

PROPOSED UNIFORM CHILD WITNESS TESTIMONY ACT: AN IMPERMISSIBLE ABRIDGEMENT OF CRIMINAL DEFENDANTS' RIGHTS

Abstract: The judicial system is struggling to accommodate the special needs of a rapidly growing number of child witnesses in its courtrooms. An increasingly popular approach to obtaining children's testimony is the use of "shielding methods," which allow child witnesses to testify outside the presence of the defendant. When courts use these methods, the judicial system's obligation to protect children arguably conflicts with its duty to ensure criminal defendants' right to confront their accusers as mandated by the Sixth Amendment Confrontation Clause. This Note examines the most recent development in child witness shielding, the Uniform Child Witness Testimony by Alternative Methods Act, drafted in 2002 by the National Conference of Commissioners on Uniform State Laws. This Note argues that states should not enact the proposed Act for several reasons. The Act violates the Federal Confrontation Clause as well as many state constitutions. Additionally, empirical evidence reveals harmful effects of shielded testimony not only on criminal defendants, but also on the child witnesses themselves and on the judicial system as a whole. This Note concludes that pretrial education and counseling would better serve child witnesses without sacrificing defendants' constitutional rights.

INTRODUCTION

Over the last two decades, the number of children testifying in courtroom proceedings has increased dramatically, primarily due to more aggressive prosecution of child sexual abuse claims.¹ To accommodate this influx of young witnesses, the judicial system has developed various procedural innovations designed to promote both sensitivity to children within the legal process and a higher conviction

¹ Terese L. Fitzpatrick, Note, *Innocent Until Proven Guilty: Shallow Words for the Falsely Accused in a Criminal Prosecution for Child Sexual Abuse*, 12 U. BRIDGEPORT L. REV. 175, 175, 177-78 (1991); see Dorothy F. Marsil et al., *Child Witness Policy: Law Interfacing with Social Science*, LAW & CONTEMP. PROBS., Winter 2002, at 209, 209-10. From 1985-1990 alone, reports of child abuse increased by thirty-one percent nationally. Hon. Barbara Gilleran-Johnson & Timothy R. Evans, *The Criminal Courtroom: Is It Child Proof?*, 26 LOY. U. CHI. L.J. 681, 683 (1995).

rate for child sexual abuse prosecutions.² This Note focuses on one category of procedural techniques developed to enable children's participation in court—witness shielding procedures.³

The term "shielding procedure" encompasses a number of methods by which child witnesses may avoid direct contact with the defendant while testifying.⁴ Federal and state courts most commonly use three types of shielding procedures: screening, videotape, and closed-circuit television.⁵ Screening allows a child to testify inside the courtroom with a barrier placed between him or her and the defendant.⁶ Videotaped testimony can be either contemporaneous or pre-recorded.⁷ Contemporaneous video testimony allows children to testify outside the courtroom during the trial and broadcasts their statements live into the proceedings.⁸ Prerecorded depositions of children, however, are taped before the trial and replayed in the courtroom.⁹ Finally, closed-circuit television instantly transmits the child's out-of-court direct and cross-examinations into the trial proceedings.¹⁰ Closed-circuit television can be either one-way (those present in the courtroom can see and hear the child, but the child cannot see or hear the courtroom activity) or two-way (children can see and hear the courtroom proceedings).¹¹

Shielding procedures are controversial because they technically violate the Sixth Amendment Confrontation Clause, which provides that in all criminal prosecutions "the accused shall enjoy the right . . . to be confronted with the witnesses against him."¹² Traditionally, defendants' Sixth Amendment confrontation rights have been satisfied

² Barbara Hobday Owens, Comment, *Videotaped Child Testimony and the Confrontation Clause: Are They Reconcilable?*, 14 U. DAYTON L. REV. 361, 361-62 (1989); see Fitzpatrick, *supra* note 1, at 176.

³ See Owens, *supra* note 2, at 361-62.

⁴ See Marsil et al., *supra* note 1, at 209-10.

⁵ *Id.*; see Janet Leach Richards, *Protecting the Child Witness in Abuse Cases*, 34 FAM. L.Q. 393, 399-401 (2000).

⁶ See Marsil et al., *supra* note 1, at 209-10; Richards, *supra* note 5, at 401; see also Coy v. Iowa, 487 U.S. 1012, 1012 (1988) (analyzing the constitutionality of a screening device placed between witnesses and defendant).

⁷ Richards, *supra* note 5, at 403.

⁸ *Id.*

⁹ *Id.*

¹⁰ See Mark A. Small & Ira M. Schwartz, *Policy Implications for Children's Law in the Aftermath of Maryland v. Craig*, 1 SETON HALL CONST. L.J. 109, 111 (1990); see also Maryland v. Craig, 497 U.S. 836, 840-42 (1990) (analyzing the constitutionality of child testimony via one-way closed-circuit television).

¹¹ Small & Schwartz, *supra* note 10, at 111.

¹² U.S. CONST. amend. VI; Owens, *supra* note 2, at 363.

through a requirement that witnesses testify face to face with the accused at trial.¹³ The rationale behind the Confrontation Clause is the presumption that people are less likely to lie under oath, particularly when facing the accused.¹⁴ Shielding procedures, however, prevent traditional face-to-face interaction between witnesses and defendants.¹⁵

As shielding procedures proliferate in courtrooms, the judicial system is struggling to accommodate two of its most important interests and duties—its obligation to assure defendants a fair trial as mandated by the Sixth Amendment and its *parens patriae* duty to protect children.¹⁶ The premise of shielding procedures is the notion that courtroom confrontation with the defendant, the alleged perpetrator, may severely traumatize child witnesses.¹⁷ Therefore, the legislative and judicial trend has been primarily in favor of introducing more procedural protections for child witnesses, particularly in sexual abuse trials.¹⁸

The most recent development in child witness testimony comes via the Uniform Child Witness Testimony by Alternative Methods Act (the "Child Witness Act") drafted by the National Conference of Commissioners on Uniform State Laws ("NCCUSL") in the summer of 2002.¹⁹ The Child Witness Act addresses the innovations that have flourished during the last twenty years, tackling the lack of uniformity that exists among state statutes with respect to the procedures by which judges admit children's testimony.²⁰ The American Bar Association (the "ABA") approved the Child Witness Act in February 2003,

¹³ *Coy*, 487 U.S. at 1016–17, 1019–20; see U.S. CONST. amend. VI.

¹⁴ *Coy*, 487 U.S. at 1019–20; see Wallace J. Mlyniec & Michelle M. Dally, *See No Evil? Can Insulation of Child Sexual Abuse Victims Be Accomplished Without Endangering the Defendant's Constitutional Rights?*, 40 U. MIAMI L. REV. 115, 123 (1985); see also U.S. CONST. amend. VI.

¹⁵ Marsil et al., *supra* note 1, at 209–10; Owens, *supra* note 2, at 363.

¹⁶ See Jacqueline Miller Beckett, Note, *The True Value of the Confrontation Clause: A Study of Child Sex Abuse Trials*, 82 GEO. L.J. 1605, 1622 (1994); see also U.S. CONST. amend. VI. "*Parens patriae*" is a term defining the state's legal role in protecting the interests of children. Nancy Ashe, *What You Need to Know About Adoption*, at <http://adoption.about.com/library/glossary/bldef-parpat.htm> (last visited Jan. 14, 2004).

¹⁷ Marsil et al., *supra* note 1, at 213.

¹⁸ Fitzpatrick, *supra* note 1, at 208; see Beckett, *supra* note 16, at 1606.

¹⁹ Molly McDonough, *Model Act Brings Uniformity to Treatment of Child Witnesses*, 1 No. 34 A.B.A. J. E-REPORT 4 (Sept. 6, 2002); *Recently Completed Uniform Act Covers Testimony by Child Witnesses*, 71 U.S.L.W. 2137, 2137 (Aug. 27, 2002) [hereinafter *Recently Completed Uniform Act*]; see UNIF. CHILD WITNESS TESTIMONY BY ALTERNATIVE METHODS ACT (2002). The text of the Child Witness Act is available at <http://www.law.upenn.edu/bll/ulc/ucwtbama/2002final.htm> (last visited Jan. 30, 2004).

²⁰ McDonough, *supra* note 19; see generally UNIF. CHILD WITNESS TESTIMONY BY ALTERNATIVE METHODS ACT.

thereby allowing individual state legislatures to consider enacting it themselves.²¹

Section 2(1) of the Child Witness Act defines an "alternative method" as

a method by which a child testifies which does not include all of the following: (A) having the child present in person in an open forum; (B) having the child testify in the presence and full view of the finder of fact and presiding officer; and (C) allowing all of the parties to be present, to participate and to view and be viewed by the child.²²

Section 2(1)(C) encompasses shielding procedures by allowing a child to testify outside the presence or view of the defendant.²³ In the drafters' Comment to section 2, they explain that the Child Witness Act is intended to permit not only any shielding procedure currently employed by states but also any technology developed in the future.²⁴

Section 4 of the Child Witness Act provides for a pretrial hearing at which the judge determines whether to allow a particular child witness to testify by an alternative method that comes within the section 2(1) definition.²⁵ Section 5 of the Child Witness Act describes two separate standards applicable to criminal and non-criminal proceedings, respectively.²⁶ In criminal proceedings, shielding procedures can be employed when the judge finds, by clear and convincing evidence, that the child would suffer "serious emotional trauma" if required to testify face to face with the defendant.²⁷ Finally, section 6 of the Child Witness Act provides a non-exclusive list of factors for the judge to consider in his or her pretrial determination, including available means to protect the child without using a shielding method, the na-

²¹ Press Release, National Conference of Commissioners on Uniform State Laws, *ABA Approves Six NCCUSL Acts*, <http://www.nccusl.org/nccusl/DesktopModules/NewsDisplay.aspx?ItemID=45> (Feb. 10, 2003) [hereinafter Press Release].

²² UNIF. CHILD WITNESS TESTIMONY BY ALTERNATIVE METHODS ACT § 2(1).

²³ *Id.* § 2(1)(C).

²⁴ *Id.* § 2 cmt.

²⁵ *Id.* §§ 2(1), 4.

²⁶ *Id.* § 5. Sections 2(3) and (4) of the Child Witness Act define a criminal proceeding as, "a trial or hearing before a court in a prosecution of a person charged with violating a criminal law of this State" and a noncriminal proceeding as, "a trial or hearing before a court or an administrative agency of this State having judicial or quasi-judicial powers, other than a criminal proceeding." *Id.* § 2(3)-(4).

²⁷ UNIF. CHILD WITNESS TESTIMONY BY ALTERNATIVE METHODS ACT § 5.

ture of the case, the importance of the child's testimony, and the nature and degree of emotional trauma.²⁸

Despite approval of the Child Witness Act by NCCUSL and most recently, the ABA, many legal scholars, lawyers, and judges are concerned that shielding procedures impermissibly erode the rights of the accused.²⁹ Opponents of shielding procedures contend that face-to-face confrontation is a necessary safeguard for criminal defendants.³⁰ In fact, by some estimates, sixty-five percent of sexual abuse reports are unfounded.³¹ A false accusation of abuse, even if retracted or disproved, could potentially be devastating to the lives of suspected perpetrators.³² Ultimately, underlying the controversy surrounding shielding procedures are the risks inherent in all criminal proceedings—convicting the innocent or exculpating the guilty.³³

This Note analyzes the appropriateness of the Child Witness Act in terms of its constitutionality and societal ramifications.³⁴ Part I summarizes Federal Confrontation Clause case law.³⁵ Part I.A outlines the U.S. Supreme Court's interpretation of the Federal Confrontation Clause over the last century, preceding the issue of child witness shielding procedures.³⁶ Part I.B describes the Court's opinion in 1988, in *Coy v. Iowa*, in which it first addressed a constitutional challenge to a child shielding procedure.³⁷ Part I.C summarizes the Court's most recent decision regarding child witness shielding in *Maryland v. Craig*, in 1990, which has influenced the last decade of testimonial innovations, including the Child Witness Act.³⁸

Part II compares textual and interpretive differences among state confrontation clauses with respect to the standards states have devel-

²⁸ *Id.* § 6.

²⁹ See *Craig*, 497 U.S. at 860–62 (Scalia, J., dissenting); Beckett, *supra* note 16, at 1606; Fitzpatrick, *supra* note 1, at 208; see also UNIF. CHILD WITNESS TESTIMONY BY ALTERNATIVE METHODS ACT; Press Release, *supra* note 21.

³⁰ See Lisa Donahue, *Confrontation in Massachusetts: What "Face to Face" Really Means*, 3 SUFFOLK J. TRIAL & APP. ADVOC. 37, 47–48 (1998).

³¹ Fitzpatrick, *supra* note 1, at 196; see Brian L. Schwab, Note, *Child Abuse Trials and the Confrontation of Traumatized Witnesses: Defining "Confrontation" to Protect Both Children and Defendants*, 26 HARV. C.R.-C.L. L. REV. 185, 185–86 (1991).

³² See Robin W. Morey, Comment, *The Competency Requirement for the Child Victim of Sexual Abuse: Must We Abandon It?*, 40 U. MIAMI L. REV. 245, 245–48 (1985).

³³ See *Craig*, 497 U.S. at 867–68 (Scalia, J., dissenting); Morey, *supra* note 32, at 245–48.

³⁴ See *infra* notes 48–301 and accompanying text.

³⁵ See *infra* notes 48–117 and accompanying text.

³⁶ See *infra* notes 48–61 and accompanying text.

³⁷ See *infra* notes 62–87 and accompanying text.

³⁸ See *infra* notes 88–117 and accompanying text.

oped to hear child witness testimony.³⁹ Part III provides an overview of relevant empirical research exploring children's testimony.⁴⁰ Part III.A describes a group of studies about the psychological effects of shielding procedures.⁴¹ Part III.B summarizes studies connecting children's suggestibility with false accusations.⁴² Part III.C explores the emotional effects of testifying in open court on children.⁴³

In Part IV, this Note argues that states should not enact the proposed Child Witness Act for three reasons.⁴⁴ Part IV.A describes how the Child Witness Act violates the Federal Constitution, falling below the minimum standards it sets for protection of the accused.⁴⁵ Part IV.B argues that the Child Witness Act violates many state constitutional provisions.⁴⁶ Finally, in Part IV.C, this Note asserts that the Child Witness Act exacerbates harmful effects of shielded testimony both on witnesses and on defendants as revealed by empirical evidence.⁴⁷

I. FEDERAL CONFRONTATION CLAUSE CASE LAW

A. *Early Interpretations of the Confrontation Clause*

By permitting child witnesses to testify outside defendants' presence, shielding procedures technically violate the Sixth Amendment Confrontation Clause, giving rise to constitutional challenges.⁴⁸ The dispute arises because the Federal Confrontation Clause does not expressly require face-to-face confrontation, despite general acceptance of that interpretation.⁴⁹ This Section highlights the leading Federal Confrontation Clause cases that provided guidance to the U.S. Supreme Court in its later decisions regarding child witness shielding procedures.⁵⁰

³⁹ See *infra* notes 118–165 and accompanying text.

⁴⁰ See *infra* notes 166–225 and accompanying text.

⁴¹ See *infra* notes 172–194 and accompanying text.

⁴² See *infra* notes 195–212 and accompanying text.

⁴³ See *infra* notes 213–225 and accompanying text.

⁴⁴ See *infra* notes 226–301 and accompanying text.

⁴⁵ See *infra* notes 231–267 and accompanying text.

⁴⁶ See *infra* notes 268–281 and accompanying text.

⁴⁷ See *infra* notes 282–301 and accompanying text.

⁴⁸ Owens, *supra* note 2, at 363.

⁴⁹ U.S. CONST. amend. VI; see *Maryland v. Craig*, 497 U.S. 836, 844 (1990).

⁵⁰ See *infra* notes 51–61 and accompanying text.

In 1895, in *Mattox v. United States*, the U.S. Supreme Court first interpreted the Confrontation Clause.⁵¹ In his appeal of a murder conviction, defendant Clyde Mattox challenged the admission of earlier recorded statements by witnesses deceased before the trial.⁵² The Court held such prior testimony by the deceased declarants admissible.⁵³ In doing so, however, the Court acknowledged two rights embedded in the Confrontation Clause—the right to cross-examination (which had previously received much more legal attention) and the right of confrontation between accused and witness.⁵⁴

In 1899, in *Kirby v. United States*, the Court declared the Sixth Amendment right to confrontation as one of the fundamental guarantees of life and liberty.⁵⁵ The *Kirby* Court reversed and remanded the lower court's indictment of the defendant on felony larceny charges.⁵⁶ The Court held that the lower court erred in admitting the conviction records of three men, separately charged and tried for an allegedly related offense, who did not appear as witnesses in defendant Joseph Kirby's trial.⁵⁷ The opinion emphasized the importance of direct confrontation between the accused and witnesses against him.⁵⁸

Reflected in the *Mattox* and *Kirby* opinions is an emphasis on ample safeguards to protect the accused from false convictions.⁵⁹ Direct confrontation of a witness in front of the jury challenges the witness's memory, perception, and sincerity.⁶⁰ Therefore, face-to-face encounters between the accused and accuser, as noted by the *Mattox* Court

⁵¹ 156 U.S. 237, 242–43 (1895); Troy A. Cotton, Comment, *Maryland v. Craig: The Supreme Court Clarifies When a Child Protective Statute Which Allows a Child Witness to Testify Outside the Presence of the Accused Will Violate the Confrontation Clause*, 19 T. MARSHALL L. REV. 309, 313 (1994).

⁵² *Mattox*, 156 U.S. at 237–38, 240.

⁵³ See *id.* at 243–44.

⁵⁴ Troy Fuhrman, *State v. Foster: Washington State Undermines Confrontation Rights to Protect Child Witnesses*, 36 GONZ. L. REV. 7, 12–13 (2001); Owens, *supra* note 2, at 365; see *Mattox*, 156 U.S. at 242–43; Cotton, *supra* note 51, at 313–14. The *Mattox* case was decided on hearsay grounds not relevant to this discussion. See 156 U.S. at 240–44.

⁵⁵ See 174 U.S. 47, 55 (1899).

⁵⁶ *Id.* at 47–48, 60–61.

⁵⁷ *Id.* at 60–61.

⁵⁸ *Id.* at 55.

⁵⁹ See *id.*; *Mattox*, 156 U.S. at 242–43; Tarek Howard, Note, *Child Sexual Abuse Prosecutions: Protecting the Child Victim and Preserving the Rights of the Accused*, 66 N.D. L. REV. 687, 690–91 (1990).

⁶⁰ See Mlyniec & Dally, *supra* note 14, at 118, 123 (citing *Herbert v. Superior Court*, 117 Cal. App. 3d 661 (1981)); Howard, *supra* note 59, at 691; Schwallb, *supra* note 31, at 190–91.

and reiterated in its progeny, have long been thought to be among the most important and reliable safeguards of justice.⁶¹

B. *Coy v. Iowa: The U.S. Supreme Court Requires Face-to-Face
Confrontation in the Child Witness Context*

As lower courts began to struggle with an increased volume of child witnesses in the 1980s, the U.S. Supreme Court was challenged to elaborate on its interpretation of the right to confront beyond *Mattox* and *Kirby*.⁶² The Court's challenge was to determine whether the Confrontation Clause mandates face-to-face interaction, despite an absence of express language to that effect, which would prohibit child witness testimony outside the defendant's presence.⁶³ This Section describes the 1988 *Coy v. Iowa* decision, in which the Court first addressed children's shielded testimony with respect to the Confrontation Clause.⁶⁴ In *Coy*, the Court held that the Confrontation Clause required face-to-face interaction—prohibiting child witnesses from testifying outside the defendant's presence but deferring the question of possible public policy-based exceptions.⁶⁵

In *Coy*, the defendant was charged with sexual assault of two thirteen-year-old girls camping near his backyard.⁶⁶ At trial, the district court allowed a screen to be placed in front of the girls during their testimony.⁶⁷ The girls could not see the defendant, but the defendant could see the victims' outlines and hear their voices.⁶⁸ On appeal of his conviction, defendant John Coy argued that the screening device, authorized by an Iowa statute, violated his Sixth Amendment right to

⁶¹ See Mlyniec & Dally, *supra* note 14, at 117; Howard, *supra* note 59, at 690–92, 703–04; see also *California v. Green*, 399 U.S. 149, 157 (1970) (recognizing historical interpretation of the Confrontation Clause as the literal right to face the witness at trial); *Mattox*, 156 U.S. at 242–43. In March 2004, the U.S. Supreme Court issued its latest decision regarding the general requirements of the Confrontation Clause. See *Crawford v. Washington*, 124 S.Ct. 1354, 1359 (2004). In *Crawford*, Justice Antonin Scalia, writing for the majority, held that the Sixth Amendment requires in-court testimony by witnesses unless they are unavailable or have already been subject to cross-examination in another proceeding, thus reemphasizing the necessity of face-to-face confrontation. *Id.* at 1369.

⁶² See Fuhrman, *supra* note 54, at 12–13; Marsil et al., *supra* note 1, at 209–10; Cotton, *supra* note 51, at 313–15.

⁶³ See Fuhrman, *supra* note 54, at 12–13; Cotton, *supra* note 51, at 313; see also U.S. CONST. amend. VI.

⁶⁴ See *infra* notes 65–87 and accompanying text.

⁶⁵ 487 U.S. 1012, 1020–21 (1988).

⁶⁶ *Id.* at 1014.

⁶⁷ *Id.* at 1014–15.

⁶⁸ *Id.*

confront the two young girls face to face.⁶⁹ The lower courts held that the screening device did not hinder the defendant's ability to cross-examine the alleged victims and thus preserved his confrontation right.⁷⁰ By taking that position, the Iowa courts rejected the interpretation of a face-to-face requirement within the Confrontation Clause.⁷¹

Justice Antonin Scalia, in his *Coy* plurality opinion, looked first to the origins of Western legal culture.⁷² Justice Scalia noted that the right to confrontation was recognized under Roman law and early English law.⁷³ He also examined the Latin roots of the word—"contra," meaning "against," and "frons," meaning "forehead," as well as a quotation from Shakespeare referring to "face to face" encounters.⁷⁴ Justice Scalia then pointed to more modern incarnations of the phrase, including, "Look me in the eye and say that."⁷⁵ Through these references, he illustrated the traditional and historical notion that accusation is not just without direct confrontation.⁷⁶

Justice Scalia cited the Court's 1970 holding in *California v. Green* for its proclamation that the "literal right to confront" is essential to the values promoted by the Confrontation Clause.⁷⁷ In that case, the Court upheld John Green's drug conviction, finding no violation of the Confrontation Clause when the prior statements of witnesses were admitted at trial.⁷⁸ Justice Scalia also relied on the *Kirby* Court's statement that facts provided by witnesses can only be proved by those whom the defendant can face at trial.⁷⁹

In light of these historical, cultural, and judicial references, Justice Scalia reasserted that the Sixth Amendment goes beyond cross-examination to a right of confrontation.⁸⁰ Using a literal interpretation of the word "confrontation," he emphasized that face-to-face contact at trial between accuser and accused is, and always has been, essential to that right.⁸¹ Justice Scalia reasoned that this direct interaction was necessary to ensure the integrity of the fact-finding process because wit-

⁶⁹ *Id.*

⁷⁰ See *Coy*, 487 U.S. at 1015.

⁷¹ See *id.*

⁷² *Id.* at 1015-16.

⁷³ *Id.*

⁷⁴ *Id.* at 1016 (quoting WILLIAM SHAKESPEARE, *RICHARD II*, act 1, sc. 1).

⁷⁵ *Coy*, 487 U.S. at 1018.

⁷⁶ *Id.* at 1018-19.

⁷⁷ *Id.* at 1017 (citing *Green*, 399 U.S. at 157).

⁷⁸ *Green*, 399 U.S. at 151, 158. The *Green* case was decided on hearsay grounds. *Id.* at 158.

⁷⁹ See *Coy*, 487 U.S. at 1016-17 (citing *Kirby*, 174 U.S. at 55).

⁸⁰ *Id.* at 1015-20.

⁸¹ *Id.* at 1016-17.

nesses are less likely to lie when they have to "repeat [their] story looking at the man whom [they] will harm greatly."⁸² He added that, although in-court confrontation may upset witnesses, it may also reveal false accusations or evidence of coaching.⁸³

Turning to the particular screening device used in defendant Coy's trial, Justice Scalia pronounced its use to be a flagrant violation of the defendant's Sixth Amendment right.⁸⁴ In response to the State's argument that the necessity of protecting sexual abuse victims outweighed the constitutional right at stake, Justice Scalia conceded that Sixth Amendment rights are not absolute.⁸⁵ Justice Scalia, however, was unwilling to compromise confrontation rights, primarily because of the Iowa statute's presumption of trauma for all child victims of sexual abuse.⁸⁶ Deferring the question of whether exceptions to the Confrontation Clause exist, Justice Scalia indicated that the Constitution would require individualized findings that a particular witness required special protection, supported by an important public policy, before permitting an abridgement of defendants' rights.⁸⁷

C. *Maryland v. Craig*: The U.S. Supreme Court Permits Exceptions to Face-to-Face Confrontation for Child Witnesses

As noted in the previous Section, two primary concepts emerged from Justice Scalia's plurality opinion in *Coy*: first, a literal reading of the Confrontation Clause as the defendant's right to meet all witnesses face to face at trial and second, the possibility of a compelling public policy exception upon individualized findings.⁸⁸ This Section describes the U.S. Supreme Court's application and expansion of that holding two years later in *Maryland v. Craig*.⁸⁹

In its 1990 *Craig* opinion, the Court upheld an exception to face-to-face confrontation based on individualized findings.⁹⁰ Pursuant to a state shielding statute, the Maryland circuit court permitted young witnesses to testify via one-way closed-circuit television in a sexual abuse

⁸² *Id.* at 1019 (quoting Z. CHAFFEE, *THE BLESSINGS OF LIBERTY* 35 (1956)).

⁸³ *Id.* at 1020.

⁸⁴ *See Coy*, 487 U.S. at 1020.

⁸⁵ *Id.*

⁸⁶ *Id.* at 1021.

⁸⁷ *Id.* at 1020-21.

⁸⁸ *See id.*; Marsil et al., *supra* note 1, at 212.

⁸⁹ *See infra* notes 90-117 and accompanying text.

⁹⁰ 497 U.S. at 849, 853.

case arising from the defendant's operation of a preschool.⁹¹ The Court then rejected defendant Sandra Ann Craig's objection that the shielding procedure violated her Sixth Amendment confrontation rights.⁹²

To begin its analysis, the Court had to determine whether exceptions to the Confrontation Clause were indeed permissible—exploring further Justice Scalia's suggestion of a possible policy-based exception in *Coy*.⁹³ The *Craig* majority acknowledged that the Confrontation Clause has traditionally provided defendants with the right to meet face to face with witnesses.⁹⁴ Nevertheless, the Court then held that the Confrontation Clause does not guarantee an absolute right to face-to-face confrontation.⁹⁵ Concluding that precedents demonstrate merely a preference for face-to-face confrontation at trial, the *Craig* majority affirmed that exceptions to that right—shielding procedures—are permissible.⁹⁶ Shielding procedures must be both reliable and necessary to further a compelling state interest.⁹⁷

In its assessment of reliability, the *Craig* majority adopted a functional approach to the Confrontation Clause, attaching great weight to the particular characteristics of the closed-circuit method at issue.⁹⁸ The Court reasoned that reliability was preserved because the one-way closed-circuit testimony kept intact the "essence" of the Confrontation Clause through oath, cross-examination, and observation of the witnesses' demeanor.⁹⁹ The direct and cross-examinations in *Craig* were obtained in a separate room in the presence of the prosecutor and defense counsel.¹⁰⁰ The testimony was then broadcasted live into the courtroom for the judge, jury, and defendant's observation.¹⁰¹ The witnesses could not see or hear the courtroom or defendant, but the defendant could hear the witnesses and communicate electronically with her attorney.¹⁰² Conceding the presumption of enhanced accuracy in direct confrontation, the majority held the one-way closed-

⁹¹ *Id.* at 840–41.

⁹² *Id.* at 842, 857.

⁹³ *Id.* at 844–45; *Coy*, 487 U.S. at 1021.

⁹⁴ 497 U.S. at 844.

⁹⁵ *Id.*

⁹⁶ *Id.* at 849.

⁹⁷ *Id.* at 850.

⁹⁸ See *id.* at 851; Schwallb, *supra* note 31, at 209–10.

⁹⁹ See *Craig*, 497 U.S. at 846, 857.

¹⁰⁰ *Id.* at 841–42.

¹⁰¹ *Id.*

¹⁰² *Id.*

circuit television testimony to be the functional equivalent of traditional, in-court testimony.¹⁰³

After concluding the statute's procedure was adequately reliable, the *Craig* Court next addressed the necessity of Maryland's asserted state interest—the protection of child abuse victims from the trauma of testifying.¹⁰⁴ Giving deference to the Maryland legislature, the Court considered evidence of the policy's importance based on similar state statutes, precedent that recognized the same interest, and academic literature.¹⁰⁵ The Court held that, given an adequate showing of necessity for each individual witness, Maryland's asserted interest in protecting child abuse victims was sufficiently compelling to warrant a shielding procedure.¹⁰⁶

The *Craig* majority then articulated a three-prong test for assessing the necessity of a shielding procedure to further the asserted state interest.¹⁰⁷ The requirements are (1) a case-specific finding with respect to each child witness; (2) trauma to the child caused by defendant rather than by the courtroom, generally; and (3) distress that is more than de minimis—more than anxiety, nervousness, or reluctance.¹⁰⁸ The *Craig* Court determined that the Maryland statute, on its face, satisfied all three requirements.¹⁰⁹

After the *Craig* decision, Congress responded to the trend towards enhanced protection of child witnesses by enacting the Child Victims' and Child Witnesses' Rights (the "CVCWR") statute in 1990.¹¹⁰ The CVCWR statute provides a standard for federal courts and applies the public policy exception to face-to-face confrontation

¹⁰³ *Id.* at 846, 851.

¹⁰⁴ 497 U.S. at 851–52.

¹⁰⁵ *Id.* at 852–55. In 1990, thirty-seven states had authorized use of videotaped testimony for sexually abused children; twenty-four permitted one-way closed-circuit television; and eight allowed two-way closed-circuit television in their courtrooms. *Id.* at 853 & n.2, 854 & nn.3–4. See generally *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982) (identifying compelling state interest in protecting minor victims of sex crimes from further distress).

¹⁰⁶ *Craig*, 497 U.S. at 855.

¹⁰⁷ *Id.* at 855–56; Bennett L. Gershman, *Child Witnesses and Procedural Fairness*, 24 AM. J. TRIAL ADVOC. 585, 598–99 (2001).

¹⁰⁸ See *Craig*, 497 U.S. at 855–56; Gershman, *supra* note 107, at 598–99. As differentiated from the flawed Iowa statute in *Coy*, which presumed trauma for all child victims of abuse, the Maryland statute in *Craig* expressly required an individualized showing of "serious emotional distress" that hinders communication. Compare *Craig*, 497 U.S. at 855, with *Coy*, 487 U.S. at 1021.

¹⁰⁹ 497 U.S. at 855–57.

¹¹⁰ 18 U.S.C. § 3509 (Supp. II 1990), amended by 18 U.S.C. § 3509 (1996); see Gilleran-Johnson & Evans, *supra* note 1, at 692; Richards, *supra* note 5, at 399–401.

articulated by the *Craig* majority.¹¹¹ Yet, the federal statute deviates from *Craig* in several respects, such as allowing different shielding methods like videotape and two-way closed-circuit television, instead of the one-way closed-circuit procedure approved by the Court.¹¹² In 1993, in *United States v. Garcia*, a defendant challenged the CVCWR statute in the Ninth Circuit as an unconstitutional departure from the *Craig* holding.¹¹³ The Ninth Circuit upheld the federal statute's constitutionality despite its textual deviation from *Craig*.¹¹⁴

Today, *Craig* retains its status as the U.S. Supreme Court's most recent opinion on the issue of child witness shielding procedures.¹¹⁵ Subsequent statutes, including the Federal CVCWR statute, state provisions, and the new Child Witness Act approved by the ABA, purport to follow the Court's guidelines in *Craig*.¹¹⁶ Still, the U.S. Supreme Court has not ruled on the constitutionality of any shielding statute since the specific Maryland provision at issue in *Craig*.¹¹⁷

II. STATE CONFRONTATION CLAUSE CASE LAW

The U.S. Supreme Court cases in Part I described the Federal Sixth Amendment Confrontation Clause and interpretations of the protections it provides to criminal defendants.¹¹⁸ Likewise, each state has a confrontation provision embedded in its state constitution.¹¹⁹ Although each state confrontation clause describes the rights of the accused at trial, the texts of those clauses differ in some instances from the Federal Confrontation Clause.¹²⁰ This Part describes textual variations among state confrontation clauses and the impact those variations have upon the permissibility of witness shielding procedures in state courtrooms.¹²¹

¹¹¹ Gilleran-Johnson & Evans, *supra* note 1, at 692; Richards, *supra* note 5, at 399-401; see 18 U.S.C. § 3509.

¹¹² Gilleran-Johnson & Evans, *supra* note 1, at 692; Richards, *supra* note 5, at 399-401; see 18 U.S.C. § 3509.

¹¹³ *United States v. Garcia*, 7 F.3d 885, 888 (9th Cir. 1993).

¹¹⁴ *Id.*

¹¹⁵ See 497 U.S. at 849-50.

¹¹⁶ See, e.g., UNIF. CHILD WITNESS TESTIMONY BY ALTERNATIVE METHODS ACT § 5 cmt. (2002).

¹¹⁷ See Howard, *supra* note 59, at 701.

¹¹⁸ See *supra* notes 48-117 and accompanying text.

¹¹⁹ See Beckett, *supra* note 16, at 1612-13; Donahue, *supra* note 30, at 42-46.

¹²⁰ See Donahue, *supra* note 30, at 41-46.

¹²¹ See *infra* notes 122-165 and accompanying text.

Under the U.S. form of government, the Federal Bill of Rights, which includes the Sixth Amendment Confrontation Clause, generally sets the threshold for citizens' rights, below which state governments may not fall in their own provisions.¹²² State legislatures are free to bestow upon their citizens equal or greater rights than those afforded by the federal government.¹²³ Because each state can draft its own constitution, textual and interpretive variations among state provisions are common.¹²⁴

With specific regard to confrontation clauses, the texts of state constitutions fall into two categories.¹²⁵ First, thirty-three state confrontation clauses contain language identical to the Federal Sixth Amendment, providing a defendant "the right . . . to be confronted with the witnesses against him."¹²⁶ These states allow child witness shielding through application of the *Maryland v. Craig* decision, which held that face-to-face confrontation was not mandatory, partially due to the absence of that phrase within the Federal Confrontation Clause.¹²⁷

The remaining seventeen state constitutions, however, differ from the Federal Confrontation Clause by providing defendants the express right "to meet face to face" the witnesses against them.¹²⁸ Therefore, the challenge for those states is determining whether their explicit "face to face" language disallows the *Craig* Court's public policy exception to direct confrontation between witnesses and the accused.¹²⁹ If a state's confrontation clause does not permit public policy exceptions to

¹²² See Donahue, *supra* note 30, at 47-48.

¹²³ See *id.*

¹²⁴ See *id.* at 42-46.

¹²⁵ See *id.*

¹²⁶ See, e.g., CAL. CONST. art. I, § 15 ("The defendant in a criminal case has the right . . . to be confronted with the witnesses against [him]."); see also *infra* note 128 (listing state constitutions that differ from the Federal Confrontation Clause).

¹²⁷ See Donahue, *supra* note 30, at 44-45; see also U.S. CONST. art. VI; *Maryland v. Craig*, 497 U.S. 836, 849 (1990). For example, Connecticut's confrontation clause language matches the federal version, and it allows videotaped testimony in child sexual abuse cases. Donahue, *supra* note 30, at 44-45 (citing *State v. Jarzbeck*, 529 A.2d 1245, 1256 (Conn. 1987)).

¹²⁸ Compare U.S. CONST. art. VI, with ARIZ. CONST. art. II, § 24, COLO. CONST. art. II, § 16, DEL. CONST. art. I, § 7, IND. CONST. art. I, § 13, KAN. CONST. § 10, KY. CONST. § 11, MASS. CONST. art. XII, MO. CONST. art. I, § 18(a), MONT. CONST. art. II, § 24, NEB. CONST. art. I, § 11, N.H. CONST. art. XV, OHIO CONST. art. I, § 10, OR. CONST. art. I, § 11, S.D. CONST. art. VI, § 7, TENN. CONST. art. I, § 9, WASH. CONST. art. I, § 22, and Wis. CONST. art. I, § 7.

¹²⁹ Donahue, *supra* note 30, at 42.

face-to-face testimony, child witness shielding procedures would violate the state constitution.¹³⁰

States whose constitutions contain the phrase "face to face" have used either functional or literal approaches to resolve the child witness shielding controversy.¹³¹ States using the literal approach, like Justice Scalia did in his *Coy v. Iowa* plurality opinion, interpret the "face to face" language as a strict requirement of direct confrontation between witnesses and the accused.¹³² States adopting the functional approach interpret their confrontation clauses more flexibly, like the *Craig* majority, and allow witnesses to avoid face-to-face confrontation with defendants via shielding methods.¹³³

Massachusetts, for example, is among the seventeen states whose constitutions include the explicit "face to face" language.¹³⁴ In the context of child witness shielding, Massachusetts has employed a literal interpretive approach.¹³⁵ Therefore, Massachusetts courts do not permit the *Craig* Court's exception to face-to-face confrontation, thereby requiring all child witnesses to testify in front of the accused.¹³⁶

In defense of the face-to-face requirement for child witnesses, Massachusetts judges look to the intent of the drafters of the state confrontation clause.¹³⁷ Massachusetts was the first state explicitly to guarantee defendants the right to meet accusers "face to face" in article 12 of its constitution.¹³⁸ The legislative history of article 12 reveals a deliberate deviation by the state from other pre-existing states' confrontation clauses, none of which contained the "face to face" language.¹³⁹ Instead, Massachusetts legislators sought to provide enhanced protection to criminal defendants, a trend which state judges

¹³⁰ See *id.* at 42-46.

¹³¹ See *id.*; Schwalb, *supra* note 31, at 209-10.

¹³² See Donahue, *supra* note 30, at 42-44; Schwalb, *supra* note 31, at 209-10.

¹³³ See Donahue, *supra* note 30, at 44-45; Schwalb, *supra* note 31, at 209-10.

¹³⁴ See MASS. CONST. art. XII ("Every subject shall have a right . . . to meet the witnesses against him face to face . . ."); *supra* note 128 and accompanying text.

¹³⁵ See Donahue, *supra* note 30, at 42-44.

¹³⁶ See *id.* at 43.

¹³⁷ *Id.* at 46; see *Commonwealth v. Johnson*, 631 N.E.2d 1002, 1005 (Mass. 1994); Beckett, *supra* note 16, at 1612-13.

¹³⁸ Donahue, *supra* note 30, at 42; see MASS. CONST. art. XII.

¹³⁹ Beckett, *supra* note 16, at 1612-13; see *Johnson*, 631 N.E.2d at 1005. The origin of Massachusetts's face-to-face confrontation requirement dates back to the Salem witch trials of the seventeenth century. Beckett, *supra* note 16, at 1612-13. The state legislature issued such a mandate in 1692 upon the recommendation of Reverend Increase Mather, then President of Harvard College, who pronounced, "It was better that ten suspected witches should escape than one innocent person should be condemned . . . I had rather judge a witch to be an honest woman than judge an honest woman as a witch." *Id.*

have continued in the child witness context despite the state legislature's enactment of a shielding statute in the 1980s.¹⁴⁰

The 1988 *Commonwealth v. Bergstrom* opinion demonstrates the Massachusetts Supreme Judicial Court's position on the state's child witness shielding statute, holding that the procedure allowing the alleged child victims to testify outside the defendant's presence violated the state constitution.¹⁴¹ In addressing child witness shielding for the first time, the Massachusetts court expressed its strong disapproval of the state statute that permitted the shielded testimony at defendant Robert Bergstrom's trial.¹⁴² The Massachusetts child witness shielding statute has not been repealed or amended, but the state's highest court continues to hold that shielded testimony violates article 12 of the state constitution, effectively barring application of the statute.¹⁴³

For example, in 1994 in *Commonwealth v. Johnson*, the Massachusetts Supreme Judicial Court maintained its position that the right of face-to-face confrontation was mandatory with no exceptions in Massachusetts, responding directly to the federal *Craig* decision.¹⁴⁴ The *Johnson* court ruled that the trial judge violated the defendant's confrontation right when he allowed a special seating arrangement during the testimony of the child witnesses, alleged rape victims.¹⁴⁵ The Massachusetts court reasoned that protection of victims cannot come at the expense of defendants' fundamental rights.¹⁴⁶ The *Johnson* court also expressed concerns about negative inferences about the defendant that jurors might draw from the special seating arrangement.¹⁴⁷ Recognizing its duty to protect children, the court indicated that accommodations other than

¹⁴⁰ Donahue, *supra* note 30, at 47; see MASS. GEN. LAWS ch. 278, § 16D (2000); HON. PAUL J. LIACOS ET AL., HANDBOOK OF MASSACHUSETTS EVIDENCE 56-57, 266-67 (7th ed. 1999).

¹⁴¹ 524 N.E.2d 366, 367, 377-78 (Mass. 1988).

¹⁴² *Id.* at 367, 368-69, 374, 377; see MASS. GEN. LAWS ch. 278, § 16D; LIACOS ET AL., *supra* note 140, at 266-67.

¹⁴³ LIACOS ET AL., *supra* note 140, at 266-67; see MASS. GEN. LAWS ch. 278, § 16D; *Commonwealth v. Amirault*, 677 N.E.2d 652, 662 (Mass. 1997) (holding that special seating arrangement which prevented defendant from seeing minor witness's face violated article 12 of the Massachusetts constitution); *Johnson*, 631 N.E.2d at 1004-05, 1007.

¹⁴⁴ *Johnson*, 631 N.E.2d at 1006-07; see Donahue, *supra* note 30, at 43-44.

¹⁴⁵ 631 N.E.2d at 1004, 1007. Although there is some dispute as to the specifics of the seating arrangement at issue, it appears that the child witnesses sat near the court reporter's table, rather than at the witness stand, facing the jury. *Id.* at 1004-05. The questioning attorney sat between the witnesses and the jury. *Id.* This seating arrangement blocked defendant James Johnson's view of the child witnesses' faces. *Id.*

¹⁴⁶ See *id.* at 1005-07.

¹⁴⁷ *Id.* at 1006; see Schwalb, *supra* note 31, at 200-02 (describing presumption of guilt created by shielding procedures).

shielding procedures may be made for child witnesses that do not increase the risk of false convictions, such as pretrial counseling.¹⁴⁸

Despite explicit face-to-face constitutional provisions, some state courts have adopted the functional approach to confrontation clause interpretation in the context of witness shielding.¹⁴⁹ Kentucky, for example, has a state confrontation clause that includes the "face to face" language.¹⁵⁰ Following the federal trend, however, the Kentucky courts have permitted exceptions to the confrontation right for child witnesses in the form of closed-circuit television.¹⁵¹ Acknowledging the framers' original intent, the Kentucky Supreme Court reasoned that the drafters of the state confrontation clause could not have foreseen the technology that allows shielding mechanisms today.¹⁵² Similarly, in 1998, in *State v. Foster*, the Washington Supreme Court held that an alleged child sexual abuse victim could testify outside the courtroom despite the wording of the state constitution.¹⁵³ That court then stated that the Washington constitution in essence did not differ significantly from the federal one.¹⁵⁴ Furthermore, at least one state whose constitution contained the "face to face" phraseology has amended its confrontation provision in response to the issue of child witness testimony to allow for shielding procedures.¹⁵⁵

Among the states that permit child witness shielding procedures, either because their confrontation clauses are identical to the federal one or because they do not interpret the phrase "face to face" literally, child witness shielding statutes vary considerably.¹⁵⁶ Some follow *Craig* by permitting one-way closed-circuit television, and others allow two-

¹⁴⁸ See *Johnson*, 631 N.E.2d at 1007.

¹⁴⁹ See *Donahue*, *supra* note 30, at 45-46; *Schwalb*, *supra* note 31, at 209-10.

¹⁵⁰ KY. CONST. § 11 ("In all criminal prosecutions the accused has the right . . . to meet the witnesses face to face . . .").

¹⁵¹ *Donahue*, *supra* note 30, at 45-46; see *Commonwealth v. Willis*, 716 S.W.2d 224, 227-31 (Ky. 1986) (holding that the Kentucky constitution contained merely a preference for face-to-face confrontation like the federal provision).

¹⁵² *Willis*, 716 S.W.2d at 230, 231.

¹⁵³ 957 P.2d 712, 717, 721, 726, 727 (Wash. 1998); see WASH. CONST. art. I, § 22 ("In criminal prosecutions the accused shall have the right . . . to meet the witnesses against him face to face . . .").

¹⁵⁴ *Foster*, 957 P.2d at 722.

¹⁵⁵ *Gilleran-Johnson & Evans*, *supra* note 1, at 695-98. The effectiveness of constitutional amendments may be limited in the scant application of shielding procedures by individual judges who resist the popular opinion. See *id.* For example, an amendment to the Illinois constitution designed to enable witness shielding was not effective in promoting change. See *id.*

¹⁵⁶ See *Richards*, *supra* note 5, at 401-03.

way television broadcast or videotaped testimony.¹⁵⁷ They differ as to the types of offenses that are applicable to consideration of shielding procedures, some being limited to sexual abuse prosecutions but others being applicable to all criminal offenses.¹⁵⁸ Some statutes also limit the applicability of the statute by the victim's age.¹⁵⁹ State shielding statutes also vary in the degree of trauma that must be shown, some requiring more than de minimis distress and others requiring the inability of the child to communicate at trial.¹⁶⁰ Some state statutes permit shielded testimony when children are traumatized by the courtroom itself, despite the *Craig* Court's emphasis on the defendant being the particular source of distress.¹⁶¹ Lastly, the state statutes differ in the standard of proof the judge must apply in the pretrial hearing before permitting shielding of the witness.¹⁶²

NCCUSL intended the Child Witness Act as a solution to the textual and interpretational variations among state confrontation clauses as well as the differences among existing state child shielding statutes.¹⁶³ The drafters of the Child Witness Act hope to achieve uniformity in treatment of child witnesses at the state level through each state's adoption of the Child Witness Act.¹⁶⁴ Now that the ABA has approved the Child Witness Act, its delegates will petition individual state legislatures to pass the Child Witness Act into law.¹⁶⁵

III. EMPIRICAL STUDIES

This Note's previous Parts traced the federal and state courts' treatment of confrontation clauses with respect to child witness

¹⁵⁷ *Id.* at 403; *cf. Craig*, 497 U.S. at 840-42, 851.

¹⁵⁸ Richards, *supra* note 5, at 402.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 401-02.

¹⁶¹ *Id.* at 403; *cf. Craig*, 497 U.S. at 856 (holding that the trial court must find that the witness would be traumatized, "not by the courtroom generally, but by the presence of the defendant").

¹⁶² Richards, *supra* note 5, at 402. For example, California's standard is more specific than the *Craig* Court's, expressly requiring clear and convincing evidence of substantial trauma. *Id.* at 402. Compare CAL. PENAL CODE § 1347(b)(2) (West Supp. 2000), with *Craig*, 497 U.S. at 855-57.

¹⁶³ McDonough, *supra* note 19; see UNIF. CHILD WITNESS TESTIMONY BY ALTERNATIVE METHODS ACT (2002).

¹⁶⁴ McDonough, *supra* note 19; see UNIF. CHILD WITNESS TESTIMONY BY ALTERNATIVE METHODS ACT.

¹⁶⁵ Press Release, *supra* note 21; see UNIF. CHILD WITNESS TESTIMONY BY ALTERNATIVE METHODS ACT; McDonough, *supra* note 19; *Recently Completed Uniform Act*, *supra* note 19.

shielding.¹⁶⁶ Underlying federal and state statutes, including the newly proposed Child Witness Act, are several assumptions about the psychological effects of in-court testimony on child witnesses—specifically, serious emotional trauma and decreased ability to communicate with the fact finder.¹⁶⁷ This Part explores the empirical bases of those assumptions by providing an overview of three groups of studies related to children's testimony.¹⁶⁸ Part III.A summarizes several studies that analyze various features of shielded testimony and their effects on trial outcomes.¹⁶⁹ Part III.B focuses on research examining children's suggestibility and its consequences on the accuracy of their testimony.¹⁷⁰ Finally, Part III.C highlights studies that assess the emotional effects of traditional courtroom testimony on child witnesses, both at the time of trial and afterward.¹⁷¹

A. *Studies Analyzing Effects of Shielded Child Testimony*

Beginning in the late 1980s, several teams of researchers examined the effects of shielding procedures on five different aspects of criminal trials: psychological effects on the child witness; jurors' perceptions of trial fairness; prejudice to the defendant; prejudice to the child witness; and reliability of shielded testimony.¹⁷² With respect to the first aspect, psychological effects of in-court testimony on the child, studies by Gail Goodman, a social scientist specializing in child witnesses, found after interviewing actual child witnesses that children usually fear a face-to-face confrontation with the defendant.¹⁷³ Researcher Louise Dezwirek-Sas added to Goodman's results, finding that child interviewees also feared being hurt by the defendant, testifying on the stand, crying during testimony, being sent to jail, and failing to understand questions asked of them.¹⁷⁴

¹⁶⁶ See *supra* notes 48–165 and accompanying text.

¹⁶⁷ See Marsil et al., *supra* note 1, at 211.

¹⁶⁸ See *infra* notes 172–225 and accompanying text.

¹⁶⁹ See *infra* notes 172–194 and accompanying text.

¹⁷⁰ See *infra* notes 195–212 and accompanying text.

¹⁷¹ See *infra* notes 213–225 and accompanying text.

¹⁷² See Marsil et al., *supra* note 1, at 211, 213–24.

¹⁷³ Gail S. Goodman et al., *Testifying in Criminal Court: Emotional Effects on Child Sexual Assault Victims*, MONOGRAPHS SOC'Y FOR RES. CHILD DEV., Dec. 1992, at 1, 100–01, discussed in Marsil et al., *supra* note 1, at 214.

¹⁷⁴ Louise Dezwirek-Sas, *Empowering Child Witnesses for Sexual Abuse Prosecution*, in CHILDREN AS WITNESSES 192, 194–95 (Helen Dent & Rhonda Flin eds., 1992), discussed in Marsil et al., *supra* note 1, at 214.

Exploring the second aspect of children's shielded testimony, jurors' perceptions of trial fairness, social scientist Rod Lindsay and colleagues showed mock jurors videotaped simulations of a child sexual abuse trial to assess their reactions to shielding methods.¹⁷⁵ In the videos, the child victim testified in open court, behind a screen, or via closed-circuit television.¹⁷⁶ The mock jurors' responses indicated no difference in their perceptions of fairness when child testimony was delivered by any of the three methods.¹⁷⁷

Empirical research has revealed several pitfalls of child witness shielding.¹⁷⁸ The third set of studies examined the possibility of prejudice to the defendant resulting from shielded witnesses.¹⁷⁹ Research by Janet Swim, Associate Professor of Psychology at Pennsylvania State University, showed that the more serious the charge, the more jurors preferred to hear from the child witness in open court before rendering a guilty verdict.¹⁸⁰ Swim based her results on a comparison of the mock jurors' responses to questionnaires following presentation of simulated child sexual abuse trials in which the child testified either live or via video deposition.¹⁸¹ In a similar experiment by social scientist David Ross, witness shielding reduced the likelihood of mock jurors convicting the defendant when the child was the sole witness at trial.¹⁸²

The fourth set of studies addressed prejudice to child witnesses when their testimony is shielded.¹⁸³ A study by Goodman using live child witness testimony and mock jurors revealed that jurors viewed the child as less credible when shielded, despite the increased accuracy of the testimony.¹⁸⁴ In a similar experiment by psychologist Ann

¹⁷⁵ Rod C.L. Lindsay et al., *What's Fair When a Child Testifies?*, 25 J. APPLIED SOC. PSYCHOL. 870, 873-75, 884-85 (1995), discussed in Marsil et al., *supra* note 1, at 218-19.

¹⁷⁶ *Id.* at 874.

¹⁷⁷ *Id.* at 878, 884-85.

¹⁷⁸ See Marsil et al., *supra* note 1, at 238-41.

¹⁷⁹ See *id.* at 215-17.

¹⁸⁰ Janet K. Swim et al., *Videotaped Versus In-Court Witness Testimony: Does Protecting the Child Witness Jeopardize Due Process?*, 23 J. APPLIED SOC. PSYCHOL. 603, 603, 617, 626 (1993), discussed in Marsil et al., *supra* note 1, at 215-17.

¹⁸¹ *Id.* at 607-08.

¹⁸² David F. Ross et al., *The Impact of Protective Shields and Videotape Testimony on Conviction Rates in a Simulated Trial of Child Sexual Abuse*, 18 LAW & HUM. BEHAV. 553, 563, 564-65 (1994), discussed in Marsil et al., *supra* note 1, at 216-17.

¹⁸³ Marsil et al., *supra* note 1, at 219-20.

¹⁸⁴ Gail S. Goodman et al., *Face-to-Face Confrontation: Effects of Closed-Circuit Technology on Children's Eyewitness Testimony and Jurors' Decisions*, 22 LAW & HUM. BEHAV. 165, 195, 199 (1998), discussed in Marsil et al., *supra* note 1, at 219-20. Studies by Ross and Swim were unable to replicate Goodman's results because the mock jurors watched videotaped trial

Tobey, jurors rated children's testimony via closed-circuit television as generally less believable.¹⁸⁵ The mock jurors described the children as less credible, less able to discern fact from fantasy, less intelligent, and less confident when testifying in the protective condition.¹⁸⁶ Scholars attribute these results to the witnesses' decreased emotion and the jurors' reduced ability to empathize with or observe the non-verbal cues of a witness who only appears over a television screen.¹⁸⁷

The fifth set of shielding studies focused on the reliability of shielded testimony.¹⁸⁸ Given empirical evidence from other sources that high levels of stress can decrease children's ability or willingness to provide accurate and complete testimony, researchers sought to determine to what extent shielding mitigates those effects.¹⁸⁹ In a study by Paula Hill and Samuel Hill, thirty-seven children, ages seven to nine, watched a video about an unpleasant exchange between a father and daughter.¹⁹⁰ They were then asked to testify about the video encounter either in the courtroom with the father present or in a small room without the father.¹⁹¹ The results demonstrate that the children gave more detailed and accurate testimony in the protective condition and were less likely to give no response or say, "I don't know."¹⁹² This positive effect was amplified for younger children who participated in a similar study by Goodman.¹⁹³ Concerns have been raised, however, about the increased likelihood of false positives being given by shielded children, possibly demonstrated by their overall increase in response under protective conditions.¹⁹⁴

simulations rather than live child witnesses. Ross et al., *supra* note 182, at 560; Swim et al., *supra* note 180, at 617.

¹⁸⁵ Ann E. Tobey et al., *Balancing the Rights of Children and Defendants: Effects of Closed-Circuit Television on Children's Accuracy and Jurors' Perceptions*, in *MEMORY AND TESTIMONY IN THE CHILD WITNESS* 232-33 (Maria S. Zaragoza et al. eds., 1995), *discussed in* Marsil et al., *supra* note 1, at 219-20.

¹⁸⁶ *Id.*

¹⁸⁷ Schwalb, *supra* note 31, at 201-02.

¹⁸⁸ See Marsil et al., *supra* note 1, at 220-23.

¹⁸⁹ Kay Bussey et al., *Lies and Secrets: Implications for Children's Reporting of Sexual Abuse*, in *CHILD VICTIMS, CHILD WITNESSES* 162-63 (Gail S. Goodman & Bette L. Bottoms eds., 1993); Douglas P. Peters, *The Influence of Stress and Arousal on the Child Witness*, in *THE SUGGESTIBILITY OF CHILDREN'S RECOLLECTIONS* 74-75 (John Doris ed., 1991). For a discussion of these studies, see Marsil et al., *supra* note 1, at 214-15.

¹⁹⁰ Paula E. Hill & Samuel M. Hill, *Videotaping Children's Testimony: An Empirical View*, 85 MICH. L. REV. 809, 813, 814 & n.19 (1987), *discussed in* Marsil et al., *supra* note 1, at 222.

¹⁹¹ *Id.* at 814.

¹⁹² *Id.* at 815.

¹⁹³ Goodman et al., *supra* note 184, at 183-86; see Marsil et al., *supra* note 1, at 222.

¹⁹⁴ See Marsil et al., *supra* note 1, at 222.

B. Studies Analyzing Children's Suggestibility

This Section describes the research of legal scholars and social scientists who have closely examined children's suggestibility in the context of pretrial child witness interviews.¹⁹⁵ The theory of children's suggestibility has been well documented and widely accepted since the nineteenth century.¹⁹⁶ Suggestibility means that children's memories, thoughts, and statements are easily influenced by others, especially adults, regardless of their truthfulness.¹⁹⁷ Suggestibility is a natural consequence of children's level of cognitive and social development.¹⁹⁸ Cognitively, children, particularly in their preschool years, are often unable to distinguish clearly between fact and fantasy, incorporating a hybrid of each into their statements and narratives.¹⁹⁹ Socially, children yearn for acceptance and approval, especially from adults, and may provide inaccurate answers when they perceive a positive response.²⁰⁰

Children's suggestibility affects their role as witnesses, particularly in criminal prosecutions.²⁰¹ Child abuse investigators often use leading or repeated questions accompanied by props like anatomical dolls because of psychological evidence that children give less-complete responses when asked open-ended questions.²⁰² Children may also have difficulty communicating with the investigator, requiring more direct and persistent questioning.²⁰³ These same techniques, however, increase the likelihood of false positive responses—responses that wrongfully accuse defendants—because of children's suggestibility.²⁰⁴

¹⁹⁵ See *infra* notes 196–212 and accompanying text.

¹⁹⁶ See Stephen J. Ceci & Richard D. Friedman, *The Suggestibility of Children: Scientific Research and Legal Implications*, 86 CORNELL L. REV. 33, 34 (2000). Early studies by French psychologist Alfred Binet over a century ago first documented the theory of children's suggestibility. *Id.* at 39. Binet made four conclusions relevant to this discussion: children's suggestibility arises from a desire to conform to interviewers' expectations; the accuracy of children's responses is tied to the nature and format of the questions; children's erroneous responses become engrained in their memory; and children are more suggestible in groups. *Id.* at 39–43.

¹⁹⁷ Matthew H. Scullin et al., *Measurement of Individual Differences in Children's Suggestibility Across Situations*, 8 J. EXPERIMENTAL PSYCHOL.: APPLIED 233, 234, http://www.apa.org/journals/xap/press_releases/december_2002/xap84233.pdf (2002).

¹⁹⁸ Ceci & Friedman, *supra* note 196, at 39–43; see Beckett, *supra* note 16, at 1606–07, 1633–35; Fitzpatrick, *supra* note 1, at 200–01.

¹⁹⁹ Beckett, *supra* note 16, at 1606–07, 1633–35.

²⁰⁰ See Ceci & Friedman, *supra* note 196, at 40; Beckett, *supra* note 16, at 1634–35.

²⁰¹ See Ceci & Friedman, *supra* note 196, at 39–46.

²⁰² See *id.* at 45–46.

²⁰³ *Id.*

²⁰⁴ *Id.* at 46.

Analyses by professors Stephen J. Ceci and Richard D. Friedman sought to determine the extent to which interviewing techniques influence the content of children's testimony.²⁰⁵ Ceci and Friedman focused on four studies by Goodman and her colleagues that they felt demonstrated children's vulnerability to suggestion.²⁰⁶ In each study, Goodman's researchers interviewed children about nonsexual contact they had with a strange adult.²⁰⁷ For example, in "The Trailer Study," researchers left thirty-six children, in pairs, to play in a trailer with an adult they had never met.²⁰⁸ In this study, as well as the other three, some of the children agreed with the interviewer's false suggestion that the stranger had engaged in inappropriate touching with them.²⁰⁹

After analyzing the results of all four Goodman studies, Ceci and Friedman revealed false positive response rates varying from three to forty percent.²¹⁰ Ceci and Friedman reasoned that even false positive response rates as low as three percent posed a significant risk of false convictions in the legal context.²¹¹ Ceci and Friedman suggest that children's suggestibility makes defendants' need for Sixth Amendment protection especially compelling.²¹²

C. *Studies Analyzing the Emotional Effects of Face-to-Face Testimony on Child Witnesses*

The last set of studies included in this Section analyzes the emotional effects of in-court testimony on young witnesses.²¹³ For example, one empirical study has shown that five months after testifying in sexual abuse cases, children who testified in court were faring as well

²⁰⁵ See *id.* at 34.

²⁰⁶ See Ceci & Friedman, *supra* note 196, at 46–53. The four studies analyzed by Ceci and Friedman were: "The Pediatric Exam Study" by Goodman and Karen Saywitz; "The Delayed Inquiry Study" by Goodman; "The Trailer Study" by Goodman and Leslie Rudy; and "The Mt. Sinai Study" by Goodman and Mitchell Eisen. *Id.*

²⁰⁷ *Id.* at 46–52.

²⁰⁸ *Id.* at 48–49.

²⁰⁹ *Id.* at 46–52. In "The Trailer Study," approximately three to seven percent of children agreed with the interviewer's false suggestions of sexual abuse. *Id.* at 49. Furthermore, "The Delayed Inquiry Study," following a similar format, revealed that one-third of the children supplied incorrect answers that indicated inappropriate touching by the adult. *Id.* at 48.

²¹⁰ *Id.* at 53.

²¹¹ Ceci & Friedman, *supra* note 196, at 49, 81, 84.

²¹² See *id.* at 84.

²¹³ See *infra* notes 214–225 and accompanying text.

as, if not better than, those who did not.²¹⁴ Even eighteen months after providing testimony, children in another study demonstrated no differences in self-esteem or behavior from children who did not provide in-court testimony.²¹⁵

In fact, some social scientists and legal scholars believe that children may find open court testimony to be therapeutic, due to the sense of retribution and empowerment the criminal justice system can provide to victims.²¹⁶ Prosecutors, parents, and therapists often underestimate a child's emotional ability to testify in court.²¹⁷ To demonstrate this point, law professor Jean Montoya examined transcripts of sexual abuse trials in which therapists testified during a pretrial hearing to determine the necessity of shielding a child witness.²¹⁸ Montoya reveals that in the transcript of one case, *People v. Akiki*, seven of twelve child witnesses indicated to the judge that they were capable of testifying in the defendant's presence.²¹⁹ The therapists, however, testified that the children would be unable to do so.²²⁰ In denying the prosecution's motion for shielded testimony in that case, the judge indicated that the children were not as fragile as their therapists claimed.²²¹

Conversely, other studies reveal adverse effects of testifying on child witnesses due to such factors as multiple interviews, lengthy delays and continuances, confronting the defendant at trial, and harsh courtroom questioning.²²² Still, very few evaluations of shielding procedures have been conducted to measure their actual effectiveness in reducing psychological harm to children.²²³ In fact, lack of trial preparation may account for a great deal of the trauma experienced by child witnesses.²²⁴ Despite the inconsistencies in empirical data on

²¹⁴ See Gail S. Goodman et al., *Innovations for Child Witnesses: A National Survey*, 5 PSYCHOL., PUB. POL'Y, & L. 255, 258 (1999).

²¹⁵ *Id.*

²¹⁶ *See id.*

²¹⁷ Jean Montoya, *Lessons from Akiki and Michaels on Shielding Child Witnesses*, 1 PSYCHOL., PUB. POL'Y, & L. 340, 363 (1995).

²¹⁸ *Id.* at 356-62.

²¹⁹ *Id.* at 361. In the *People v. Akiki* child sexual abuse case, eleven children testified without the aid of shielding procedures. *Id.* at 343-46 (citing *People v. Akiki*, No. CR. 129395 (Cal. Super. Ct. 1993)).

²²⁰ *Id.* at 362-63.

²²¹ *Id.* at 363.

²²² Goodman et al., *supra* note 214, at 258.

²²³ *See id.* at 259.

²²⁴ *See, e.g., State v. Foster*, 957 P.2d 712, 715 (Wash. 1998) (permitting shielding procedure for traumatized child witness who kept repeating, "I didn't know [defendant] was going to be [at trial].").

the subject, shielding statutes, including the Child Witness Act, continue to utilize shielding procedures.²²⁵

IV. ANALYSIS: THE ACT SHOULD NOT BE ADOPTED BY THE STATES AS DRAFTED

In the struggle to balance child witnesses' and defendants' rights, the Child Witness Act unjustly compromises the constitutional rights of the accused.²²⁶ Therefore, despite recent ABA approval, states should not adopt the Child Witness Act.²²⁷ First, the Child Witness Act falls below the standards of the Federal Confrontation Clause, as interpreted by the U.S. Supreme Court in *Maryland v. Craig*.²²⁸ Second, even if the Child Witness Act passes federal constitutional muster, it undeniably violates many state constitutional provisions, the drafters of which intentionally heightened criminal defendants' constitutional protections.²²⁹ Finally, the Child Witness Act runs contrary to important public policy principles, eroding the criminal justice system.²³⁰

A. Act's Unconstitutionality Under Federal Standards

The Court's holding in *Craig* set the federal standard for exceptions to the Sixth Amendment Confrontation Clause in the child witness context.²³¹ Therefore, no state or federal witness shielding statute can provide less protection to criminal defendants than that provided by the Federal Sixth Amendment as interpreted in *Craig*.²³² The Child Witness Act, however, is unconstitutionally broader in application than the *Craig* holding in three respects, thus providing significantly less protection to criminal defendants.²³³ First, the Child Witness Act encompasses virtually any technologically feasible shielding procedure and even accommodates as-yet undeveloped technology in its

²²⁵ See, e.g., UNIF. CHILD WITNESS TESTIMONY BY ALTERNATIVE METHODS ACT (2002); *supra* notes 172–224 and accompanying text.

²²⁶ See UNIF. CHILD WITNESS TESTIMONY BY ALTERNATIVE METHODS ACT.

²²⁷ See *id.*; Press Release, *supra* note 21. As of the close of the 2003 state legislative sessions, only three states—Idaho, Nevada, and Oklahoma—had enacted the Child Witness Act. Uniform Law Commissioners, *Child Witness Testimony by Alternative Methods Act Summary*, at <http://www.uccusl.org/uccusl/ActSearchResults.aspx> (last visited Jan. 6, 2004).

²²⁸ See *infra* notes 231–267 and accompanying text.

²²⁹ See *infra* notes 268–281 and accompanying text.

²³⁰ See *infra* notes 282–301 and accompanying text.

²³¹ 497 U.S. 836, 849–50, 855–56 (1990); see U.S. CONST. amend VI.

²³² 497 U.S. at 849–50, 855–56.

²³³ See *infra* notes 237–267 and accompanying text.

provisions.²³⁴ Second, the Child Witness Act does not limit the considerations by which judges could permit shielding procedures in their courtrooms.²³⁵ Lastly, the Child Witness Act does not limit the types of cases in which shielding methods may be used.²³⁶

The provisions of the Child Witness Act place no limitations on the types of shielding procedures that courts may use.²³⁷ Section 2(1)(C) of the Child Witness Act encompasses in its definition of "alternative method" any procedures by which witnesses testify outside defendants' presence.²³⁸ Courts may employ shielding procedures in criminal proceedings if the section 5 standard of proof is met.²³⁹ The Child Witness Act contains no other restrictions upon the type of witness shielding methodology judges may permit in their courtrooms, despite the *Craig* Court's insistence on reliability of witness shielding formats.²⁴⁰

Admittedly, judicial and legislative innovations since *Craig* have included a variety of witness shielding formats.²⁴¹ The Federal CVCWR statute, for example, permits testimony via two-way television and videotape.²⁴² Although the Ninth Circuit Court of Appeals upheld the CVCWR's constitutionality in 1993 in *United States v. Garcia*, the U.S. Supreme Court has held only that one-way closed-circuit television is permissible.²⁴³ Although the *Craig* Court found sufficient reliability in Maryland's one-way closed-circuit procedure, it did not provide a blanket approval of all shielding procedures.²⁴⁴ The Court has never ruled on the constitutionality of other legislative innovations that permit videotaped or two-way closed-circuit testimony.²⁴⁵

The Child Witness Act goes beyond current versions of state and federal shielding procedures to any other conceivable, or as-yet inconceivable, method in which the child is able to testify outside the

²³⁴ See *infra* notes 237-248 and accompanying text.

²³⁵ See *infra* notes 249-258 and accompanying text.

²³⁶ See *infra* notes 259-264 and accompanying text.

²³⁷ See UNIF. CHILD WITNESS TESTIMONY BY ALTERNATIVE METHODS ACT § 2(1) & cmt. (2002).

²³⁸ See *id.* § 2(1).

²³⁹ See *id.* § 5. Under section 5(a)(2), if the presiding officer finds by clear and convincing evidence that the child will suffer serious emotional trauma impairing his or her ability to communicate, the judge may permit the child to avoid face-to-face confrontation. *Id.*

²⁴⁰ *Id.* § 2(1); see 497 U.S. at 850.

²⁴¹ See Richards, *supra* note 5, at 399-403.

²⁴² *Id.* at 399-401.

²⁴³ 7 F.3d 885, 888 (9th Cir. 1993); Richards, *supra* note 5, at 399-400.

²⁴⁴ See 497 U.S. at 851-52.

²⁴⁵ See *id.* at 852; Howard, *supra* note 59, at 701.

defendant's presence.²⁴⁶ The Child Witness Act would give broad latitude to judges and magistrates to devise their own strategies for the protection of child witnesses.²⁴⁷ Rather than fostering uniformity in the treatment of child witnesses, the Child Witness Act would promote a broad range of procedural variations, many of which could compromise defendants' confrontation rights.²⁴⁸

The second reason the Child Witness Act is impermissibly broader than *Craig* is due to its absence of limitations on the types of factors judges may consider when determining the necessity of a shielding method.²⁴⁹ In addition to requiring reliability of the shielding procedure, the *Craig* majority also required a showing of its necessity to further a compelling state interest.²⁵⁰ The Court had previously emphasized in *Coy v. Iowa* that such policy exceptions to the Confrontation Clause were limited and insisted upon individualized findings of necessity when Confrontation Clause exception issues arise.²⁵¹

The Court in *Coy* and *Craig* only addressed protection of child abuse victims in the witness shielding context.²⁵² Although the Court did not negate the possibility of other valid policy considerations, it set a high standard by requiring witness shielding to be necessary to further a compelling, or important, state interest.²⁵³ The Child Witness Act, however, offers no such guidelines for the policy considerations judicial officers may make when faced with the issue.²⁵⁴ In fact, the Child Witness Act does not expressly include a requirement that exceptions to confrontation rights be based on any finding of compelling public policy.²⁵⁵ Instead, section 6 of the Child Witness Act suggests seven non-exclusive factors for judges to consider, none of which

²⁴⁶ See UNIF. CHILD WITNESS TESTIMONY BY ALTERNATIVE METHODS ACT § 2(1) cmt. (2002); McDonough, *supra* note 19.

²⁴⁷ See McDonough, *supra* note 19; *Recently Completed Uniform Act*, *supra* note 19; see also UNIF. CHILD WITNESS TESTIMONY BY ALTERNATIVE METHODS ACT.

²⁴⁸ See McDonough, *supra* note 19.

²⁴⁹ See UNIF. CHILD WITNESS TESTIMONY BY ALTERNATIVE METHODS ACT § 6; see also 497 U.S. at 849–50, 855.

²⁵⁰ See 497 U.S. at 849–50, 855.

²⁵¹ See 487 U.S. 1012, 1021 (1988).

²⁵² See *Craig*, 497 U.S. at 852–55; *Coy*, 487 U.S. at 1020–21. It is somewhat unclear whether *Craig* identified the compelling state interest as protection of child abuse victims or, more specifically, the protection of child sexual abuse victims, as the opinion uses both labels. See 497 U.S. at 852–55. That ambiguity, however, is irrelevant for the purposes of the foregoing discussion. See *id.*

²⁵³ See *Craig*, 497 U.S. at 852–55.

²⁵⁴ See UNIF. CHILD WITNESS TESTIMONY BY ALTERNATIVE METHODS ACT § 6.

²⁵⁵ See *id.*

encompasses a public policy consideration.²⁵⁶ The U.S. Supreme Court has unequivocally required that a compelling state interest or public policy be furthered by an exception to defendants' confrontation rights.²⁵⁷ Yet, the Child Witness Act ignores this key element of the *Coy* and *Craig* holdings, consequentially lowering the threshold by which state judges may permit shielding procedures.²⁵⁸

Finally, the Child Witness Act is unconstitutional because it does not restrict the application of shielding procedures for child witnesses to specific types of criminal proceedings, unlike most existing state statutes on the subject.²⁵⁹ Because the Child Witness Act does not limit permissible policy exceptions to protection of child abuse victims, it could be applied to all kinds of criminal matters.²⁶⁰ The Child Witness Act could apply to trials in which the child was not a victim at all, but merely a third-party observer of a robbery, for example.²⁶¹

As long as the child meets the threshold standard of emotional trauma required under section 5 of the Child Witness Act, a judge could permit an exception to the defendant's confrontation rights, regardless of the witness's relation to the alleged crime.²⁶² Clearly, a robbery case does not raise the same policy concerns regarding child welfare as does a child abuse prosecution, due to the especially despicable nature of sexual abuse.²⁶³ By permitting shielded testimony in any type of criminal proceeding, the Child Witness Act deviates substantially from the limited applicability of witness shielding contemplated by the U.S. Supreme Court in *Coy* and *Craig*.²⁶⁴

States should not adopt the Child Witness Act because it would be unlikely to sustain a federal constitutional challenge.²⁶⁵ Because the Child Witness Act does not narrowly tailor the types of permissible shielding methods, the factors to be considered by a judge in deciding

²⁵⁶ See *id.*

²⁵⁷ See *Craig*, 497 U.S. 852-55; *Coy*, 487 U.S. at 1020-21.

²⁵⁸ See UNIF. CHILD WITNESS TESTIMONY BY ALTERNATIVE METHODS ACT § 6; *Craig*, 497 U.S. 852-55; *Coy*, 487 U.S. at 1020-21.

²⁵⁹ See UNIF. CHILD WITNESS TESTIMONY BY ALTERNATIVE METHODS ACT § 2(3); *Recently Completed Uniform Act*, *supra* note 19.

²⁶⁰ See UNIF. CHILD WITNESS TESTIMONY BY ALTERNATIVE METHODS ACT § 2(3); *Recently Completed Uniform Act*, *supra* note 19.

²⁶¹ See UNIF. CHILD WITNESS TESTIMONY BY ALTERNATIVE METHODS ACT § 2(3).

²⁶² See *id.* § 5.

²⁶³ See *Craig*, 497 U.S. at 852-56 (highlighting judicial and legislative recognition of a state's interest in protecting minor victims of sex crimes).

²⁶⁴ See *Craig*, 497 U.S. at 852-56; *Coy*, 487 U.S. at 1020-21; UNIF. CHILD WITNESS TESTIMONY BY ALTERNATIVE METHODS ACT § 2(3).

²⁶⁵ See *supra* notes 231-264 and accompanying text.

whether to permit shielding in a particular trial, or the types of cases in which the methods may be used, it falls below the federal constitutional standards articulated by the *Craig* Court.²⁶⁶ Without further guidance from the U.S. Supreme Court regarding child witness shielding, it is presumptuous to enact such a drastic deviation from the Court's holding in *Craig*.²⁶⁷

B. Act's Unconstitutionality Under State Standards

Even if the Child Witness Act satisfies the standards of the Federal Confrontation Clause, it violates several state confrontation provisions.²⁶⁸ Some states whose confrontation clauses contain the words "face to face" have interpreted that language literally, resisting child witness shielding procedures on state constitutional grounds.²⁶⁹ The Federal Constitution provides merely a minimum threshold by which states measure the rights they afford to their own citizens.²⁷⁰ States have always been free to draft provisions that provide equal or greater rights, including rights of criminal defendants.²⁷¹ With respect to confrontation rights, several states, like Massachusetts, have consciously sought to enhance protection of criminal defendants and have consistently applied that intention to the issue of shielded testimony.²⁷²

To accommodate the proposed Child Witness Act, those states interpreting literally their confrontation clauses' "face to face" language would have to amend their constitutions or reverse precedents on the subject.²⁷³ Such actions are an unlikely result, judging by the strong opposition to the *Craig* holding demonstrated by the highest court in Massachusetts, for instance.²⁷⁴ Massachusetts already has a statute providing for shielded child witness testimony, but its state courts have consistently barred application of the provision.²⁷⁵ Likewise, adoption of the Child Witness Act, without an accompanying state constitutional amendment, could meet significant judicial resistance in some jurisdictions, either from an entire state court system or from individual judges

²⁶⁶ See *supra* notes 231–264 and accompanying text.

²⁶⁷ See *supra* notes 231–264 and accompanying text.

²⁶⁸ See Donahue, *supra* note 30, at 41–48.

²⁶⁹ See *supra* notes 131–148 and accompanying text.

²⁷⁰ See Donahue, *supra* note 30, at 47–48.

²⁷¹ See *id.*

²⁷² See *supra* notes 131–148 and accompanying text.

²⁷³ See *supra* notes 131–148 and accompanying text.

²⁷⁴ See *supra* notes 141–148 and accompanying text.

²⁷⁵ See *supra* notes 141–148 and accompanying text.

opposed to child witness shielding.²⁷⁶ Because the Child Witness Act is so broad and flexible, state judges can, in their discretion, permit the use of shielding methods on a very limited basis.²⁷⁷

Those states that already allow some form of child witness shielding should also hesitate to adopt such a broad provision.²⁷⁸ Despite the policy-driven trend to increase protection of children, states still have a duty to guarantee defendants' constitutional rights.²⁷⁹ The Child Witness Act threatens those rights by overreaching constitutional boundaries, or at the very least, disregarding states' legal standpoints.²⁸⁰ Some states will decline to adopt the Child Witness Act, but even in states where the Child Witness Act becomes law, the boundless interpretive and discretionary possibilities it provides will lead to countless variations on child shielding mechanisms in state family, probate, trial, and appellate courts around the country.²⁸¹

C. *Negative Consequences of the Act from a Policy Perspective*

Aside from constitutional considerations, child witness shielding procedures perpetuate a number of grave public policy ramifications, many revealed by empirical evidence.²⁸² Given the reality that some defendants are falsely accused, and especially considering the nature of child abuse allegations, the problems associated with shielded testimony are particularly inexcusable.²⁸³ Rather than expanding the applicability of shielding procedures as the Child Witness Act does, statutes should limit the use of shielded testimony.²⁸⁴

First, at a most basic level, child witness shielding diminishes the presumption of innocence guaranteed to defendants in criminal proceedings.²⁸⁵ When a child witness testifies outside the presence of the defendant, the jury is likely to assume that the child is afraid of the defendant.²⁸⁶ From that assumption, the jury may easily infer that the child

²⁷⁶ See *supra* notes 131-148 and accompanying text.

²⁷⁷ See UNIF. CHILD WITNESS TESTIMONY BY ALTERNATIVE METHODS ACT (2002); Gileran-Johnson & Evans, *supra* note 1, at 695-98; McDonough, *supra* note 19; *Recently Completed Uniform Act*, *supra* note 19.

²⁷⁸ See UNIF. CHILD WITNESS TESTIMONY BY ALTERNATIVE METHODS ACT.

²⁷⁹ See Beckett, *supra* note 16, at 1622; Fitzpatrick, *supra* note 1, at 208.

²⁸⁰ See *supra* notes 131-148, 226-279 and accompanying text.

²⁸¹ See *supra* notes 226-279 and accompanying text.

²⁸² See *infra* notes 285-301 and accompanying text.

²⁸³ See Fitzpatrick, *supra* note 1, at 196-99.

²⁸⁴ See UNIF. CHILD WITNESS TESTIMONY BY ALTERNATIVE METHODS ACT (2002).

²⁸⁵ See Schwalb, *supra* note 31, at 200-02.

²⁸⁶ See *id.*

fears the defendant because he or she committed the alleged acts that are the subject of the trial.²⁸⁷ The constitutionally guaranteed presumption of innocence is thus transformed into a presumption of guilt.²⁸⁸

Second, social science research has revealed that witness shielding may bias juries against child witnesses.²⁸⁹ In particular, studies have shown that jurors are less likely to believe child witnesses and more reluctant to convict defendants, especially of more serious crimes, when the witnesses are shielded.²⁹⁰ Children, therefore, are spared a few moments or hours of distress on the witness stand only to increase the likelihood that a guilty defendant will be released back into society potentially to commit the same offenses.²⁹¹

Another group of studies has raised doubts about the reliability of child witness testimony due to children's suggestibility, especially in child abuse investigations.²⁹² On the one hand, empirical evidence gathered under shielded conditions has shown an overall increased willingness of child witnesses to respond and to give more frequent and detailed responses.²⁹³ On the other hand, statistical research also has revealed an accompanying rise in false positives.²⁹⁴ The risk of such results is unacceptable in any criminal justice system, but particularly one that favors freeing the guilty over convicting the innocent.²⁹⁵ The especial suggestibility of children makes defendants' constitutional protections, including confrontation, even more necessary than when dealing with adult witnesses.²⁹⁶ Therefore, judges and legislatures should require empirical documentation of the effects of each proposed shielding method on children's testimonial accuracy before implementing those procedures in courtrooms.²⁹⁷

Finally, a third group of studies has suggested that children may not be as distressed at the prospect of testifying in court as therapists and prosecutors contend.²⁹⁸ Furthermore, longitudinal studies have raised doubts as to whether all children are emotionally harmed in the

²⁸⁷ See *Commonwealth v. Johnson*, 631 N.E.2d 1002, 1006 (Mass. 1994); Schwalb, *supra* note 31, at 200–02.

²⁸⁸ Schwalb, *supra* note 31, at 200; see *Johnson*, 631 N.E.2d at 1006.

²⁸⁹ See *supra* notes 178–187 and accompanying text.

²⁹⁰ See *supra* notes 178–187 and accompanying text.

²⁹¹ See Marsil et al., *supra* note 1, at 215–17.

²⁹² See *supra* notes 195–212 and accompanying text.

²⁹³ See *supra* notes 188–194 and accompanying text.

²⁹⁴ See *supra* notes 201–212 and accompanying text.

²⁹⁵ See Ceci & Friedman, *supra* note 196, at 34.

²⁹⁶ See *id.* at 49, 81, 84.

²⁹⁷ See Small & Schwartz, *supra* note 10, at 129–30.

²⁹⁸ See *supra* notes 217–221 and accompanying text.

long run by testifying in court, face to face with defendants.²⁹⁹ Prosecutors, judges, and parents may be too eager to spare young children the distress of open court testimony, not only denying defendants their constitutionally guaranteed rights but also denying children the chance to be empowered by taking the stand.³⁰⁰ Pretrial educational programs for young witnesses could help reduce the anxiety of confrontation while affording defendants their Sixth Amendment rights.³⁰¹

CONCLUSION

Promotion of child witness protection is a worthy and important goal of state legislatures and judicial officers. That objective, however, should not be pursued through abrogation of the constitutional rights of criminal defendants, particularly when they are accused of the most atrocious of crimes—sexual offenses against children. As the most recent step in the trend toward enhanced child witness protection, the states should not adopt the Child Witness Act because it impermissibly diminishes defendants' rights.

The Child Witness Act falls below the federal constitutional standards set forth in *Maryland v. Craig* by failing to place limitations on shielding procedures' applicability. The Child Witness Act also violates the constitutions of states whose confrontation clauses purposely heighten protections for criminal defendants beyond the federal standard. Finally, the Child Witness Act fails to address the adverse consequences witness shielding has for both defendants and child witnesses: for defendants, a presumption of guilt and reduced reliability of child witness testimony; for child witnesses, a loss of credibility as witnesses and the potential emotional benefits of open court testimony.

Therefore, proposed statutes like the Child Witness Act should seek to limit the use of shielding procedures to only the most reliable methods and most compelling circumstances. Statutory provisions should be accompanied by guidelines for pretrial witness education and preparation that encourage direct confrontation between witnesses and defendants. The Child Witness Act instead sacrifices the rights of criminal defendants for the sake of benefits to child witnesses that may not actually exist.

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²⁹⁹ See *supra* notes 213–216 and accompanying text.

³⁰⁰ See Montoya, *supra* note 217, at 363.

³⁰¹ See *Johnson*, 631 N.E.2d at 1007.