complaints.259 The prosecutor was allowed to sit in on twelve of the twenty "therapy" sessions with Brooke.260 In ensuing conversations with her parents and in further sessions with her therapist, Brooke implicated several people. Among the accused were Ms. Craig, two of Ms. Craig's children, and other children at the school.261

Several key facts, independently and in combination, created a need to safeguard physical confrontation in Craig. First, the alleged child victim did not make any spontaneous statements that suggested the abuse.262 Indeed, she apparently said nothing until after four or five pointed therapy sessions—sessions that were designed to uncover abuse rather than explore the child's general well-being.263 Second, the parents were not prompted to act by anything they observed about or learned from their child.264 Only a pointed letter from the county and a subsequent town meeting spurred the parents to act.265 Third, the therapy sessions did not take place in a clinically neutral environment—rather, the prosecutor was present at twelve of the twenty therapy sessions. Finally, the child identified multiple assailants.266 These circumstances

257. Id.
258. Id. at 254-55, 544 A.2d at 786.
259. Id. at 255, 544 A.2d at 786.
260. Id. at 263, 544 A.2d at 790.
261. Id. at 255, 544 A.2d at 786.
262. The Court has identified spontaneity and consistent repetition as factors that indicate the reliability of a child's abuse allegations. Idaho v. Wright, 110 S. Ct. 3139, 3150 (1990) (citing State v. Robinson, 153 Ariz. 191, 201, 735 P.2d 801, 811 (1987)).
263. The Court has also noted that interrogation, prompting or manipulation by adults indicate that a child's abuse allegations may not be trustworthy. Id. at 3152.
264. For instance, parents might be prompted if they observe their child acting out sexually or if they observe an unusual physical condition, such as swelling, bleeding, or discharge in the child's genital area.
265. Interestingly, in the McMartin case, the police department sent a letter to the various parents of children in the subject preschool, indicating that they were investigating a complaint of sexual abuse at the school. Timnick & McGraw, supra note 1, at A20. Media accounts following the first McMartin trial indicated that the deliberating jurors were troubled by this fact and believed that these letters contaminated the subsequent investigation. See, e.g., id. at A19.
266. This factor also figured prominently in the McMartin litigation. As at least one jour-
cast doubt on the trustworthiness of Brooke's abuse allegations, but the trial judge was not statutorily obligated to consider any circumstances beyond the child's needs in deciding whether or not to allow the shielding procedure.

Statutes providing for the use of one-way closed circuit television should, in addition to requiring an individualized finding that the child witness will suffer significant (i.e., more than de minimis) trauma in the physical presence of the defendant, include a provision requiring the judge to consider any case-specific need that there may be for physical confrontation. In other words, the court should closely examine any need there may be for physical confrontation based on particular case facts, and not simply compare the need for physical confrontation in the abstract with the particularized showing of likely trauma to the child. Otherwise, there can be no appreciation of the interests at stake, and Craig calls for close examination of the competing interests.

After examining the particularized interests involved, the trial court should allow shielding only if it finds that the reliability and adversariness of the proceedings will be better assured by shielding than by physical confrontation. Of course, this means that the focus of the pretrial evidentiary hearing is broadened from an inquiry into the child's needs to an inquiry into the necessities of the case (an inquiry that will—as it should—embrace the confrontation concerns of the defendant as well as the child). But this broader inquiry need not prove burdensome to the courts. We can expect courts, with the help of the litigants, to identify classes of circumstances that particularly warrant physical confrontation. These might be found, for example, where child abuse allegations arise in

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267. As Professor Ceci has observed,

it is of the utmost importance to examine the conditions prevalent at the time of a child's original report about a criminal event in order to judge the suitability of using that child as a witness in the court. It seems particularly important to know the circumstances under which the initial report of concern was made, how many times the child was questioned, the hypotheses of the interviewers who questioned [the] child, the kinds of questions the child was asked, [and] the consistency of the child's report over a period of time. . . . [A]ny of these conditions would not in and of itself invalidate a child's testimony, but it ought to raise cautions in the mind of the court.


269. Id. ("We have accordingly interpreted the Confrontation Clause in a manner sensitive to its purposes and sensitive to the necessities of trial and the adversary process.")
suspect circumstances or defense theories require a face-to-face meeting. We also would not expect courts to prejudge the facts of the case, but only to determine whether the case encompasses circumstances warranting a face-to-face meeting, either to check influences that spawn false or inaccurate allegations of child abuse, or to effectuate a defense.

This Article makes no attempt to provide an exhaustive list of suspect circumstances in child abuse cases. Nevertheless, some social scientists have documented the desire of children to please authority figures. This tendency is implicated when, as in Craig, children are subjected to repeated and leading questioning by parents and other investigators of the alleged abuse. See Stephen J. Ceci et al., Suggestibility of Children's Memory: Psychological Implications, 116 J. EXPERIMENTAL PSYCHOL. 38, 46 (1987) (Suggestibility can be explained in part by children's tendency to conform to an adult's wishes. Children exposed to a seven-year-old questioner were significantly more likely to recognize correctly the original event than were their peers who were exposed to an adult questioner.); Carol B. Cole & Elizabeth F. Loftus, The Memory of Children, in CHILDREN'S EYEWITNESS MEMORY, supra note 117, at 178, 199 ("[T]he demand characteristics of being given certain information by an adult, and even of being questioned by an adult are powerful components of suggestibility in young children."); Goodman & Clarke-Stewart, supra note 144, at 103 ("Clarke-Stewart's findings indicate that children can be led by a persistent interrogator to change their descriptions of what they have seen or what has been done if the event is somewhat ambiguous to start."); Amye Warren et al., Inducing Resistance to Suggestibility in Children, 15 LAW & HUM. BEHAV. 273, 283 (1991) ("Recent research indicates that children tend to interpret repeated questioning alone as feedback that their initial responses are incorrect and thus exhibit a greater propensity toward changing their answers."). These circumstances might warrant physical confrontation.

Another example of suspect circumstances that might warrant physical confrontation appears when the allegations of abuse arise in the context of divorce or custody proceedings. Studies indicate that the likelihood of false accusations increases dramatically in these situations. See Elissa P. Benedek & Diane H. Schetky, Allegations of Sexual Abuse in Child Custody and Visitation Disputes, in EMERGING ISSUES IN CHILD PSYCHIATRY AND THE LAW 145, 155 (Diane H. Schetky & Elissa P. Benedek eds., 1985) (failing to document charges of sexual abuse in 10 of 18 children evaluated during disputes over custody and visitation, a false-positive incidence of 55%); Eth, supra note 248, at 224 (attributing the rise in false reports during divorce and child custody disputes to "the judicial trend of awarding joint custody, a decree that forces angry, spiteful ex-spouses to continue to share their children," and to the vindictive parent who encourages a child to repeat the parent's false allegations of abuse); Arthur H. Green, True and False Allegations of Sexual Abuse in Child Custody Disputes, 25 J. AM. ACAD. CHILD PSYCHIATRY 449, 449 (1986) (documenting four false allegations in eleven children reported to be sexually abused by the noncustodial parent, an incidence of 36%); Haugaard et al., supra note 117, at 258 ("If a child who is told to say a certain thing by one parent believes that the parent's instruction makes the child's statement the truth, then the child could speak 'the truth' in a way that could mislead a jury.").

See supra notes 187-200 and accompanying text.

Again, the San Diego case, in which the court continued the trial because the child witness was recanting, is instructive. See supra note 254. A court considering a motion to shield that child witness might consider the following factors: The child's initial complaint; the child's testimony at the preliminary hearing; that the child was the subject of visitation rights; the suggestive counseling of the child; and the child's recantation. All of these factors relate to the quality of the child's abuse allegations and the need for a face-to-face meeting to check the risk of a false-positive report.

On the other hand, it would amount to prejudging the case to consider the following factors: That the defendant denied molesting his daughter; that the defendant passed two lie
Under the model proposed here, the trial judge would consider Brooke's situation and then look beyond Brooke's needs as a child witness to the needs of the case. After examining the particularized interests of the defense and the prosecution, a discerning judge might decide that the investigatory techniques employed in *Craig* were so suggestive as to create a compelling need for physical confrontation—a mechanism which (presumably) prevents false positives—and initially deny the motion to shield the child witness. If Brooke were uncommunicative in the confrontational setting, then the court could resort to shielding and the jury would enjoy the benefit of having observed the child witness in the courtroom.

The factual possibilities are limitless. Another judge may decline to shield even an uncommunicative child witness upon concluding that the child's silence was preferable to the risk of unreliable testimony. Such might be the case where the child has told grossly inconsistent stories at different times and is unable to testify in the defendant's presence. In yet another case, the court might conclude that shielding is necessary to protect a child witness who was allegedly brutalized by the defendant, so long as there was no contamination of the investigatory process and no marked deviation in the child's story over time. The same judge in the same case might initially require physical confrontation where the defense has raised identification as an issue and then resort to shielding only if the child is uncommunicative.

Reasonable judges might reach different conclusions, but the proposed model gives the judge more information with which to decide whether and when to shield a child witness. Rather than myopically focusing on the child's needs, this model allows shielding only if that procedure will best advance the reliability and adversariness of the proceedings. Framing the inquiry in this way acknowledges, as does detector tests; that the defendant rejected a plea bargain which called for him to plead guilty to a misdemeanor charge in exchange for a prosecution recommendation that he serve no jail time (he was charged with three felonies); or the conflicting medical testimony as to whether the girl's genital area showed signs of abuse. See Wilkens & Okerblom, *supra* note 254, at B-7. To be sure, the latter factors are logically relevant to an inquiry into the trustworthiness of the child's abuse allegations, but a consideration of these factors would require a grossly impractical mini-trial.

The Supreme Court rejected such a mini-trial approach in an analogous situation when it circumscribed the inquiry into the reliability of a child's out-of-court statements. See *Idaho v. Wright*, 110 S. Ct. 3139, 3147 (1990) (The statements did not fall into a firmly rooted hearsay exception.). In *Wright*, the State pressed the Court to consider evidence that would corroborate the truth of the child's statements, *id.* at 3148, but the Court rejected this approach and limited the inquiry to the circumstances surrounding the making of the statement, *id.* at 3149. Similarly, the inquiry here would be limited to the quality of the abuse allegations themselves and other circumstances that might warrant a face-to-face meeting.
Craig, that the reliability and adversariness of the proceedings are the touchstones of truth-seeking under the Confrontation Clause.

Conclusion

Child abuse cases are troubling, for many reasons. The victims are truly vulnerable and their cause cries out for justice. Arguably, the fabric of society is revealed from the way these most vulnerable of victims are treated. Yet, because these victims evoke so much sympathy, one could just as well infer something about the fabric of society from the way it treats those charged with child abuse.

We need to proceed cautiously when compromising a criminal defendant’s right of physical confrontation, especially when we do it in the name of truth. In the interest of truth, we must be mindful that there are at least two sides to every story. Accordingly, this analysis underscores the need to construe Craig narrowly and to engage in a more balanced inquiry when the time comes for the judge to decide whether or not to allow the use of one-way closed circuit television in a given case. Until we can be sure that shielding the child witness does not promote false positives as well as prevent false negatives, justice requires at least this much. The proposals set forth herein are consistent with the holding and logic of Craig, and appropriately take into account the interests of child witnesses, the rights of criminal defendants, and the needs of the criminal justice system in obtaining reliable evidence.

273. See generally David Libai, The Protection of the Child Victim of a Sexual Offense in the Criminal System, 15 WAYNE L. REV. 977 (1969) (arguing that while juvenile delinquents enjoy special protections, child victims have been neglected by the American criminal justice system).