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Andrea L. Dennis*

Prosecutorial Discretion and the Neglect of Juvenile Shielding Statutes

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* Associate Professor of Law, University of Georgia School of Law. Thanks are owed to Susan Frelich Appleton who graciously spent time reading and commenting on a very early draft of this Article. Helpful feedback was also received from participants in Washington University Law School's junior faculty regional WIP workshop, the University of South Carolina School of Law's Social Justice Workshop, my former colleagues at the University of Kentucky College of Law, my current colleagues Dan Coenen and Erica Hashimoto, and members of the Mid-Atlantic Criminal Law Research Collective. Valuable research assistance was provided by Alicia Harden. All errors or omissions are my own. Thanks for everything, Plum.

I. INTRODUCTION

When legislatures enact statutes, furtherance of legislative intent depends on the behavior of actors in the executive and judicial branches of government. In the criminal justice system, prosecutors may frustrate legislative intent when they exercise prosecutorial discretion. This Article examines an instance in which prosecutors' choices work to the detriment of children. This troubling outcome is poignantly exemplified by the prosecution of juvenile prostitution cases.

University researchers conservatively estimated that 244,000 American children in the year 2000 were "at risk" of becoming victims of sexual exploitation—including prostitution.[1] While researchers could not precisely ascertain the number of juveniles actually participating in prostitution, they offered some generalizations about the characteristics of juveniles engaged in that practice. Most prostituted juveniles are girls whose average age when first engaging in prostitution is twelve to fourteen years.[2] The vast majority of prostituted girls are runaways, throwaways, or homeless; have been neglected and abused by their parents; and end up sexually exploited by pimps.[3] These girls' lives are full of violence and threats.[4] They are disconnected from family and friends, suffer from physical and emotional maladies, and may be drug-dependent.[5]

The United States Department of Justice has made it a priority in the last five years to prosecute U.S.-based pimps trafficking in juveniles.[6] The Department initiates federal cases and has established state-federal partnerships to assist in state-level prosecutions.[7] Some of these pimp prosecutions are resolved through trial rather

1. RICHARD J. ESTES & NEIL ALAN WEINER, UNIV. OF PA., THE COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN IN THE U.S., CANADA AND MEXICO 143 (2001).
2. *Id.* at 92.
3. *Id.* at 60, 68.
4. *Id.* at 68.
5. *Id.* at 75–89.
6. *See* Press Release, U.S. Dep't of Justice, The Innocence Lost Initiative (Dec. 15, 2005), *available at* http://www.justice.gov/criminal/ceos/innocencelost%20FACT FINAL_121605.pdf.
7. *See, e.g.*, Press Release, U.S. Dep't of Justice, Department of Justice Announces Human Trafficking Task Force in the District of Columbia and Grants for Law Enforcement to Fight Human Trafficking and Assist Victims (Nov. 23, 2004), *available at* http://www.ojp.usdoj.gov/archives/pressreleases/2004/DOJ04760.htm; Press Release, U.S. Dep't of Justice, Five Arrested in Houston Sex Trafficking Case (Aug. 25, 2009), *available at* http://www.justice.gov/criminal/ceos/Press%20Releases/SDTX_FIVE-ARRESTED_08-25-09.pdf.

than guilty plea.[8] When a case proceeds to trial, the juvenile is likely to be a prosecution witness.[9]

Prosecution should represent a space of apparent safety—both physically and emotionally—for the prostituted juvenile. The court has probably detained her pimp, thereby limiting his influence over her, and government officials can also provide her with ameliorative social and educational services. Yet, the adjudicatory process itself places burdens on the juvenile, particularly when the case proceeds to trial. At times, the government detains as material witnesses girls who are especially reluctant to cooperate with an investigation, so much so they might choose to flee before testifying.[10] At trial, the juvenile confronts the difficult and traumatic task of recounting episodes of sexual exploitation in open court in the defendant's presence.[11]

Some juveniles who testify at trial can navigate the process with little or no more difficulty than the ordinary witness. Trial usually results in conviction, and the child is either none the worse for wear or has benefited emotionally from having her day in court. Other teenage prostitutes, however, need support to cope with the general rigors of testifying and the particularized stresses that result from having to testify in the presence of a former victimizer.[12] For these girls, the experience of testifying will add new short-term and long-term emotional and social harms to the heavy burdens already borne by being the victims of child prostitution.[13]

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8. *See, e.g.*, Press Release, U.S. Dep't of Justice, Federal Jury Convicts Washington, D.C. Man of Interstate Sex Trafficking of 14-Year-Old Child and 19-Year-Old Adult (Mar. 1, 2006), *available at* http://www.justice.gov/criminal/ceos/Press%20Releases/DC%20Brice%20PR_030106.pdf (trial); Press Release, U.S. Dep't of Justice, New Britain Man Pleads Guilty to Federal Child Sex Trafficking Charges (Jan. 21, 2011), *available at* http://www.justice.gov/criminal/ceos/Press%20Releases/DCT_Sanderson_PLEA_20110121.pdf (guilty plea).
9. *See* Debbie Wilgoren, *Area Juvenile Sex Rings Targeted Using Anti-Trafficking Laws*, WASH. POST, Mar. 6, 2006, at A1; Press Release, U.S. Dep't of Justice, "Motor City Mink" Sentenced to 35 Years Imprisonment on Internet Child Prostitution Charges (Mar. 19, 2009), *available at* http://detroit.fbi.gov/dojpressrel/pressrel09/de031909.htm.
10. *See* Myesha K. Braden, *Providing Victim-Centered Services to Prostituted Youth*, 54:7 U.S. ATTYS' BULL. 37, 41–42 (Nov. 2006); Geneva O. Brown, *Little Girl Lost: Las Vegas Metro Police Vice Division and the Use of Material Witness Holds Against Teenaged Prostitutes*, 57 CATH. U. L. REV. 471, 472–73 (2008).
11. *E.g.*, Wilgoren, *supra* note 9 (reporting that prostituted juveniles testified at length in trial).
12. *See id*. (describing use of advocates, tissues, and stress balls while prostituted teenagers testified).
13. *See* Mickey Goodman, *Teen Suicide Spurs War on Child Prostitution*, REUTERS, Nov. 28, 2007, *available at* http://www.reuters.com/article/2007/11/28/us-usa-prostitution-children-idUSN0736630420071128 (reporting about a prostituted juvenile who committed suicide after testifying at her pimp's trial).

From the prosecutor's perspective, indicting the pimp and having the child victim available to testify at trial should be an advantageous position. However, special problems confront prosecutors in child-prostitution cases. Because of immaturity and fear, the child witness may be uncooperative on direct examination or vulnerable to the rigors of cross-examination.[14] An overly stressed child may produce testimony that is unreliable or difficult to test with follow-up questions.[15] The child witness may refuse to answer questions at all, provide vague or incomplete answers, or give false or misleading responses.[16]

The prosecutor may employ a variety of measures to help the child witness whose effectiveness is threatened by the danger of emotional trauma while testifying. Pretrial, prosecutors may limit the number of interviews, use specially trained interviewers, provide therapeutic counseling, and prepare the child for her role as a witness, including a tour of the courtroom.[17] Throughout the testimonial process, prosecutors might provide a child witness with a stress-relieving item, such as a hand-held ball or comforting toy, or request that a supportive adult sit near the child.[18] Additionally, prosecutors may ask that the court monitor the locations and movements of counsel during testimony, order the re-arrangement of seating during the child's examination, or instruct attorneys to remain seated while questioning a child witness.[19]

In addition to measures generally focused on remediating harms from testifying, a unique, particularized, and highly controversial measure prosecutors have available to them is the practice of shielding.[20] Unlike other measures, shielding is aimed exclusively at remediating the harms caused by the presence of the defendant while the witness testifies.[21] It is usually—but not exclusively—available for very young victim-witnesses in sexual abuse cases.[22]

Shielding limits the ability of the juvenile witness to view the defendant—and sometimes the defendant to view the witness—while

14. Kayla Bakshi & Darcy Katzin, *Helping Child Victims and Witnesses Present Effective Testimony*, 54:7 U.S. ATTYS' BULL. 42, 42–43 (Nov. 2006).

15. *See id*. at 42–43, 46.

16. *See id*.; *infra* section II.A.

17. *See* Bakshi & Katzin, *supra* note 14, at 43–45.

18. AM. PROSECUTORS RESEARCH INST., INVESTIGATION AND PROSECUTION OF CHILD ABUSE 326–27, 441–42 (3d ed. 2004); Wilgoren, *supra* note 9.

19. AM. PROSECUTORS RESEARCH INST., *supra* note 18, at 326.

20. This Article adopts the term "shielding" to describe any measure that limits the ability of the child to view the defendant while testifying. Jean Montoya used this concept in her 1992 work critiquing the Supreme Court's decision in *Maryland v. Craig*, 497 U.S. 836 (1990). *See* Jean Montoya, *On Truth and Shielding in Child Abuse Trials*, 43 HASTINGS L.J. 1259, 1260 (1992).

21. *Craig*, 497 U.S. at 852–53.

22. *See infra* subsection III.D.2.b.

the witness testifies.[23] The ability to request shielding of at least some child witnesses is available to prosecutors in virtually every jurisdiction.[24] Most shielding laws took hold in the 1980s and 1990s, which saw an exponential increase in reported child sex abuse cases, excessive media coverage of notorious child sex abuse scandals, and research indicating that sometimes children were traumatized by testifying in the presence of the defendant.[25] In 1990, the Supreme Court approved shielding in *Maryland v. Craig*,[26] after sidestepping the constitutionality issue in the earlier case of *Coy v. Iowa*.[27] Justice Scalia vigorously dissented in *Craig*,[28] and many legal scholars joined him in offering critiques of the majority opinion.[29]

Legislators, vindicated in their efforts by the Court's decision, presumably expected that prosecutors would use the latest addition to their trial-practice toolbox, ultimately to the benefit of both children and the public at large. Yet almost ten years later, survey research revealed that prosecutors often declined to seek approval to shield juvenile witnesses, and more recent anecdotal evidence suggests this trend has persisted.[30] In short, it appears that the legislative aims behind shielding—remediating harm to child witnesses and facilitating prosecution in child sex abuse cases[31]—have been frustrated by the discretionary choices of prosecutors.

The failure of prosecutors to use shielding in many cases raises serious concerns. Especially worrisome is the risk that prosecutorial choices have produced inequities in the treatment of different categories of child witnesses. There is reason to believe that shielding is not broadly available to juvenile witnesses in teenage prostitution cases, as well as youthful witnesses in domestic violence and street crimes cases.[32] Rather, shielding is mostly limited to young children in sex

23. *Craig*, 497 U.S. at 854–55.
24. *See infra* section II.B.
25. *See infra* section II.A.
26. 497 U.S. at 836.
27. 487 U.S. 1012 (1988); *see infra* section II.C.
28. *See Craig*, 497 U.S. at 860 (Scalia, J., dissenting).
29. *Craig* led to the emergence of a robust body of literature on the constitutional propriety and normative value of shielding. *E.g.*, Toni M. Massaro, *The Dignity Value of Face-to-Face Confrontations*, 40 U. FLA. L. REV. 863 (1988); Montoya, *supra* note 20; Robert P. Mosteller, *Remaking Confrontation Clause and Hearsay Doctrine Under the Challenge of Child Sexual Abuse Prosecutions*, 1993 U. ILL. L. REV. 691 (1993); Peter T. Wendel, *A Law and Economics Analysis of the Right to Face-to-Face Confrontation Post-*Maryland v. Craig: *Distinguishing the Forest from the Trees*, 22 HOFSTRA L. REV. 405 (1993); Bryan H. Wildenthal, *The Right of Confrontation, Justice Scalia, and the Power and Limits of Textualism*, 48 WASH. & LEE L. REV. 1323 (1991).
30. *See infra* section II.D.
31. *See infra* section II.B.
32. *See infra* text accompanying notes 185–87.

abuse cases.[33] If one is committed to youth-centered advocacy—as contrasted with defense or prosecution-focused advocacy—or takes seriously the promotion of a stated legislative aim of protecting child witnesses while testifying, then there is much to learn from examining prosecutors' neglect of this unique aspect of criminal adjudication.

This Article reviews the failure of juvenile shielding statutes to take hold in the prosecution of cases involving child witnesses because of prosecutors' discretionary decisions not to use these statutes.[34] The Article investigates prosecutors' pragmatic and doctrinal justifications for not utilizing juvenile shielding statutes and concludes that the proffered reasons are legitimate. Building on these insights, the Article concludes by offering legislative reform designed to revitalize juvenile shielding statutes.

The discussion that follows proceeds in three parts. Part II describes the development of juvenile shielding laws, particularly the circumstances sparking the public and academic demand for protection of juvenile witnesses during in-court testimony, the resulting state legislative enactments of juvenile shielding statutes, and the Supreme Court's validation of these statutes in *Craig*. This Part then describes evidence revealing the unexpected failure of prosecutors to use this modern and constitutional litigation device.

Part III fleshes out the multiple factors that have led prosecutors to seldom use such statutes, despite expectations to the contrary. Generally, prosecutors' concerns reflect four ideas: namely, that shielding is (1) infeasible, (2) needless, (3) ineffective, and (4) impermissible. Even in the wake of *Craig*, a follow-up assessment of each explanation shows them all to be legitimate.

Part IV draws on the observations in Part III to suggest that legislators must pay close attention to who is granted standing to request protective measures, who falls within the protected class of witnesses, and which technologies are best utilized to effectuate shielding. Evaluation of these matters leads to three reform proposals. First, witnesses must be given authority independent from prosecutors to request shielding. Second, the class of witnesses eligible for protection should not be limited by the witness's role in the case or the characteristics of the case or child. Third, legislative enactments should eschew reliance on electronic technologies. In essence, this Article suggests that legislative adoption of these reforms—and only legislative adop-

33. *See infra* subsection III.D.2.b.

34. This Article embraces the challenge posed by I. Bennett Capers for legal scholars to examine how the efficacy of a legislative criminal reform effort is contingent upon the actions of other criminal justice institutions and players. *See* I. Bennett Capers, *Crime Legitimacy, Our Criminal Network, and the Wire*, 8 OHIO ST. J. CRIM. L. (forthcoming 2011) (manuscript at 13–15) (on file with author).

tion of these reforms—will invigorate shielding laws in a way that permits them to achieve their original and salutary purposes.

II. THE DEVELOPMENT OF JUVENILE SHIELDING LAWS

This Part describes the advent of juvenile shielding laws aimed at remediating the problems with in-court child witness testimony, including traumatization of the child witness and production of unreliable testimony. In the 1980s and 1990s, psychologists studied the effects of testifying in court on child sexual abuse victim-witnesses.[35] Their efforts were inspired by the rapid increase in reports of child sexual abuse and notorious child sexual abuse cases that made their way into the public consciousness.[36] Overall, research demonstrated that some child sex abuse victim-witnesses who testified at trial were traumatized by the experience generally and by the defendant's presence in particular.[37] Moreover, in some cases evidence revealed that confronting the defendant caused the child's testimony to be less complete and accurate than it otherwise would have been.[38]

In response to these findings, legislatures nationwide enacted new laws, including shielding laws, in an effort to limit the negative impact of the defendant's presence on testifying child witnesses.[39] Shielding measures limit the ability of the child witness to view the defendant while the child testifies.[40] In 1990, the Supreme Court in *Maryland v. Craig* sanctioned shielding when it held that the Sixth Amendment Confrontation Clause was not violated when young child sex abuse victim-witnesses testified at trial outside the courtroom via one-way closed-circuit television while the defendant remained in the courtroom.[41] *Craig* remains good law. In 1999, however, survey data revealed that prosecutors rarely invoke shielding statutes, and anecdotal evidence suggests that this continues to be the case.[42]

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35. *See, e.g.*, Gail S. Goodman et al., *Testifying in Criminal Court: Emotional Effects on Child Sexual Assault Victims*, 57 MONOGRAPHS OF THE SOC'Y FOR RES. IN CHILD DEV., no. 5, 1992 at 1.

36. *See* Tonya L. Brito, *Paranoid Parents, Phantom Menaces, and the Culture of Fear*, 2000 WIS. L. REV. 519, 520–22 (2000).

37. Goodman et al., *supra* note 35, at 114–21.

38. *Id*. at 88, 121.

39. *See* DEBRA WHITCOMB, U.S. DEP'T OF JUSTICE, WHEN THE VICTIM IS A CHILD 65 (2d ed. 1992).

40. *See* Maryland v. Craig, 497 U.S. 836, 853–55 (1990).

41. *Id*. at 854–55; *see infra* section II.C.

42. *See* Gail Goodman et al., *Innovations for Child Witnesses: A National Survey*, 5 PSYCHOL. PUB. POL'Y & L. 255 (1999); *infra* Part III.

A. Child Sexual Abuse Reporting, Notoriety, and Research

Beginning in the mid-1970s and continuing through the mid-1980s, reports of child sexual abuse swiftly increased.[43] Then, in the 1980s, the nation's attention was gripped by a series of criminal sexual abuse prosecutions charging daycare operators with the abuse of large numbers of young children.[44] Daycare employees across the country were prosecuted and the national media reported on the cases, including the following: McMartin Preschool (California), Wee Care Nursery School (New Jersey), Gingerbread Preschool (Massachusetts), Craig's Country Preschool (Maryland), and Country Walk Daycare (Florida).[45] In connection with these prosecutions, many of the alleged child victims testified in criminal court.[46] Many of the trials resulted in convictions.[47]

Researchers soon focused attention on examining the experience of child victims of sexual abuse while testifying. Professor Gail Goodman was, and continues to be, the dominant researcher in this area. In 1992, Goodman and collaborators published a study, begun years earlier, concluding that some child sexual abuse victim-witnesses were frightened by the prospect of testifying in criminal court, were emotionally stressed while testifying, and suffered continuing psychological harms as a result of the experience.[48]

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43. The currently named American Humane Association (AHA) was responsible for collecting data on abuse and neglect from 1973 to 1987. *See Child Abuse & Neglect Data*, AM. HUMANE ASS'N, http://www.americanhumane.org/children/professional-resources/research-evaluation/child-abuse-and-neglect-data.html (last visited July 11, 2011). In 1976, according to the AHA, 1,975 cases of child sex abuse were reported, and in 1986 the number was 132,000. Brief of Am. Psychological Ass'n as Amici Curiae in Support of Neither Party at 2 n.2, *Craig*, 497 U.S. 836 (No. 89-478) [hereinafter APA Brief].

44. *See* Brito, *supra* note 36, at 520–22.

45. *See id*. (listing daycare child abuse cases that grabbed nationwide attention); Mary DeYoung, *Two Decades After* McMartin: *A Follow-up of 22 Convicted Day Care Employees*, 34 J. SOC. & SOC. WELFARE 9 (2007) (reviewing cases of twenty-two daycare workers who were convicted in daycare ritual abuse cases). Not all cases received national attention, however. *See* DeYoung, *supra*, at 11.

46. *See, e.g.*, Craig v. State, 544 A.2d 784 (Md. Ct. Spec. App. 1988), *rev'd*, 497 U.S. 836 (1990) (Craig's Country Preschool); State v. Michaels, 642 A.2d 1372 (N.J. 1994) (Wee Care); State v. Kelly, 456 S.E.2d 861 (N.C. Ct. App. 1995) (Little Rascals); PAUL EBERLE & SHIRLEY EBERLE, THE ABUSE OF INNOCENCE: THE MCMARTIN PRESCHOOL TRIAL 51–68, 75–87 (1993) (McMartin Preschool).

47. Defendants in some cases were convicted and served sentences (e.g., Country Walk), while others were convicted but had their convictions overturned on appeal, resulting in prosecutors dismissing charges (e.g., Wee Care, Craig's Country Preschool). *See* DeYoung, *supra* note 45, at 11–13. The *McMartin* defendants were acquitted of many charges and the prosecutors ultimately dismissed the remaining ones. *Id.* at 11.

48. Goodman et al., *supra* note 35, at 114. The study was funded by the National Institute of Justice. *See* WHITCOMB, *supra* note 39, at 27 n.49.

In anticipation of testifying, some children reported fear at having to recount their stories in public and in front of the defendants.[49] Overall, children who testified experienced social and emotional repercussions during the pendency of their cases.[50] As compared to children six to eleven years of age, more specifically, children less than six years of age and older than eleven years demonstrated more behavioral problems after testifying.[51] Additionally, children who testified on multiple occasions had more deep-seated problems, as compared to children who testified one time.[52] After testifying, most children identified facing the defendant as the most frightening aspect of testifying.[53] Female witnesses experienced higher levels of strain than males.[54]

Goodman's data also revealed that testimony provided by child sex abuse victim-witnesses who confronted their alleged victimizers in the courtroom was less than ideal. Children tended to answer more questions posed by prosecutors than defense attorneys and provided less detailed responses to defense attorney questions.[55] As a child's fear of the defendant increased, the child answered fewer of the prosecutor's questions.[56]

B. State Legislatures Spring into Action

In response to research suggesting that testifying in criminal court for some child sex abuse victim-witnesses was stressful and produced unhelpful testimony, many state legislatures enacted statutes permitting the use of measures designed to prevent or reduce trauma to children who testify in sex abuse cases.[57] Shielding was a common

49. Goodman et al., *supra* note 35, at 121.
50. *Id.* at 114.
51. *Id.* at 115.
52. *Id.* at 117.
53. *Id.* at 121.
54. *Id.* at 116.
55. *Id.* at 88.
56. *Id.* at 121.
57. For example, a prosecutor could have a supportive adult sit near the child in the courtroom while testifying in order to comfort the child. *E.g.*, 18 U.S.C. § 3509(i) (2006); CONN. GEN. STAT. ANN. § 54-86g(b)(2) (West 2009). Judges could close courtrooms to public observation to protect children from the embarrassment and trauma of testifying publicly. *See* 18 U.S.C. § 3509(e); Globe Newspapers Co. v. Superior Court, 457 U.S. 596 (1982). Judges were authorized to control the manner of interrogation of child witnesses. *E.g.*, ALA. CODE § 15-25-1 (1995) (permitting leading questions for victims or witnesses under ten years of age). Some statutes permit attorneys to use testimonial aides, such as dolls and drawings, while questioning child witnesses. *E.g.*, 18 U.S.C. § 3509(*l*) ("anatomical dolls, puppets, drawings, mannequins, or any other [appropriate] demonstrative device"); CONN. GEN. STAT. ANN. § 54-86g(b)(3) (anatomically correct dolls). Finally, attorneys have been ordered to remain seated while questioning and making objections to the testimony of child witnesses. CONN. GEN. STAT. ANN. § 54-

innovation. By December 31, 1989, thirty-two states and the federal government had passed statutes allowing for juvenile shielding by closed-circuit television.[58]

The closed-circuit television method involves taking the child's testimony in a location outside the courtroom, while contemporaneously transmitting it into the courtroom via closed-circuit television.[59] In all cases, the defendant remains in the courtroom and can view the testifying child.[60] Sometimes, testimony taking involves only one-way transmission, so that the child witness does not view the defendant at all.[61] Other times a judge uses two-way transmission, which permits the child to view the defendant through a video monitor without having to enter the courtroom and testify in the physical presence of the defendant.[62]

Shielding can also be implemented without the use of electronic technology. Prior to the enactment of shielding statutes, some judges authorized the placement of a one-way screen, partition, or mirror between the child and the defendant so that the child could not observe the defendant but the jury and defendant were able to observe the child.[63] Other judges reconfigured the parties' or witnesses' stations in the courtroom to allow the defendant and jury to see the child witness while limiting the ability of the juvenile to see the defendant.[64]

86g(b)(4); s*ee also* Montoya, *supra* note 20, at 1260–61 (discussing different statutory schemes enacted to protect child witnesses).

58. WHITCOMB, *supra* note 39, at 65.

59. *See, e.g.*, United States v. Weekley, 130 F.3d 747 (6th Cir. 1997) (using two-way closed-circuit television); United States v. Quintero, 21 F.3d 885 (9th Cir. 1994) (using closed-circuit television); United States v. Farley, 992 F.2d 1122 (10th Cir. 1993) (using two-way closed-circuit television).

60. Shielding as used herein does not include use of closed-circuit television to transmit a child's testimony from one room to the courtroom when the defendant is present in the same room while the child is testifying because the child testifies in the defendant's physical presence.

61. Maryland v. Craig, 497 U.S. 836, 841–42 (1990).

62. *See* 18 U.S.C. § 3509(b)(1); United States v. Boyles, 57 F.3d 535 (7th Cir. 1995). Another method relying on electronics is to video-record the child's testimony outside the defendant's presence prior to trial and later show the recorded testimony in the courtroom during trial. This method combines both shielding and use of the child's hearsay testimony. This Article does not concern the use of hearsay testimony in lieu of in-court testimony. *See* White v. Illinois, 502 U.S. 346 (1992); Idaho v. Wright, 497 U.S. 805 (1990).

63. *See, e.g.*, ALASKA STAT. § 12.45.046 (2011) (permitting one-way mirror); Hoversten v. Iowa, 998 F.2d 614 (8th Cir. 1993) (same); Graham v. Addison, No. CIV-05-322-RAW, 2008 WL 2704474 (E.D. Okla. July 7, 2008) (using a blackboard as a divider).

64. *E.g.*, Ellis v. United States, 313 F.3d 636 (1st Cir. 2002) (positioning witness's chair so that it did not face the defendant); Smith v. State, 8 S.W.3d 534 (Ark. 2000) (same); Ortiz v. State, 374 S.E.2d 92 (Ga. Ct. App. 1988) (same); State v. Hoyt, 806 P.2d 204 (Utah Ct. App. 1991) (switching usual prosecution and defense seating arrangement so that witness was not seated directly across from

C. Supreme Court Approval

Shielding statutes proved controversial because they implicate the Sixth Amendment Confrontation Clause, which specifies: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[65] The Supreme Court had long suggested that confrontation requires physical proximity of the defendant and witness while the witness testifies. In an 1895 case, *Mattox v. United States*,[66] the Court stated that a witness should "stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives testimony whether he is worthy of belief."[67] Eighty-five years later, in *Ohio v. Roberts*,[68] the Court again declared that "the Confrontation Clause reflects a preference for face-to-face confrontation."[69] Criminal defendants drew on these authorities to argue that shielding laws offended the textual command of the Constitution that they be "confronted with the witnesses against" them.[70]

Notwithstanding defendants' arguments, in *Coy v. Iowa*[71] the Court signaled its willingness to uphold child shielding laws. In *Coy*, the defendant was charged with sexual abuse of two thirteen-year-old girls.[72] At the State's request, the trial court permitted the two victim-witnesses to testify at the defendant's trial behind a one-way screen that shielded the defendant from the witnesses' views.[73] Fol-

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defendant). *But see* Commonwealth v. Johnson, 631 N.E.2d 1002 (Mass. 1994) (placing child so the defendant observed only the child's back held unconstitutional).

65. U.S. CONST. amend. VI. The Supreme Court has held that the right of confrontation applies to juvenile delinquency proceedings. *In re* Gault, 387 U.S. 1, 56 (1967). It is unclear, however, whether the nature, scope, and application of the right of confrontation in juvenile proceedings are identical to that in adult criminal prosecutions.
66. 156 U.S. 237 (1895).
67. *Id*. at 242–43.
68. 448 U.S. 56 (1980).
69. *Id*. at 63. *But see* Coy v. Iowa, 487 U.S. 1012, 1016 (1988) (claiming "the Confrontation Clause *guarantees* the defendant a face-to-face meeting with witnesses appearing before the trier of fact" (emphasis added)). Some state constitutions use "face-to-face" language in their confrontation clauses. *E.g.*, KY. CONST. § 11 ("In all criminal prosecutions the accused has the right to . . . meet the witnesses face to face"); MASS. CONST. pt. 1, art. XII ("[E]very subject shall have a right to . . . meet the witnesses against him face to face"); *see also* Sarah M. Dunn, Note, *"Face to Face" with the Right of Confrontation: A Critique of the Supreme Court of Kentucky's Approach to the Confrontation Clause of the Kentucky Constitution*, 96 KY. L.J. 301, 314 n.22 (2008) (listing states with "face-to-face" confrontation clause language). These states vary in whether or not the use of "face-to-face" language requires physical confrontation. *See* Dunn, *supra*, at 316–18.
70. U.S. CONST. amend. VI; *see, e.g.*, Maryland v. Craig, 497 U.S. 836 (1990).
71. 487 U.S. 1012 (1988).
72. *Id*. at 1012.
73. *Id.* at 1014–15.

lowing conviction, the defendant appealed, contending that use of the screen violated his right to face-to-face confrontation.[74] The Iowa Supreme Court affirmed his conviction.[75]

Before the Supreme Court, the State claimed that the defendant's Sixth Amendment confrontation right should be subordinated to the "necessity of protecting victims of sexual abuse."[76] The Supreme Court overturned the defendant's conviction, but did so on narrow grounds. The trial court had not made individualized findings that the victim-witnesses would be traumatized because the Iowa statute authorizing shielding created a presumption of witness trauma.[77] Citing a lack of individualized findings of trauma, the Supreme Court held that the defendant's right of confrontation was violated and reversed and remanded.[78] The Court declined to reach the question of whether there were any exceptions to a defendant's face-to-face Confrontation Clause right, leaving open the possibility of permitting shielded testimony if individualized trauma appeared on the record.[79]

Less than two years after its decision in *Coy*, the Supreme Court in *Maryland v. Craig*[80] again encountered the shielding issue. In *Craig*, the government had charged a daycare owner with committing sexual offenses against a six-year-old girl attending the daycare.[81] At trial, the State invoked a Maryland statute permitting a child victim-witness to testify via one-way closed-circuit television in a room apart from the courtroom where the defendant remained.[82] Before a child could testify in this manner, the statute required an individualized finding that the child would suffer serious emotional distress preventing reasonable communication in court.[83] The defendant objected to the protective measure, citing her face-to-face Confrontation Clause right.[84] The trial court rejected her argument and permitted the victim and three other children to testify via the protective procedure.[85]

74. *Id.* at 1015.
75. *Id.*
76. *Id.* at 1020.
77. *Id*. at 1021.
78. *Id*. at 1021–22.
79. *Id*. at 1021. The Court stated, however, that were it in the future to find any exceptions to the right of confrontation, it would do so only to "further an important public policy." *Id*. Justice O'Connor wrote separately for herself and Justice White to make clear their viewpoint that Confrontation Clause rights are not absolute and "may give way in an appropriate case to other competing interests." *Id.* at 1022 (O'Connor, J., concurring). These Justices deemed the protection of child witnesses a "compelling state interest." *Id.* at 1025.
80. 497 U.S. 836 (1990).
81. *Id.* at 840.
82. *Id.*
83. *Id.* at 841.
84. *Id.* at 842.
85. *Id.* at 843. A fifth child, aged eight years, also testified but did so without being shielded. Brief for Petitioner at 11 n.13, *Craig*, 497 U.S. 836 (No. 89-478). Be-

The jury convicted the defendant of all counts.[86] Her conviction was reversed on appeal for an insufficient showing of witness trauma.[87]

The Supreme Court granted certiorari to resolve "whether the Confrontation Clause of the Sixth Amendment categorically prohibits a child witness in a child abuse case from testifying against a defendant at trial, outside the defendant's physical presence, by one-way closed circuit television."[88] Before turning directly to the issue, the Court delineated the nature and bounds of the Confrontation Clause right, stating, as it had in the past, that a witness ordinarily must testify in the defendant's physical presence.[89] The Court went on to conclude, however, that in "narrow circumstances" competing interests "'may warrant dispensing with confrontation at trial.'"[90] The Court explained that these "narrow circumstances" would exist only when dispensing with face-to-face confrontation was "necessary to further an important public policy and . . . reliability of the testimony [was] otherwise assured."[91]

Turning to the propriety of the statutory procedure at issue, the Court had no difficulty recognizing as compelling the State's interest in protecting minor victims of sex crimes from additional trauma and embarrassment.[92] The Court further concluded that "a State's interest in the physical and psychological well-being of child abuse victims

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cause she did not claim to have been abused, she was not covered by the authorizing statute. *Id*.

86. *Craig*, 497 U.S. at 843.

87. *Id.*

88. *Id.* at 840.

89. *Id.* at 844. Writing for the majority in *Coy*, Justice Scalia employed history and precedent to argue that the right of confrontation requires a witness and defendant come face-to-face; that is, the witness must testify in the physical proximity of the defendant. Coy v. Iowa, 487 U.S. 1012, 1015–21 (1988). The Court clearly stated, however, that the confrontation right does not require eyeball-to-eyeball confrontation such that a witness must look at the defendant or in the defendant's eyes while testifying. *Id.* at 1019. Moreover, courts have not interpreted state constitutions employing the "face-to-face" language as requiring eyeball-to-eyeball confrontation. *See* Dunn, *supra* note 69, at 314 n.22 (citing state court decisions that reject eyeball-to-eyeball confrontation). A trier-of-fact may, however, draw whatever inferences it likes from the failure of a witness to look the defendant in the eye. *Coy*, 487 U.S. at 1019.

90. *Craig*, 497 U.S. at 848 (quoting Ohio v. Roberts, 448 U.S. 56, 64 (1980)).

91. *Id.* at 850. It is unclear whether and how *Craig* applies to juvenile delinquency proceedings. Pursuant to authorizing statutes, courts have permitted shielding in juvenile delinquency matters. *E.g.*, *In re* J.D.S., 436 N.W.2d 342 (Iowa 1989) (four-year-old allegedly abused by sixteen-year-old testified via one-way mirror); *In re* Noel O., 855 N.Y.S.2d 318 (N.Y. Fam. Ct. 2008) (allowing five-year-old alleged victim of sexual abuse by teen to testify via two-way closed-circuit television); *In re* Howard, 694 N.E.2d 488 (Ohio Ct. App. 1997) (permitting child victims and witnesses of sexual abuse allegedly committed by a fifteen-year-old to testify via two-way closed-circuit television).

92. *Craig*, 497 U.S. at 852.

may be sufficiently important to outweigh, at least in some instances, a defendant's right to face his or her accusers in court."[93]

Following the logic of *Coy*, however, the Court continued to insist that shielding is permissible only "if the State makes an adequate showing of necessity."[94] Moreover, a determination of necessity must be on a case-by-case basis, be individualized to the particular child witness, be grounded on something more than de minimis trauma, and be attributable to the presence of the defendant rather than the other stresses of in-court testimony.[95] Because the court below had not made such an inquiry, the Supreme Court vacated and remanded the case for further findings.[96]

D. Unanticipated Prosecutorial Neglect

One might reasonably expect that shielding would be a popular litigation tool in the arsenal of prosecutors, especially given the public concern for child abuse victims, social science supporting the use of shielding, and constitutional approval of shielding laws.[97] In a follow-up study, however, Gail Goodman discovered otherwise.[98] In 1999, Goodman examined prosecutorial utilization of shielding mechanisms.[99] Her research revealed that prosecutors rarely utilized shielding, primarily because the court would not permit them to do so or because they anticipated they would not be authorized to utilize shielding if requested.[100] Goodman's study was far-reaching. It surveyed prosecutors nationwide about their use of shielding techniques and other innovations for child witnesses, their perceptions of those new methods, and prosecutors' reasons for not using particular innovations.[101] Goodman also solicited information regarding the impact of *Craig* on prosecutorial use of protective measures for child witnesses.[102]

As with many studies, Goodman's work may not capture the realities of shielding in perfect fashion. Goodman noted several limitations

93. *Id.* at 853.
94. *Id.* at 855.
95. *Id.* at 855–56.
96. *Id.* at 860. On remand, the Maryland Court of Appeals held that the trial court failed to make findings necessary to allow shielding, resulting in the reversal of the conviction. Craig v. Maryland, 588 A.2d 328, 340 (Md. 1991). Eventually, the government declined to re-try the case. *See* Elisha King, *State Won't Seek to Retry Howard Child-Abuse Cas*e, BALT. SUN, July 2, 1991, *available at* 1991 WLNR 767058.
97. *See supra* sections II.A–C.
98. *See* Goodman et al., *supra* note 42, at 255.
99. *See id*.
100. *Id.* at 270.
101. *Id.* at 263.
102. *Id.*

of the study, including a less than ideal fifty-two percent return rate among those surveyed, the temporal limitation of the results to the early 1990s, and the inability to draw causal relations from the data.[103] Nevertheless, the study offers helpful insights about prosecutorial decision-making. Prosecutors—not judges, child-witnesses, or parents—are the primary end-users of child witness legislative innovations because they are usually responsible for making strategic decisions regarding litigation, including whether to seek approval to use shielding.[104] As a result, prosecutors' motivations and desires should play a key role in legislative design. If prosecutors do not ultimately utilize the statutes, then the aims of legislators will be frustrated.

As an initial matter, Goodman's survey queried the characteristics of cases in which children appeared as witnesses.[105] According to prosecutors, the most common cases of this sort involved prosecutions for child sexual abuse, physical abuse, and domestic violence.[106] In the child sexual abuse cases, the children were especially likely to have been the victims of the prosecuted crimes.[107]

Next, Goodman asked about the level of utilization of child witness accommodations in child sexual abuse cases, as well as prosecutor perceptions of particular accommodations and explanations for lack of use.[108] In response to these questions, prosecutors indicated that they rarely or never used shielding measures.[109] With respect to inquiry regarding the utility of shielding, a high percentage of prosecutors did not respond, suggesting that their lack of experiences with shielding prevented them from judging its utility.[110] Those who did address the utility of shielding measures rated shielding as only moderately useful

103. *Id.* at 277–78.

104. Shielding statutes fall into one of four categories with respect to standing: (1) those that generally grant courts authority to order shielding, without specifying whether a motion must be filed and by whom, *e.g.*, MD. CODE ANN., CRIM. PROC. § 11-303(b) (West, Westlaw through 2011 legislation); TENN. CODE ANN. § 24-7-120(a) (2000); (2) those that vest authority to request standing in parties, presumably prosecutors and defendants, but not the witness, *e.g.*, CONN. GEN. STAT. ANN. § 54-86g(a) (West 2009); LA. CHILD. CODE ANN. art. 329A (2004); (3) those that vest standing in parties, the child, and the court, *e.g.*, 18 U.S.C. § 3509 (2006); MISS. CODE ANN. § 13-1-405(2) (West 1999); N.J. STAT. ANN. § 2A:84A-32.4(c) (West 1994); and, perhaps the most rare, (4) those that vest standing solely in prosecutors, *e.g.*, CAL. PENAL CODE § 1347(b) (West 2004).

105. Goodman et al., *supra* note 42, at 255.

106. *Id*. at 264–65.

107. *Id.* at 277.

108. *Id*. at 267–73.

109. *Id.* at 267. Prosecutors were most likely to use vertical prosecution, preparation of testimony, support persons in the courtroom, and tours of the courtroom in child sexual abuse cases to accommodate child witnesses. *Id.*

110. *Id.* at 270.

in reducing trauma to the testifying child and increasing the chances of successful prosecution.[111]

Goodman specifically asked prosecutors why they did not utilize shielding.[112] Prosecutors responded that the primary reason for not using shielding measures was that the court would not grant permission.[113] Concern that defendants would challenge the measure was also commonly cited as a reason not to pursue shielding.[114] With respect to shielding by closed-circuit television, prosecutors additionally cited a lack of funding.[115]

Finally, Goodman sought to determine whether the Supreme Court's holding in *Craig* influenced prosecutorial decisions about using child witness accommodations.[116] Only nine out of 134 respondents indicated that *Craig* influenced their litigation practices.[117] Of those respondents, only three indicated that it encouraged them to use shielding methods.[118]

In sum, Goodman's study revealed that children are especially likely to testify as victims in child sex abuse cases.[119] Additionally, she learned that children who testify usually do so without the benefit of shielding.[120] Finally, prosecutors explained that the Supreme Court's approval of shielding did not influence prosecutors to seek its use, and the most common reasons for not shielding included lack of permission, fear of defense challenges, and lack of resources.[121] The next Part explores these explanations in greater detail and examines others in order to ascertain whether prosecutors' explanations are well-founded.

III. AN AUTOPSY OF JUVENILE SHIELDING LAWS

Juvenile shielding statutes reflect legislative efforts to decrease the psychological harms to children that result from testifying in the presence of defendants and to increase the quality and quantity of such testimony.[122] Because prosecutors and judges had earlier acknowledged the utility of shielding a juvenile witness from the defen-

111. *Id.* at 269. Victim advocates, support persons in the courtroom, and touring the courtroom were deemed useful for reducing trauma to child witnesses in child sex abuse cases but not for increasing guilty outcomes. *Id.* at 268–69.
112. *Id*. at 263.
113. *Id.* at 269.
114. *Id.*
115. *Id.*
116. *Id.* at 273.
117. *Id.*
118. *Id.*
119. *Id*. at 264–65.
120. *Id*. at 268.
121. *Id*. at 270–73.
122. *E.g.*, *id*. at 256.

dant's presence, even without legislative approval,[123] observers might rightly have expected that prosecutors would embrace the formalized endorsement of shielding and use it broadly in their efforts to prosecute defendants in child abuse cases. Yet, Goodman's nationwide survey of prosecutors revealed that prosecutors rarely use shielding measures.[124] Prosecutors indicated that they do not use shielding because they view it as infeasible, needless, ineffective, and impermissible.[125] This Part probes the legitimacy of each of those explanations.

A. Infeasibility

Pragmatic concerns about implementation costs affect whether prosecutors use shielding, particularly technology-based shielding. In response to Goodman's 1999 survey, prosecutors indicated that they chose to rely mostly on child witness accommodations that were easily and inexpensively implemented, such as touring the courtroom with the child prior to trial or having a supportive adult in the courtroom while the child testified.[126] Prosecutors were less likely to use technological innovations—such as closed-circuit television—that require expensive machinery and out-of-the-ordinary efforts to implement, such as the purchasing of video and audio equipment, acquiring additional space, and employing specially trained personnel.[127] More recent information confirms that cost-based concerns continue to hamper the use of modern shielding technologies. In 2004, prosecutors were advised that technology-based shielding can be "very expensive" and "may be cost prohibitive."[128]

B. Needlessness

Goodman's survey of prosecutors identified lack of need as a reason prosecutors do not use juvenile shielding.[129] The survey data indicated that lack of need justifications flow from either the overall case mix of the prosecutor's office or the case-specific evaluation of a particular prosecutor.[130]

In a variety of ways, the particular caseload of an office or jurisdiction may impact the frequency with which prosecutors need to use shielding measures. Some jurisdictions handle only a small number of

123. *See supra* section II.B.
124. *See supra* section II.D.
125. *See infra* sections III.A–D.
126. *See supra* text accompanying notes 108–15.
127. *See supra* text accompanying notes 108–15.
128. AM. PROSECUTORS RESEARCH INST., *supra* note 18, at 455 (listing the disadvantages of using closed-circuit television).
129. Goodman et al., *supra* note 42, at 270.
130. *Id*. at 267.

cases involving child witnesses.[131] The dearth of cases in an office may be attributable either to a lack of cases coming to the attention of prosecutors or an office's low prioritization of cases with child witnesses, particularly child victim-witnesses.[132] In offices with few cases involving child witnesses, it is not surprising that prosecutors would less frequently use shielding.[133] Fewer cases creates fewer opportunities or need to use shielding, as well as greater per case cost to put technology to work.[134] Relatedly, it stands to reason that offices that do not—for whatever reason—prioritize cases involving child witnesses, particularly child victim-witnesses, would choose not to devote significant resources and energies to these prosecutions.[135] This is not to suggest that the office would not vigorously pursue prosecution. The office, however, may not go out of its way to utilize measures that are costly, preferring to focus resources on prioritized cases and use methods that are less resource-intensive.[136] Another caseload consideration turns on rates of guilty pleas. In jurisdictions with high guilty plea rates, it would be expected that shielding measures are rarely utilized for the simple reason that shielding becomes an issue only in cases that go to trial. If a prosecutor is able to resolve a case with a guilty plea and avoid going to trial, then the need to use shielding measures at trial is eliminated.[137]

Case-specific reasons also lend prosecutors to perceive a lack of need to use shielding. Prosecutors may decide not to seek the use of shielding if they are of the opinion, personally or after consultation with others, that the measure is not needed for a particular child.[138] The prosecutor may conclude that a child witness faces little or no risk of trauma from testifying that is attributable to a face-to-face encounter with the defendant.[139] In other words, an evaluation of this kind may lead the prosecutor to conclude that shielding is not necessary for the child because the child will not be harmed by testifying in the defendant's presence.

C. Ineffectiveness

Prosecutors' responses to Goodman's survey suggest that they are not confident in the efficacy of shielding and that they are unwilling to

131. *See id*. at 266–67.
132. *Id*. at 267.
133. *Id*.
134. *See id*. at 274.
135. *Id*. at 267.
136. *Id*.
137. *See id.*
138. *Id.* at 270–71 tbl.5; *see also* AM. PROSECUTORS RESEARCH INST., *supra* note 18, at 455 ("[P]rosecutor must determine whether close circuit television is appropriate on a case-by-case basis.").
139. *See* AM. PROSECUTORS RESEARCH INST., *supra* note 18, at 455.

use unhelpful innovations they believe will undermine the chances of conviction.[140] Shielding laws are aimed at both reducing the stress placed on child witnesses from testifying in the defendant's presence and facilitating prosecution by promoting the receipt of testimony from children.[141] Apparently, prosecutors are not inclined to believe that shielding statutes achieve these goals. In response to Goodman's survey, prosecutors responded that shielding is "useful" at reducing children's stress, but not "very useful."[142] Prosecutors' perceptions respecting whether shielding increases the likelihood of conviction were less optimistic. With respect to this concern, prosecutors rated shielding between "rarely useful" and "useful."[143] Prosecutors were also concerned the use of shielding might lead to a successful defense appeal.[144]

D. Impermissibility

In response to Goodman's survey, prosecutors indicated that the primary reason for not using shielding is that courts rejected their requests.[145] Given the Supreme Court's ruling in *Craig*, this response may seem odd or mistaken. Close examination suggests, however, that the response makes some sense. Prosecutors, not surprisingly, are hesitant to pursue litigation strategies that pose a chance of resulting in the reversal of a conviction. Indeed, prosecutors are employed to pursue punishment for criminal violations and, like other trial lawyers, tend to measure success based on case outcomes. In the case of child witness testimony, Goodman's survey revealed that prosecutors would strategically decline to use innovations that had the potential to hurt their cases, even if the measures might benefit the children.[146] For prosecutors, the post-*Craig* legal landscape may not have instilled confidence that shielding approvals by trial judges can be either affirmed or successfully defended on appeal. Three main concerns propel prosecutorial worries. First, in some jurisdictions, complications exist due to state constitutional rules that may impose limitations in addition to the federal law standards delineated in *Craig*.[147] Second, *Craig* itself raises far-reaching questions of applicability due to the opaqueness of the *Craig* rationale, the inherent difficulties of applying *Craig*'s rationale anew to individual cases, and legal uncertainties that surrounded the Court's endorsement of

140. *See* Goodman et al., *supra* note 42, at 267–74.
141. *Id*. at 256.
142. *Id*. at 268.
143. *Id.*
144. *Id.* at 272.
145. *Id*. at 270, 272.
146. *Id.* at 272.
147. *See infra* subsection III.D.1.

shielding in some circumstances.[148] Finally, the Supreme Court has not clarified or refined *Craig*, despite opportunities to do so.[149]

1. Interference of State Constitutional Laws

In *Craig*, the Supreme Court held that shielding statutes did not violate the Sixth Amendment's Confrontation Clause.[150] After *Craig,* however, state courts remained free to evaluate shielding statutes in light of their own state constitutions.[151] Most state courts held that shielding statutes withstood scrutiny under state constitutions.[152] However, relying on state constitutional language requiring "face-to-face" confrontation, three states interpreted their respective state constitutions as requiring literal face-to-face confrontation, which does not occur when shielding is employed.[153] Thus, for some prosecutors, shielding is not constitutionally available despite state legislative approval and Supreme Court sanction.

State constitutions also raise complications to the use of shielding laws even when state-court rulings have not wholly barred their use. First, in some jurisdictions it remains unresolved whether shielding comports with state constitutional commands.[154] In any such state, prosecutors may utilize shielding only at their own peril. Second, even if state courts conclude that state constitutions authorize shielding, they may not permit its use to the same extent as *Craig*.[155] At least in some states, defendants may be able to urge courts that a shielding ruling that meets the *Craig* standard offends a stricter standard established by state law.[156] Again, this state of affairs creates legal perils for prosecutors; faced with this two-bites-at-the-apple problem, local prosecutors might choose to avoid the use of shielding altogether.

2. Concerns about Craig

Even if a jurisdiction's shielding statute survives state constitutional scrutiny, concern about the rationale underlying the *Craig* standard and a plethora of unresolved issues about that standard's meaning may well discourage prosecutors from attempting to use the shielding mechanism.

148. *See infra* subsection III.D.2.
149. *See infra* subsection III.D.3.
150. Maryland v. Craig, 497 U.S. 836, 857 (1990).
151. *See* Dunn, *supra* note 69, at 311–14.
152. *See id*. at 316–17.
153. *See* People v. Fitzpatrick, 633 N.E.2d 685 (Ill. 1994); Commonwealth v. Bergstrom, 524 N.E.2d 366 (Mass. 1988); Commonwealth v. Ludwig, 594 A.2d 281 (Pa. 1991).
154. *See* Dunn, *supra* note 69, at 317.
155. *See id*.
156. *See, e.g.*, Brady v. State, 575 N.E.2d 981, 986–89 (Ind. 1991).

i. Nebulous Rationale

The rationale for the Court's holding in *Craig* is indefinite. On one hand, the Court's rationale seems to be grounded in long-standing precedent focused on promoting child welfare.[157] A holding grounded in precedent stands on sure footing and is unlikely to be overturned. On the other hand, the Court's decision can be viewed as rooted in overwhelming state legislative support of shielding measures and empirical findings that correlated in-court testimony with psychological harms.[158] A decision premised on such contemporary representations of public values, both of which can shift over time, seems more unstable in nature. These complexities in the Court's underlying reasoning in *Craig* raise questions as to both the durability and scope of the holding.

In arriving at its holding in *Craig*, the Court cited precedent establishing that the need to protect children suffices to warrant interference with a constitutional right.[159] Of particular significance were *New York v. Ferber*[160] and *Osborne v. Ohio*,[161] both of which the Court acknowledged approved legislation intruding on constitutional rights in order to further the State's interest in protecting the physical and emotional welfare of children.[162] The Court in *Ferber* confronted the question of whether a New York criminal statute that prohibited "persons from knowingly promoting sexual performances by children under the age of 16 by distributing material which depicts such performances" violated the First Amendment.[163] In *Osborne*, decided in the same term as *Craig*, the Court considered "whether Ohio may constitutionally proscribe the possession and viewing of child pornography" in light of the First Amendment.[164] In both cases, the Court rejected the constitutional attack.[165] Furthermore, the *Craig* Court relied upon *Ginsberg v. New York*[166] for the proposition that the State's interest in protecting child welfare is "traditional and 'transcendent.'"[167] *Ginsberg* held that a prohibition on the sale of obscenity to minors was constitutional when obscenity was determined in reference to minors and not adults.[168] Finally, the Court favorably

157. *See* Maryland v. Craig, 497 U.S. 836, 852–53 (1990).
158. *See id.* at 853–55.
159. *Id.* at 852–53.
160. 458 U.S. 747 (1982).
161. 495 U.S. 103 (1990).
162. *Craig*, 497 U.S. at 852–53.
163. *Ferber*, 458 U.S. at 749.
164. *Osborne*, 495 U.S. at 108.
165. *See id.*; *Ferber*, 458 U.S. at 774.
166. 390 U.S. 629 (1968).
167. *Craig*, 497 U.S. at 855 (quoting *Ginsberg*, 390 U.S. at 640).
168. *Ginsberg*, 390 U.S. at 633.

cited *Prince v. Massachusetts*,[169] in which the Court upheld child labor laws on the basis of the State's parens patriae interest in the well-being of its youth.[170]

Having indicated that its precedent established a compelling state interest in protecting child victims of sex abuse, the Court went on to explain that its conclusion was reinforced by the substantial legislative support for measures aimed at reducing the trauma to child witnesses in abuse cases.[171] More particularly, the Court tallied the number of states that permitted use of either one-way or two-way closed-circuit television in abuse cases as well as those authorizing videotaped testimony of sexually abused witnesses.[172] The Court has often relied upon patterns of state legislative activity to justify constitutional decisions, but such reliance is not without its concerns and criticisms.[173] Moreover, it is unclear to what extent the Court relied on the modern legislative trend to support its decision.

These difficulties in determining the rationale for the Court's ruling are compounded because the Supreme Court's decision may also be viewed as grounded in whole or in part on social science data.[174] In the 1980s, social scientists studied the effects of testifying on child sex abuse victim-witnesses and concluded that some child sex abuse victims are significantly harmed by testifying in the defendant's presence and unreliable testimony may result from the defendant's presence while the witness testifies.[175] Legislatures enacted shielding provisions in response to this research.[176]

The Supreme Court was aware of the existing social science data when it issued its decision in *Craig*, in part because the American Psychological Association filed an amicus brief relating the state of knowledge at the time of the case.[177] Goodman was a primary consultant on the brief and her research permeates its arguments.[178] In its decision, the Court pointed out that social science evidence supported shielding.[179] In keeping with the findings of Goodman, the Court also spoke at various times of protecting the physical and psychological

169. 321 U.S. 158 (1944); *see Craig*, 497 U.S. at 852.
170. *Prince*, 321 U.S. at 166–70.
171. *Craig*, 497 U.S. at 853.
172. *Id.* at 853–54 & nn.2–4.
173. *See, e.g.*, Corinna Barrett Lain, *The Unexceptionalism of "Evolving Standards,"* 57 UCLA L. REV. 365, 369–70 (2009) (concluding that the Court's reliance on the majority trends of states to decide constitutional questions challenges the traditional understanding of the Court as counter-majoritarian and "bedrock principles of constitutional law").
174. *See Craig*, 497 U.S. at 854–55.
175. *See supra* section II.A.
176. *See supra* section II.B.
177. *See* APA Brief, *supra* note 43.
178. *See id.*
179. *Craig*, 497 U.S. at 855.

well-being of child abuse victims, as well as protecting minor victims of sex crimes from further trauma and embarrassment.[180]

The Court's references to social science evidence were arguably designed to lend strength to the Court's ultimate approval of shielding, whether based on precedent or legislative trend, rather than serve as the primary justification for permitting shielding.[181] Yet, it is possible that neither legislatures nor the Supreme Court were cautious enough in relying on social science to support adoption and approval of shielding. The state of research at the time was not robust and, depending on one's assessment, either did not demonstrate a consensus viewpoint or was conflicted.[182] The question naturally arises then: If premised on social science, should the Court's approval of shielding retain vitality if the initial data is discredited or newer data undermines it?

ii. Multiple Open Questions

Wholly apart from uncertainties about *Craig's* underlying rationale, the Court's decision left many questions unresolved, thereby creating unpredictability that has led prosecutors to avoid the use of shielding in some cases. Open questions include: How much more than de minimis trauma must be shown to warrant shielding? Is shielding permissible for children who are traumatized but nevertheless can testify? Must expert testimony be presented to establish the necessity for shielding? And what standard of proof applies when a trial court evaluates a case? Scholars have attempted to address these questions.[183]

A particularly difficult issue, which may substantially undermine prosecutorial utilization of shielding, is whether the Court's decision in *Craig* is generalizable to all juvenile witnesses in any type of case or is limited only to specific categories of child witnesses, such as to very young child victims in sex abuse cases like those involved in *Craig* itself. Scholars have paid far less attention to exploring in depth this issue.[184]

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180. *Id.* at 852–53.
181. *See id*. at 852–54.
182. *See, e.g.*, APA Brief, *supra* note 43.
183. *See* sources cited *supra* note 29.
184. Some have briefly raised the proposition. *E.g.*, Amy Ljungdahl, Maryland v. Craig: *Public Policy Trumps Constitutional Guarantees*, 14 J. CONTEMP. LEGAL ISSUES 515, 521 (2004) (querying whether the protections of *Craig* are limited to child sex abuse victims or extend to adult victims and victims of other crimes); Marc Chase McAllister, *Two-Way Video Trial Testimony and the Confrontation Clause: Fashioning a Better* Craig *Test in Light of* Crawford, 34 FLA. ST. U. L. REV. 835, 854–55 (2007) (opining that *Craig* should extend to disguised adult witnesses among others); Wendel, *supra* note 29, at 490 ("It is difficult to see . . . how the state's interest in protecting the well-being of children who are the victims of

Some state legislatures passed statutes that allow shielding only of certain classes of child witnesses. For example, shielding statutes vary widely in their age cut-offs.[185] With respect to the nature of the case, rules differ on whether to allow shielding in a narrow category of cases, a modest range of cases, or broadly in any case.[186] Finally,

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child abuse differs that much from (1) the state's interest in the well-being of children who are the victims of other personal crimes of a heinous nature; and (2) the state's interest in the well-being of victims of heinous crimes, regardless of the age of the victim."). Others have argued for extension of *Craig* to select categories of adults. *E.g.*, J. Steven Beckett & Steven D. Stennett, *The Elder Witness—The Admissibility of Closed Circuit Television Testimony After* Maryland v. Craig, 7 ELDER L.J. 313 (1999); Thekla Hansen-Young, *Considering the Constitutionality of a Confrontation Clause Exception for Domestic Violence Victims*, 14 BUFF. WOMEN'S L.J. 82 (2006); Heather Fleniken Cochran, Note, *Improving Prosecution of Battering Partners: Some Innovations in the Law of Evidence*, 7 TEX. J. WOMEN & L. 89, 112–13 (1997); Lisa Hamilton Thielmeyer, Note, *Beyond* Maryland v. Craig: *Can and Should Adult Rape Victims be Permitted to Testify by Closed-Circuit Television?*, 67 IND. L.J. 797 (1992).

185. A small minority of jurisdictions permits all juveniles up to the age of eighteen to be shielded. The Maryland statute at issue in *Craig* applied to juveniles under the age of eighteen years who were victims of child abuse. *Craig*, 497 U.S. at 842. That statute remains in effect but is now codified elsewhere. *See* MD. CODE ANN., CRIM. PROC. § 11-303 (West, Westlaw through 2011 legislation). The federal shielding statute that was enacted five months after the Court's decision in *Craig* also allows shielding for juveniles up to the age of eighteen years. Victims of Child Abuse Act of 1990, Pub. L. No. 101-647, § 225(a), 104 Stat. 4792, 4798 (codified as amended at 18 U.S.C. § 3509 (2006)). Iowa and Hawaii also set the maximum age at eighteen years. IOWA CODE ANN. § 915.38 (West 2003); HAW. R. EVID. 616. Several states also extend shielding to older teenagers, though not up to eighteen years of age. Louisiana and Rhode Island set the limit for shielding at seventeen years of age. LA. CHILD. CODE ANN. art. 329 (Supp. I 2010); R.I. GEN. LAWS § 11-37-13.2 (2002). A handful of states set the limit at sixteen years of age. ALA. CODE § 15-25-3 (LexisNexis 1995); ALASKA STAT. § 12.45.046 (2004); FLA. STAT. ANN. § 92.54 (West 1999); MISS. CODE ANN. § 13-1-405 (West 1999); N.J. STAT. ANN. § 2A:84A-32.4 (West 1994); 42 PA. CONS. STAT. ANN. §§ 5982, 5985 (West 2000). On the lower end of the age spectrum, many states permit shielding only for children who have not yet reached their teen years—for example, Delaware sets its age limit at eleven years. DEL. CODE ANN. tit. 11, § 3514 (2001). Many other jurisdictions set the limit only slightly later at twelve years. ARK. CODE ANN. § 16-43-1001 (1999); COLO. REV. STAT. § 16-10-402 (2010); CONN. GEN. STAT. ANN. § 54-86g (West 2009); KY. REV. STAT. ANN. § 421.350 (West 2006); MINN. STAT. ANN. § 595.02(4) (West 2010); OR. REV. STAT. § 40.460(24) (2003); S.D. CODIFIED LAWS § 26-8A-30 (2004); WIS. STAT. ANN. § 972.11(2m) (West 2007); VT. R. EVID. 807. Georgia and Washington are the most restrictive respecting age, setting the limit at ten years. GA. CODE ANN. § 17-8-55 (2004); WASH. REV. CODE ANN. § 9A.44.150 (West 2009).

186. Consistent with the fact that shielding was created in response to the experiences of child sex abuse victims, some jurisdictions have limited shielding to child sex abuse cases. *E.g.*, R.I. GEN. LAWS § 11-37-13.2 (2002) (limiting shielding to child sex abuse victims seventeen-years-old or younger). Commonly, however, statutes have moved a step further and extended shielding to all child abuse cases, whether sexual or physical. *E.g.*, CONN. GEN. STAT. ANN. § 54-86g (West 2009); LA. CHILD. CODE ANN. art. 329 (Supp. I 2010); WASH. REV. CODE ANN. § 9A.44.150

some jurisdictions limit the availability of shielding based on the child's relationship to the case.[187] Thus, in these jurisdictions, prosecutors may not be allowed to use shielding at all because of statutory limitations, even though the federal Constitution otherwise permits it. In other instances, a prosecutor may avoid the use of shielding laws due to potential disputes over ambiguous statutory interpretations regarding eligibility.[188] Given the lack of clarity of *Craig*, even prosecutors in jurisdictions with broad eligibility rules might hesitate to argue for shielding of a large portion of juvenile witnesses, including adolescent victims of prostitution or child witnesses to domestic violence.

When it decided *Craig*, the Supreme Court was well aware of differing statutory treatments of shielding. At oral arguments in both *Coy* and *Craig*, the Court inquired of counsel for the States about the limitations on what types of witnesses and in what types of cases the protective measures could be implemented. In *Coy*, the Court inquired specifically about the limitations of the Iowa statute that authorized the use of the screen.[189] Counsel contended that the language of the statute made the screening protection applicable even to a child witness in a robbery case where the child witnessed only a portion of the crime.[190] Upon further questioning about the broader applicability of his argument, counsel also maintained that, like traumatized children, traumatized adults and the elderly should be able to

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(West 2009). Some states have expanded shielding to all violent crime cases. CAL. PENAL CODE § 1347 (West 2004) (violent felonies); MINN. STAT. ANN. § 595.02(4) (West 2010); OHIO REV. CODE ANN. § 2945.481 (LexisNexis 2003); S.D. CODIFIED LAWS § 26-8A-30 (2004). At the extreme are jurisdictions that permit shielding of a child in any criminal case. *E.g.*, ARK. CODE ANN. § 16-43-1001 (1999); 42 PA. CONS. STAT. ANN. § 5985 (West 2000); WIS. STAT. ANN. § 972.11(2m) (West 2007).

187. Maryland's shielding statute, which was at issue in *Craig*, limits shielding to victims. MD. CODE ANN., CRIM. PROC. § 11-303 (West, Westlaw through 2011 legislation); *Craig*, 497 U.S. at 842. Many other jurisdictions similarly limit shielding. *E.g.*, CAL. PENAL CODE § 1347 (West 2004); GA. CODE ANN. § 17-8-55 (2004); KAN. STAT. ANN. § 22-3434 (2007); OHIO REV. CODE ANN. § 2945.481 (LexisNexis 2003); HAW. R. EVID. 616. Other jurisdictions, however, allow for both victims and witnesses to be shielded. *E.g.*, ALA. CODE § 15-25-3 (LexisNexis 1995); ALASKA STAT. § 12.45.046 (2004); ARIZ. REV. STAT. ANN. § 13-4251 (2010); COLO. REV. STAT. § 16-10-402 (2010); DEL. CODE ANN. tit. 11, § 3514 (2001); FLA. STAT. ANN. § 92.54 (West 1999); IND. CODE ANN. § 35-37-4-8 (LexisNexis 1998); MISS. CODE ANN. § 13-1-405 (West 1999); 42 PA. CONS. STAT. ANN. § 5985 (West 2000); WASH. REV. CODE ANN. § 9A.44.150 (West 2009).

188. *See, e.g.*, 18 U.S.C. § 3509(a), (b) (2006); United States v. Quintero, 21 F.3d 885 (9th Cir. 1994).

189. Transcript of Oral Argument at 41, Coy v. Iowa, 487 U.S. 1012 (1988) (No. 86-6757).

190. *Id.*

testify using screening measures.[191] In *Craig*, the Court inquired whether a State, consistent with the Confrontation Clause, could adopt protective measures for testifying adult witnesses.[192] Counsel agreed that a State could adopt similar protective measures if its decision were supported by a "demonstrated, compelling public policy."[193]

Nevertheless, the Court's opinion in *Craig* was unclear as to the permissible scope of witnesses eligible to be shielded. Maryland's shielding statute applied to child abuse victim-witnesses under the age of eighteen years,[194] but *Craig* involved young child sex abuse victim-witnesses between the ages of four and six years old.[195] The social science giving rise to shielding and which the Court referenced dealt solely with trauma resulting to child sexual abuse victims,[196] as opposed to child witnesses of non-sex-abuse crimes. Most important, the Court's holding in *Craig* was specifically couched in terms of child abuse cases,[197] rather than cases involving, for example, spousal abuse observed by the child witness. As stated by the Court:

> [W]e hold that, if the State makes an adequate showing of necessity, the state interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of a special procedure that permits a child witness in such cases to testify at trial against a defendant in the absence of face-to-face confrontation with the defendant.[198]

Reading the *Craig* decision, one is left to ponder whether *Craig* applies only to young child sexual abuse victim-witnesses, or more broadly to all victim-witnesses covered by Maryland's statute, or even more broadly to all child victims and witnesses regardless of the nature of the case. Would the Supreme Court allow the shielding of adolescent child sex abuse victims? Would the Court sanction shielding of underage witnesses to sex crimes? Can shielding apply to juvenile victims of non-sex crimes? How would the Court treat youthful witnesses to non-sex crimes?

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191. *Id.* at 44–45. Counsel did draw one distinction between children and adults. Counsel asserted that children under the age limitation set forth by the legislature should be entitled to a presumption of trauma, while individuals over the age limitation who wanted to testify using a screening procedure should not be entitled to a presumption of trauma but would have to make an affirmative showing. *Id.* at 45.

192. Transcript of Oral Argument at 20–21, *Craig*, 497 U.S. 836 (No. 89-478). Initially, the Court asked whether the measure could be adopted for adult victims of rape or organized crime. *Id*. at 20. Counsel for the State then mentioned persons with mental disabilities. *Id*. Subsequently, the Court spoke of adult witnesses generally, including the elderly. *Id*.

193. *Id.* at 21.

194. MD. CODE ANN., CRIM. PROC. § 11-303 (West, Westlaw through 2011 legislation); *Craig*, 497 U.S. at 842.

195. Brief for Petitioner, *supra* note 85, at 4, 28.

196. *Craig*, 497 U.S. at 855.

197. *Id*.

198. *Id*.

Some observers may conclude that the Court approved shielding only for young child victim-witnesses of sexual abuse. However, the Court's rationale in *Craig* seems to be that shielding is a permissible infringement of the right of confrontation because of the government interest in child welfare generally.[199] If accurate, this broader justification supports the conclusion that neither the nature of the case, nor the relationship of the child to the case, nor the child's age, should be dispositive as to whether a juvenile witness should be eligible for shielding.

Additionally, if the *Craig* decision relies in whole or in part on empirical data, then it would be nonsensical to limit shielding to young child sex abuse victim-witnesses. The reason is that research findings support shielding for younger children and older children. Social science studies regarding child sex abuse victim-witnesses have examined the relationship between age and impact of testifying on the child.[200] Evidence suggests that children younger than six years and older than eleven years may be more negatively impacted by testifying than other children.[201] With respect to very young children, one explanation for the greater impact may be that very young children are more vulnerable because of immaturity.[202] Older children may be more stressed than young children because of their greater understanding of the process of testifying, a sense of the stigma of publicly discussing sexual abuse, and a lack of ability to control the adjudicatory process.[203]

Researchers also have suggested that concerns about confrontation-induced trauma are warranted for all juvenile witnesses regardless of the nature of the case and whether the child is a victim or

199. *See supra* subsection III.D.2.a.

200. *E.g.*, Goodman et al., *supra* note 35, at 115–16. Social science evidence also indicates a gender differential in that females are more negative about testifying than males. *Id.* at 116. Other subgroups of children (and parents) who also found the process of testifying more traumatizing included more severely abused children, poor children, and children who were more fearful of the defendant. *Id.* at 119.

201. *Id.* at 115–16.

202. *Id.*

203. *Id.* Anecdotal evidence supports the findings with respect to older child sex abuse victims. A case tried in 2004 in the District of Columbia is revealing. *See* Henri E. Cauvin, *Determination, With a Delicate Touch*, WASH. POST, Aug. 5, 2004, at D.C. Extra 8. The case involved an eighteen-year-old trial witness who was seventeen at the time her uncle allegedly raped her. *Id.* In the waiting room before being called to the stand, the teenager reportedly expressed extreme reluctance to testify. *Id.* She said she did not want to testify and that she could not go through with it. *Id.* She clung to the prosecutor and the victim advocate, imploring them not to make her testify. *Id.* Ultimately, the young woman managed to testify in a "halting" manner, and apparently without the benefit of shielding. *Id.* Her uncle was convicted. *Id.*

witness.[204] Goodman, who generated much of the research regarding the effects of testifying on child sex abuse victims, has acknowledged that a child witness in a non-sex case, whether in the role of victim or eye-witness, may be traumatized by testifying in the presence of the defendant.[205] Goodman reasoned that facing the defendant in court may re-traumatize any victim, regardless of the nature of the offense.[206] She also noted that young witnesses who are intimidated by defendants may fear that they can hurt them in the courtroom.[207]

Goodman's work on child witnesses of domestic violence is particularly enlightening. Relying on studies of child witnesses to intra-family violence, she suggests that a child who witnesses domestic violence or intra-family homicide will be no less traumatized by testifying than a child sexual abuse victim.[208] She further suggests that such a child may be even more traumatized than a child caught up in a case in which a stranger committed the sex abuse.[209] Children who witness familial violence may experience re-victimization and conflicting loyalties when testifying.[210] Moreover, they may fear retaliation if a not guilty verdict is returned.[211] Legal scholar Lucy McGough has pointed out that there is no proof that child sex abuse victims are more traumatized than child witnesses to other crimes, and opined that "[a]ll children deserve special consideration when they serve as trial witnesses."[212]

Social science aside, the similarity of experiences of child victims and witnesses in sex and non-sex cases would seem to call for equal access to shielding. Recent crime data reveals that young child sex abuse victims are vital to the prosecution of criminal cases, but it also shows the need for testimony from older children who may be victims of or witnesses to sex-based crimes.[213] Notably, older children are sexually abused at high rates.[214] Indeed, despite the prominence of sex abuse trials involving very young children, child victims in sex

204. *See* Gail S. Goodman & Mindy S. Rosenberg, *The Child Witness to Family Violence: Clinical and Legal Considerations*, *in* DOMESTIC VIOLENCE ON TRIAL 97, 121 (Daniel Jay Sonkin ed., 1987).
205. *Id*.
206. *Id*.
207. Goodman et al., *supra* note 35, at 120.
208. Goodman & Rosenberg, *supra* note 204, at 121.
209. *Id*.
210. *Id*.
211. *Id*.
212. LUCY S. MCGOUGH, CHILD WITNESSES: FRAGILE VOICES IN THE AMERICAN LEGAL SYSTEM 12 (1994).
213. *See* HOWARD N. SNYDER, NAT'L CTR. FOR JUV. JUST., SEXUAL ASSAULT OF YOUNG CHILDREN AS REPORTED TO LAW ENFORCEMENT: VICTIM, INCIDENT, AND OFFENDER CHARACTERISTICS (2000), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/saycrle.pdf.
214. *Id*. at 2.

abuse investigations and prosecutions almost as often involve older juvenile victims.[215] The Department of Justice reported in 2000 that data collected between 1991 and 1996 indicated that sixty-seven percent of all victims of sexual assault reported to law enforcement agencies were juveniles under the age of eighteen years, and of this group, just under one-half of child victims were twelve to seventeen years of age.[216]

Moreover, children of all ages are victims of a wide variety of crimes committed against them, most often by adults whom they know. In 2006, the Department of Justice issued its National Report on Juvenile Offenders and Victims.[217] For 2000 and 2001, twenty-six percent of the victims of violent crime reported to law enforcement were juveniles.[218] Violent crime includes murder, violent sexual assault, robbery, and aggravated sexual assault.[219] More than thirty-three percent of those victims were under the age of twelve years.[220] Twenty-seven percent were between twelve and fourteen years.[221] Thirty-six percent were between fifteen and seventeen years.[222] In sixty percent of those cases, the offender was an adult.[223] With the exception of robbery cases, the offenders are almost always acquaintances or family members.[224]

In light of doctrinal, empirical, and experiential arguments in support of broadly allowing juveniles who are traumatized by testifying in the presence of defendants to be shielded, it comes as no surprise that trial courts have broadly construed the classes of witnesses eligible for shielding. Courts have relied on inherent authority and statutory interpretation to do so. Subsequent to *Craig*, two state trial courts relied on inherent authority to shield child witnesses under circumstances not in line with the authorizing shielding statutes. In *Gonzales v. State*,[225] the defendant was charged with murdering his five-year-old daughter.[226] The defendant's ten-year-old stepdaughter was alleged to have witnessed the defendant beat her sister to death.[227] The defendant was also alleged to have sexually abused the step-

215. *Id*.
216. *Id.*
217. HOWARD N. SNYDER & MELISSA SICKMUND, NAT'L CTR. FOR JUV. JUST., JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT (2006), *available at* http://www.ojjdp.ncjrs.gov/ojstatbb/nr2006/downloads/NR2006.pdf.
218. *Id*. at 31.
219. *Id*.
220. *Id*. at 32.
221. *Id*.
222. *Id*.
223. *Id*. at 33.
224. *Id*.
225. 818 S.W.2d 756 (Tex. Crim. App. 1991) (en banc).
226. *Id*. at 757.
227. *Id*. at 758.

daughter, and that matter was being prosecuted in a separate case.[228] The issue before the Texas appellate court was whether the defendant's face-to-face confrontation rights were violated when his stepdaughter testified in his murder trial via two-way closed-circuit television.[229] By its terms, the Texas shielding statute only applied to child victim-witnesses of the offense at issue, and only to certain offenses not including homicide.[230] On review, the appellate court concluded that even though the child witness was not covered by the enabling statute, a trial court had the authority to order shielding so long as the court made the findings required by the Supreme Court's ruling in *Craig*.[231]

In *Hernandez v. State*,[232] a trial court permitted the children of a murder victim to testify via one-way closed-circuit television outside the presence of the defendant.[233] The record indicated that the children were seated beside their mother when she was shot to death.[234] As in *Gonzales*, no enabling statute authorized shielding in these circumstances.[235] On appeal of his conviction, the defendant argued that the use of closed-circuit television violated his right of confrontation because of the lack of an enabling statute and the dictates of *Craig*.[236] The court, however, rejected the defendant's arguments.[237]

Similarly, the federal shield statute presents a problem of ambiguity regarding who can be shielded, and federal courts have broadly interpreted the statute. The language of 18 U.S.C. § 3509(b), which is the specific provision permitting shielding, suggests that only child victims of abuse may be shielded while testifying; yet, the definition of "child" within § 3509(a) implies that the shielding measures apply to child abuse victims as well as child witnesses of crimes against others.[238]

Federal courts have endorsed the broader interpretation. In *United States v. Quintero*,[239] the trial court allowed a four-year-old boy who witnessed his sibling's homicide by their father to testify via closed-circuit television.[240] The boy was the only witness to the defendant's acts.[241] The court rejected the defendant's argument that the

228. *Id*.
229. *Id*. at 757.
230. *Id*. at 764–65.
231. *Id*. at 765–66.
232. 597 So. 2d 408 (Fla. Dist. Ct. App. 1992).
233. *Id*. at 409.
234. *Id*.
235. *Id*.
236. *Id*.
237. *Id*.
238. *Compare* 18 U.S.C. § 3509(b)(1)(B) (2006), *with* 18 U.S.C. § 3509(a)(2) (2006).
239. 21 F.3d 885 (9th Cir. 1994).
240. *Id*. at 892.
241. *Id*. at 888.

federal shielding law applies only to child victims and not witnesses.[242] Similarly, in *United States v. Boyles*,[243] a three-year-old witnessed the rape of his mother.[244] During trial, the court approved the prosecution's request to video-record the child's testimony so that he would not have to testify in court in the defendant's presence.[245] Though the defendant had not objected to the shielding mechanism at trial,[246] on appeal of the defendant's conviction the circuit court examined the merits of the defendant's argument challenging the use of shielding and rejected the claim.[247] Lastly, in *United States v. Moses*,[248] the defendant was indicted for aggravated sexual abuse of a minor.[249] He was alleged to have sexually abused his two-and-a-half-year-old niece.[250] His four-year-old niece allegedly witnessed the abuse of her sister.[251] The trial court permitted the older child to testify via closed-circuit television, concluding that the child would be harmed by testifying in the defendant's presence.[252] The circuit court reversed, holding that the trial court's findings of fact on this matter were clearly erroneous and that the error was not harmless.[253] Though the court reversed the conviction, it did not suggest that the trial court erred by allowing a witness to sexual abuse to testify using shielding protections.[254]

Can prosecutors seek shielding in the absence of statutory authorization or where statutory language is ambiguous? The answer is they do not know. Trial and appellate courts in both the state and federal systems have allowed for shielding in circumstances that seem to run counter to enabling statutes, but these decisions are small in number and have not been subjected to Supreme Court scrutiny. Predictably determining whether the Court will approve of shielding for underage witnesses who are not very young victims of sex abuse is difficult. As explained, the reasoning for the Court's approval of shielding arguably extends beyond very young child sex abuse witnesses to all underage witnesses. Yet state shielding statutes may not be so broadly crafted or interpreted, and the scope of the holding of *Craig* remains contested. Given these uncertainties, one can only conclude that prosecutors will seldom seek shielding in the absence of clear witness

242. *Id*. at 892.
243. 57 F.3d 535 (7th Cir. 1995).
244. *Id*. at 537.
245. *Id*. at 539.
246. *Id*. at 545.
247. *Id*. at 546–47.
248. 137 F.3d 894 (6th Cir. 1998).
249. *Id*. at 896.
250. *Id*.
251. *Id*.
252. *Id*.
253. *Id*. at 902.
254. *See id*.

eligibility lest they expose a successful prosecution to reversal on appeal.

3. Absence of Clarification

Prosecutors may under-utilize shielding statutes because of the ambiguous rationale of *Craig* and unresolved questions as to its applicability. Worse yet, the Court has repeatedly refused to clarify its decision and remove the obstacles to prosecutorial use of shielding laws. Opportunities to refine *Craig* have come to the Court in the form of petitions for certiorari in cases involving shielding and in the context of deciding cases that more broadly concern confrontation rights. This lack of clarification has likely made prosecutors even more hesitant to use shielding statutes.

i. Rejecting Direct Review

Twice in the decade following *Craig*, defendants asked the Court to consider the breadth of that case.[255] Both times the Court rejected the requests, leading Justice Scalia to dissent.[256] The first case, *Danner v. Commonwealth*,[257] involved a defendant who was convicted of sodomizing and raping his daughter.[258] The daughter was between five and ten years of age when the offenses occurred.[259] By the time she testified at trial, the defendant's daughter was fifteen years old.[260] Pursuant to a Kentucky statute regarding the testimony of alleged child victims of sexual offenses, the daughter testified outside the defendant's presence.[261] The statute permitting her testimony outside the defendant's presence was ambiguous as to the age requirements for child victims to be covered by the statute.[262] In particular, it was unclear whether child sexual assault victims must have been twelve or younger at the time of trial to benefit from protective measures or whether they need only have been twelve or younger at the time of the offense.[263] The Kentucky Supreme Court determined that

255. In a third instance, in 2007, the Court was asked to reconsider *Craig* in light of *Crawford v. Washington*, 541 U.S. 36 (2004). *See* Petition for Writ of Certiorari, Vogelsberg v. Wisconsin, 550 U.S. 936 (2007) (No. 06-1253), 2007 WL 776725. The Court declined the petition without comment or dissent. *Vogelsberg*, 550 U.S. at 936.

256. *See* Marx v. Texas, 528 U.S. 1034, 1034–38 (1999) (Scalia, J., dissenting) (denial of certiorari); Danner v. Kentucky, 525 U.S. 1010, 1010–12 (1998) (Scalia, J., dissenting) (same).

257. 963 S.W.2d 632 (Ky. 1998).

258. *Id*. at 632.

259. *Id*. at 633.

260. *Id*.

261. *Id*.

262. *Id*. at 633–34.

263. *Id*.

the legislature intended the statute to have the latter, and more broadly protective, meaning.[264] Thus, though the defendant's daughter was fifteen at the time of the trial, the court held that she was rightfully permitted to testify outside the defendant's presence.[265] The Supreme Court denied the petition for writ of certiorari,[266] but Justice Scalia, joined by Justice Thomas, dissented, observing: "*Craig* hardly contemplate[d] that the child-witness exception is available to 15-year-olds."[267]

Justice Scalia's pointed criticism of the lower court's ruling in *Danner* gives special reason for concern that prosecutors may back away from invoking shielding statutes. It is one thing to recognize in the abstract the possibility that *Craig's* holding does not extend to child witnesses aged fifteen years. It is another thing to learn that two Justices of the Supreme Court believe that *Craig* does not authorize shielding in such a case. Here, as elsewhere, ambiguity in the law is likely to tip the scales of prosecutorial decision-making in the direction of risk-avoidance and resulting choices not to use the shielding device.

In the second case, *Marx v. State*,[268] the defendant was convicted of sexually assaulting a thirteen-year-old.[269] At his trial, the victim and a six-year-old witness to the assault testified via two-way closed-circuit television.[270] The six-year-old had previously been abused by the defendant, but that abuse was not the subject of her testimony; rather, she testified only in regards to the abuse of the thirteen-year-old.[271] On appeal, the defendant argued that the protective measure violated his Sixth Amendment right of confrontation because shielding was available by statute only to the victim of the offense for which a defendant is being tried.[272] Applying *Craig*, the state appellate court rejected the defendant's Sixth Amendment argument.[273] As in *Danner*, the Supreme Court denied the petition for writ of certiorari,[274] and again, Justice Scalia, joined by Justice Thomas, dissented from the denial.[275] In his opinion, Justice Scalia criticized the Court for failing to limit the category of witnesses covered by *Craig*.[276] He commented:

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264. *Id*. at 634.
265. *Id*.
266. Danner v. Kentucky, 525 U.S. 1010 (1998).
267. *Id*. at 1011 (Scalia, J., dissenting).
268. 987 S.W.2d 577 (Tex. Crim. App. 1999) (en banc).
269. *Id*. at 578, 580.
270. *Id*. at 579.
271. *Id*.
272. *Id*.
273. *Id*. at 580–81.
274. Marx v. Texas, 528 U.S. 1034 (1999).
275. *Id*. at 1034–38 (Scalia, J., dissenting).
276. *See id*.

> I do not think the Court should ever depart from the plain meaning of the Bill of Rights. But when it does take such a step into the dark it has an obligation, it seems to me, to clarify as soon as possible the extent of its permitted departure. The present case represents an expansion of *Craig* both as to the category of witness covered and as to the finding required. First, it extends the holding of that case to a child witness whose abuse is neither the subject of the prosecution nor will be the subject of her testimony. The only basis for excusing her from real confrontation with the defendant is that, according to the prosecution, she also was the subject of sexual abuse, on another occasion, by the same defendant. The State's extension of our novel confrontation-via-TV jurisprudence to this situation should alone warrant our accepting this case for review.[277]

Justice Scalia's dissenting opinion in *Marx* heightens prosecutorial uncertainty no less than his dissent in *Danner*. To be sure, the Supreme Court cannot grant certiorari in every case that raises issues involving the proper application of *Craig*. At the same time, frequent litigation in the lower courts, together with the Court's persistent silence on key questions, raises dangers that prosecutors will continue to err on the side of caution when deciding whether to seek shielding for child witnesses in criminal cases.

ii. Declining Indirect Reconsideration

The Supreme Court's recent Confrontation Clause decisions involving matters other than shielding may also contribute to prosecutorial reluctance to request use of shielding measures and judicial approval of such measures. In *Crawford v. Washington*,[278] decided in 2004, the Supreme Court effectuated a dramatic theoretical shift in Confrontation Clause jurisprudence.[279] In *Crawford*, the Court departed from the view of the Confrontation Clause espoused in *Ohio v. Roberts*,[280] which served as the backdrop for *Craig*.[281] The Court in *Crawford* did not overrule *Craig*, but it created conditions that open the door for reconsideration of *Craig's* holding.[282] Will the decision in *Craig* survive the theoretical shift made by *Crawford*? Thus far, defendants' challenges to the use of shielding procedures in light of *Crawford* have been unsuccessful.[283] When directly presented with the issue, the Su-

277. *Id*. at 1035.

278. 541 U.S. 36 (2004).

279. *See id*.

280. 448 U.S. 56 (1980).

281. *See Crawford*, 541 U.S. at 36; Maryland v. Craig, 497 U.S. 836 (1990).

282. *See infra* subsection III.D.3.b.

283. *E.g.*, United States v. Yates, 438 F.3d 1307, 1313–18 (11th Cir. 2006); United States v. Bordeaux, 400 F.3d 548, 553–54 (8th Cir. 2005); Pesquera v. Jackson, No. 06-CV-10186, 2007 WL 2874219, at *10 (E.D. Mich. Sept. 25, 2007); United States v. Sandoval, No. CR 04-2362 JB, 2006 WL 1228953, at *9–12 (D. N.M. Mar. 7, 2006); State v. Henriod, 131 P.3d 232, 237 (Utah 2006); State v. Vogelsberg, 724 N.W.2d 649, 654 (Wis. Ct. App. 2006).

preme Court declined to consider the matter.[284] There are reasons for concluding that *Craig's* validation of the shielding measure will and should survive *Crawford*.[285] Arguments to the contrary, however, may well contribute to prosecutorial decisions not to use the tool.

When *Craig* was decided, the Supreme Court conceived of the right of confrontation as primarily concerned with the admission of trustworthy and reliable evidence.[286] This view is at the heart of the 1980 case of *Ohio v. Roberts*,[287] which predated *Craig*. In *Roberts*, the Court was confronted with whether the admission at trial of the preliminary hearing testimony of an unavailable witness violated the Confrontation Clause.[288] The Court concluded that reliability and trustworthiness were the touchstones for the admissibility of hearsay evidence.[289] Thus, the Court held that when a witness was unavailable to testify at trial, the witness's out-of-court statements were admissible if they fell within a firmly rooted hearsay exception because statements fitting such exceptions were deemed reliable.[290]

Craig built on the reliability theory of the right of confrontation that the Court embraced in *Roberts*. Thus, denial of the right of face-to-face confrontation is permissible only where "necessary to further an important public policy and only where the reliability of the testimony is otherwise assured."[291] Because shielding does not impact witness competency, oath requirements, the ability of the defense to contemporaneously conduct cross-examination, and a jury's ability to view the witness to evaluate credibility, the Court concluded that evidence reliability is safeguarded even when shielding is used.[292] In the Court's view, shielding permits a defendant to uncover a child witness who makes false accusations as well as favorable testimony.[293]

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284. *See* Vogelsberg v. Wisconsin, 550 U.S. 936 (2007) (denying certiorari).
285. *See infra* subsection III.D.3.b.
286. *Craig*, 497 U.S. at 845–46.
287. 448 U.S. 56 (1980).
288. *Id*. at 58.
289. *Id.* at 65–66; *see also* Kentucky v. Stincer, 482 U.S. 730, 739 (1987) (stating that the "right to confrontation is a functional one for the purpose of promoting reliability in a criminal trial"); Lee v. Illinois, 476 U.S. 530, 540 (1986) (observing that the "right to confront and to cross-examine witnesses is primarily a functional right that promotes reliability in criminal trials"); Dutton v. Evans, 400 U.S. 74, 89 (1970) ("[T]he mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials . . . .").
290. *Roberts*, 448 U.S. at 66.
291. *Craig*, 497 U.S. at 850.
292. *Id*. at 851.
293. *Id*. Indeed, studies of the accuracy and reliability of evidence from shielded child witnesses revealed that shielding did not decrease the reliability of evidence. *See* APA Brief, *supra* note 43, at 20–21. The fact that a shielded child victim-witness did not come face-to-face with the defendant did not increase the rate of erroneous identification. *Id*. at 20. Children who testified without the defendant present were less likely to recall incorrect information than children who testified in

In *Crawford*, the issue before the Court was whether a witness's out-of-court statements made during interrogation by law enforcement officers were properly admitted when the witness was unavailable to testify at trial.[294] Under the *Roberts* rationale, such statements were admissible so long as they were deemed reliable.[295] The petitioner in *Crawford*, however, asked the Court to reconsider the *Roberts* rationale.[296]

After recounting the history of the Confrontation Clause, beginning with Roman times, the Court in *Crawford* concluded that the Clause was designed to prevent the government from using ex parte examinations as evidence against a defendant.[297] Building on this historical understanding, the Court concluded that the Sixth Amendment bars the admission at trial of "testimonial" statements by a witness, regardless of reliability, unless the witness is unavailable to testify at trial and the defendant had a prior opportunity to cross-examine the witness.[298] *Crawford*, in effect, reconceived of the confrontation right as a procedural protection rather than a substantive safeguard of reliability as under *Roberts*.[299] Thus, the Clause ensured reliability of evidence not by a determination of whether evidence is reliable, but rather by requiring that testimonial evidence be tested by cross-examination, which has long been deemed the "greatest legal engine" for ascertaining truth.[300]

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the courtroom in a defendant's presence. *Id*. at 21. Studies of child witnesses in simulated, non-sexual abuse cases indicated that children who testified using shielding procedures were more accurate and provided more detailed testimony than children who testified in open court. Dorothy F. Marsil et al., *Child Witness Policy: Law Interfacing with Social Science*, 65 LAW & CONTEMP. PROBS. 209, 222 (2002). Finally, studies suggested that the use of shielding measures did not facilitate lying by child witnesses. *Id*. at 223.

294. Crawford v. Washington, 541 U.S. 36, 38 (2004).

295. *Roberts*, 448 U.S. at 66.

296. *Crawford*, 541 U.S. at 42.

297. *Id*. at 50.

298. *Id*. at 68; *see also* Mattox v. United States, 156 U.S. 237, 242–43 (1895) (stressing the importance of cross-examination to an accused's constitutional right to confrontation by compelling a witness "to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief"). The *Crawford* Court declined to define "testimonial." *Crawford*, 541 U.S. at 68. It concluded, however, that the statements at issue were testimonial and inadmissible because the defendant did not have an opportunity to cross-examine the witness regarding the statements. *Id*.

299. *See Crawford*, 541 U.S. at 61; Myrna Raeder, *Remember the Ladies and the Children Too:* Crawford's *Impact on Domestic Violence and Child Abuse Cases*, 71 BROOK. L. REV. 311, 321 (2005).

300. California v. Green, 399 U.S. 149, 158 (1970) (noting that cross-examination is the "greatest legal engine ever invented for the discovery of truth" (quoting 5 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1367 (3d ed.

In the wake of *Crawford*, defense counsel have urged that *Craig* no longer can stand as good law.[301] This line of reasoning is weakened by several arguments. First, *Crawford* is devoted only to the question of the admissibility of hearsay and does not take up the question of in-court physical confrontation, which lies at the heart of *Craig*.[302] The Supreme Court itself has already drawn just such a line of distinction. In *White v. Illinois*,[303] decided after *Coy* and *Craig* but prior to *Crawford*, the Court stated:

> *Coy* and *Craig* involved only the question of what *in-court* procedures are constitutionally required to guarantee a defendant's confrontation right once a witness is testifying. Such a question is quite separate from that of what requirements the Confrontation Clause imposes as a predicate for the introduction of out-of-court declarations.[304]

Second, should the Court have an opportunity to define the nature of in-court confrontation under the Sixth Amendment, the Court might conclude that the Confrontation Clause does not require the witness to testify literally face-to-face with the defendant or in the actual physical presence of the defendant.[305] Thus, shielding would not violate the Clause. On the other hand, a historical examination of the Clause might lead to a different conclusion. Justice Scalia, the author of *Coy* and *Crawford*, contends that the Confrontation Clause requires a face-to-face confrontation, meaning a witness must testify in the defendant's physical presence,[306] even though the "face-to-face" language is not included in the Sixth Amendment.[307]

Third, *Craig* is not inconsistent with the theoretical approach to confrontation adopted in *Crawford*, which anointed promotion of the opportunity for cross-examination as the ultimate aim of the Confron-

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1940))); *see also Crawford*, 541 U.S. at 61 (stating that evidence should be tested in the "crucible of cross-examination").

301. *See supra* note 283.

302. *See* Maryland v. Craig, 497 U.S. 836, 850–51 (1990).

303. 502 U.S. 346 (1992).

304. *Id*. at 358.

305. *See* Raeder, *supra* note 299, at 316. In contrast to the Sixth Amendment, the language of some state constitutions expressly mandates "face-to-face" confrontation. *E.g.*, MASS. CONST. pt. 1, art. XII. In those instances, courts reviewing shielding cases have held that any method that limits the ability of the witness to face the defendant violates the state constitution. *E.g.*, Commonwealth v. Amirault, 677 N.E.2d 652 (Mass. 1997).

306. Coy v. Iowa, 487 U.S. 1012, 1016 (1988) ("We have never doubted . . . that the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact."); *see also Craig*, 497 U.S. at 862 (Scalia, J., dissenting) ("Whatever else it may mean in addition, the defendant's constitutional right 'to be confronted with the witnesses against him' means, always and everywhere, at least what it explicitly says: the 'right to meet face to face all those who appear and give evidence at trial.'" (quoting U.S. CONST. amend. VI; *Coy*, 487 U.S. at 1016)).

307. *See* U.S. CONST. amend. VI.

tation Clause.[308] Children who are shielded while testifying at trial remain subject to cross-examination by the defendant. Indeed, shielding may be seen as encouraging, rather than diminishing, effective cross-examination by creating a scenario in which a child can appear in court to testify, and speak more openly in response to defense counsel's questions, because the emotional trauma of testifying in the defendant's physical presence has been removed or mitigated.

In the end, there are strong reasons why the Court's ruling with regard to the non-hearsay, shielded evidence in *Craig* should survive the Court's ruling with regard to hearsay evidence in *Crawford*. Nevertheless, some prosecutors may see *Crawford* as posing a meaningful threat to *Craig's* continuing vitality. To the extent this is the case, prosecutors may take the surer course of action and opt to avoid use of witness shielding,[309] thereby rendering it far less of a protective device for child witnesses than legislatures intended or envisioned.

It may be that legislators who passed shielding laws foresaw that financial costs would render their use infeasible in some instances and that in other cases shielding would serve no useful purpose. It seems unlikely, however, that legislators would expect prosecutors not to invoke these laws on a large scale, even when costs pose no obstacle and shielding would in fact serve the needs of child witnesses. There is, however, strong evidence that fears about the legal impermissibility of shielding—both in general and in particular categories of cases—are driving prosecutors not to employ the device.[310] If this is so, prosecutorial discretion is frustrating the goals of legislatures and the general public they represent. Such a condition is deeply problematic, both because it runs counter to basic principles of democratic self-governance and because it undermines the interests of vulnerable child witnesses demonstrably in need of special protection in the criminal justice system.

IV. THE REVITALIZATION OF JUVENILE SHIELDING LAWS

How might the lessons learned from the birth and death of juvenile shielding laws inform future legislative actions respecting the remediation of in-court intimidation of juvenile witnesses? This Part proposes three reforms to juvenile shielding laws aimed at encouraging the utilization of shielding statutes to improve the testimonial experience of children: (1) expanding the group of persons with standing to seek shielding at trial, (2) narrowing the class of witnesses for whom shielding is available through the creation of sharply defined

308. *See* Crawford v. Washington, 541 U.S. 36, 55–57 (2004).

309. *See* Robert P. Mosteller, Crawford v. Washington: *Encouraging and Ensuring the Confrontation of Witnesses*, 39 U. RICH. L. REV. 511, 592 (2005); Raeder, *supra* note 299, at 386.

310. *See supra* section II.D.

eligibility criteria, and (3) avoiding reliance on technology to effectuate shielding.

These three reforms respond primarily to the difficulties documented in the earlier sections of this Article. However, they also reflect an additional concern. Updating and expanding the social science research regarding in-court testimony by child witnesses should be a priority. The mixed and incomplete empirical data regarding the need for shielding and its efficacy cuts in favor of constricting shielding laws for the near term. More robust data engendering more widely accepted conclusions would better inform which children should be shielded, when, and how. Thus, in addition to legislative reform, this Article advocates research regarding (1) the efficacy of shielding by the witness's age, nature of case, and victim or witness status; (2) the efficacy of shielding via technology-free and technology-based means; (3) the efficacy of shielding versus other innovations aimed at reducing testimonial trauma; and (4) the modern juror's perception of video-based communication for personal or business use (e.g., via Skype) as compared to use in court proceedings.[311] As further research unfolds, legislatures should reassess and reformulate existing shielding statutes. Until then, the real-world operation of existing laws, and in particular their widespread disuse, supports three significant near-term reforms.

A. Standing: Choose Wisely

One lesson of the story of juvenile shielding laws is that legislators should more carefully select whom to vest with discretion to request shielding in order to satisfy legislative aims. Criminal procedure legislation routinely places discretion in the hands of prosecutors.[312] In the shielding context, however, placing discretion in the hands of prosecutors has frustrated legislative goals. Legislators aimed at improving the experiences of child witnesses who testify at trial, while simultaneously facilitating effective prosecution.[313] More particularly, they sought to ease the trauma to child witnesses and increase the likelihood of conviction by facilitating the receipt of testimony from child witnesses.[314] Undoubtedly, legislators expected both children and prosecutors to be pleased by and in favor of using this new tool. Yet, legislatures did not always place the option to invoke shielding laws in the hands of children themselves, choosing more often in-

311. *See also* SUSAN R. HALL & BRUCE D. SALES, COURTROOM MODIFICATIONS FOR CHILD WITNESSES 261–64 (2008) (setting forth future research agenda).
312. *See, e.g.*, Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 20–25 (1998) (describing prosecutors' vast discretion and power).
313. Goodman et al., *supra* note 42, at 256.
314. *Id.*

stead to leave this decision to prosecutors.[315] This assignment of authority is deeply troubling because it turns out prosecutors do not use the device for a host of reasons.[316]

Prosecutors' choices not to use shielding are at odds with legislative purposes because one goal of shielding laws was clearly to protect child witnesses from the trauma of testifying in the presence of defendants.[317] Put simply, legislators were mistaken in expecting that prosecutors would prioritize the interests of children if such interests undermined the likelihood of convictions. Seemingly, prosecutors are primarily motivated by convictions and not by providing collateral benefits to witnesses when those benefits might undermine the chances of conviction, even if only to a small degree.[318] This conclusion is buttressed by the expressed preference of prosecutors for live, in-court, un-shielded testimony by the child, which is perceived to be a more compelling presentation of evidence for the jury's benefit.[319]

Shielding laws had another important purpose, in addition to protecting children from emotional harm. Legislators anticipated that shielding would increase both the availability and quality of testimony from children, thus facilitating law enforcement efforts.[320] If the legislative goal was to facilitate convictions, however, it is unclear whether shielding works to advance this aim. Interestingly, prosecutors' perceptions regarding the inefficacy of shielding in obtaining convictions may be accurate. Using mock trials, researchers have examined the impact of shielding on juror decisions and trial outcomes.[321] While no consensus has emerged, some analysts have concluded that shielding correlates with favorable outcomes for defendants, at least in mock trials.[322] On this point, however, the evidence is sketchy and additional research is clearly needed.[323]

In reality, shielding laws are designed to be dual-purposed—both to protect children and to facilitate the receipt of testimony—and these dual purposes suggest shielding laws should be re-configured to authorize children to request shielding and to permit courts to raise

315. *See supra* note 104.
316. *See supra* section II.D.
317. Goodman et al., *supra* note 42, at 256.
318. *Id*. at 272.
319. WHITCOMB, *supra* note 39, at 65 (stating that "[m]ost prosecutors prefer to offer a live witness whenever possible"); *see also* AM. PROSECUTORS RESEARCH INST., *supra* note 18, at 455 ("A televised image of the child victim is not as effective as a child's live testimony.").
320. Goodman et al., *supra* note 42, at 256; *see supra* section II.B.
321. *E.g.*, 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 (1998).
322. *See id*. at 199.
323. *See* HALL & SALES, *supra* note 311, at 84–86 (describing results of studies and concluding more research is needed).

the issue sua sponte. Prosecutors should be given a voice on the shielding question, but giving prosecutors complete discretion ignores the reality that their motivations and risk aversion may not align with the interests of child witnesses.

One expected critique of this proposal is that it is inappropriate and unprecedented to allow a non-party to significantly influence the course of conduct of a trial. A related criticism is that affording a child witness the ability to request shielding amounts to rights-granting that is unorthodox and unwarranted. In actuality, giving children standing to request shielding would not undermine the two-party adversarial nature of the trial system or the normative values and goals of the trial process. Prosecutors would retain authority to choose which witnesses to call to testify and to consent to or dissent from shielding requests. A defendant would also be able to object to a child's shielding request. Granting standing to a child witness only provides an opportunity to be heard; it does not guarantee a right to shielding.

Allowing children standing to request a shielding order is also not an unprecedented legislative approach inconsistent with criminal procedure norms. The federal government's child shielding statute grants standing to the child, prosecutor, or a guardian ad litem.[324] Likewise, the Uniform Child Witness Testimony by Alternative Methods Act (UCWTAMA or the Act) proposed by the National Conference of Commissioners on Uniform State Laws (Conference) takes such an approach.[325] The Act allows a litigant, the child, or an individual with "sufficient standing" to act on behalf of the child to request a hearing.[326] Outside of the shielding context, legislatures have granted victims the ability—independent of the prosecutor—to be heard during plea bargaining and sentencing.[327] Such allowance is a recognition that victims' interests and needs may not align with or be satisfied by prosecutors' strategic litigation choices.[328] The existence of these pro-

324. 18 U.S.C. § 3509(b)(1)(A) (2006).

325. *See* UNIF. CHILD WITNESS TESTIMONY BY ALT. METHODS ACT § 4(a), 12 U.L.A. 85 (2002). Four states have enacted the UCWTAMA: Idaho, New Mexico, Nevada, and Oklahoma. IDAHO CODE ANN. §§ 9-1801 to -1808 (West 2005); NEV. REV. STAT. §§ 50.500–.620 (2007); OKLA. STAT. tit. 12, §§ 2611.3–.11 (2011); H.B. 196, 50th Leg., 1st Sess. (N.M. 2011) (effective July 1, 2012).

326. UNIF. CHILD WITNESS TESTIMONY BY ALT. METHODS ACT § 4(a), 12 U.L.A. at 85.

327. *E.g.*, 18 U.S.C. § 3771 (2006) (federal statute granting victims rights to be heard at plea bargaining and sentencing); Douglas E. Beloof, *The Third Wave of Crime Victims' Rights: Standing, Remedy, and Review*, 2005 BYU L. REV. 255, 331–32 (2005) (describing development of crime victims' rights at state level).

328. *See, e.g.*, Njeri Mathis Rutledge, *Turning a Blind Eye: Perjury in Domestic Violence Cases*, 39 N.M. L. REV. 149, 179–82 (2009) (describing tensions between domestic violence victims and prosecutors); Sarah N. Welling, *Victim Participation in Plea Bargains*, 65 WASH. U. L. Q. 301, 310–11 (1987) (describing divergence of victims' and prosecutors' interests in plea bargaining context).

tective measures for third parties provides support for child witness standing in the shielding context.

B. The Protected Class: Broaden and Narrow

The many uncertainties that surround interpretation and application of shielding laws may signal to prosecutors that the laws are unstable and therefore should not be utilized. It is not worth investing resources to pursue use of the measure if the request is not likely to be granted, or if granted, the risk of reversal on appeal is significant. Creating greater predictability in the approval of shielding requests may heighten use. As more predictable rules lead prosecutors to seek shielding orders and courts to grant requests more frequently, opportunities may arise for the Supreme Court to review shielding laws thereby increasing the clarity of this area of law.

How should legislatures modify shielding laws to foster certainty? Generally, increasing requests by prosecutors to shield may be accomplished if legislatures expand the class of witnesses eligible for shielding while simultaneously imposing particular and stringent requirements for granting shielding requests. To begin, future shielding laws should expand eligibility to all juvenile witnesses in any type of criminal case. A bright-line rule that covers all minors in cases would negate potentially nettlesome problems of statutory interpretation. *Craig* arguably does not require, and existing empirical data does not support, limiting shielding to the very young child victim in a sex abuse case. Next, to counter-balance this expansion, future shielding laws should impose strict standards and direct attention to specific factors that courts apply when considering shielding requests.

The UCWTAMA again provides a valuable model for this suggested change. The Act avoids many of the complications wrought by state legislative enactments and the Supreme Court's constitutional review of shielding. First, the Act broadly applies to criminal proceedings of any nature.[329] On the other hand, most state shielding statutes apply only to criminal proceedings involving physical or sexual abuse.[330] The Conference was aware of these narrow ranges of applicability when it drafted and adopted the Act.[331] The Conference did not, however, deem the nature of the case wholly irrelevant to the decision whether to use alternative methods. In the final version of the rule, the nature of the case is a factor that must be considered by the

329. UNIF. CHILD WITNESS TESTIMONY BY ALT. METHODS ACT § 2 cmt., 12 U.L.A. at 83. By broadly defining "criminal proceeding," the Act also applies to juvenile delinquency proceedings. *Id.* § 3, 12 U.L.A. at 84.

330. *See supra* note 186.

331. UNIF. CHILD WITNESS TESTIMONY BY ALT. METHODS ACT 4 (Discussion Draft 2001), *available at* http://www.law.upenn.edu/bll/archives/ulc/ucwtbama/CHILD601.pdf [hereinafter UCWTAMA DRAFT].

judge in determining whether to allow the use of an alternative method.[332]

Second, by its terms, the Act applies to all child witnesses regardless of relationship to the case, unlike many state statutes which limit shielding to child victim-witnesses.[333] "Child witness" is defined to mean "an individual under the age of [13] who has been or will be called to testify in a proceeding."[334] Thus, "child witness" naturally includes both child victims and witnesses. Moreover, the Act's drafting history suggests that the child's relationship to the case is not a relevant consideration for whether shielding should be approved. During the early stages of drafting, the child's relationship to the case was an express factor to be considered in whether alternative methods should be utilized.[335] Over the course of drafting, however, this factor was eliminated from the express list of considered factors.[336]

Finally, the Act does not apply solely to young children, as does the legislation in some jurisdictions,[337] but extends to pre-adolescents as well. The Conference's use of brackets around "13" in the definition of "child witness" was intended to reconcile the varying age limitations adopted by the states permitting testimony to be taken by alternative means.[338] As the Act points out, states have adopted widely varying age cut-offs.[339] Georgia is on the low side at ten years of age,[340] while Florida sets the cut-off at sixteen years of age.[341] The Conference recommends that the maximum age for a juvenile to give testimony by an alternative method stand at thirteen years.[342] Given the use of brackets, however, the Conference has signaled that states are free to choose an age limit that is in accord with local values.[343]

In addition to expanding the class of witnesses eligible for shielding, the Act imposes particular and stringent requirements beyond those dictated in *Craig* with respect to whether shielding may be utilized in any particular case, resolving several open questions in the process.[344] The Act provides:

> The child may testify other than face-to-face with the defendant if the presiding officer finds by clear and convincing evidence that the child would suffer

332. UNIF. CHILD WITNESS TESTIMONY BY ALT. METHODS ACT § 6(3), 12 U.L.A. at 89.
333. *See supra* note 187.
334. UNIF. CHILD WITNESS TESTIMONY BY ALT. METHODS ACT § 2(2), 12 U.L.A. at 83 (brackets in original).
335. UCWTAMA DRAFT, *supra* note 331, § 2(4)(d).
336. *See* UNIF. CHILD WITNESS TESTIMONY BY ALT. METHODS ACT § 6, 12 U.L.A. at 89.
337. *See supra* note 185.
338. UNIF. CHILD WITNESS TESTIMONY BY ALT. METHODS ACT § 2 cmt., 12 U.L.A. at 83.
339. *Id*.
340. GA. CODE ANN. § 17-8-55(a) (West 2005).
341. FLA. STAT. ANN. § 92.54 (West 2010).
342. UNIF. CHILD WITNESS TESTIMONY BY ALT. METHODS ACT § 2 cmt., 12 U.L.A. at 83.
343. *See id*.
344. *See id*. § 5(a)(2), 12 U.L.A. at 87.

> serious emotional trauma that would substantially impair the child's ability to communicate with the finder of fact if required to be confronted face-to-face by the defendant.[345]

As indicated, the Act adopts a clear and convincing standard,[346] though *Craig* did not prescribe a particular standard for trial courts to apply.[347] Further, with respect to the necessity standard dictated by *Craig*,[348] the Act requires the court to consider a number of factors to finally determine whether an alternative method will be employed to prevent witness trauma.[349] The factors include: the reasonably available alternative methods, whether there are other means available for protecting the child without using an alternative method, the type of case, the parties' rights, the importance of the child's testimony, "the nature and degree of emotional trauma that the child may suffer if an alternative method is not used," and all other relevant factors.[350] If other methods sufficient to protect the child without interfering with physical confrontation exist, then resort to an alternative method is not necessary, which is consistent with, and a stronger version of, *Craig's* necessity requirement.[351] While the Act does not dictate how each factor should be weighed individually and collectively, it does dictate specific considerations for trial courts to consider that the Supreme Court in *Craig* did not specify. While courts may still vary in application of the factors, a specific list at least focuses the litigants, and trial and appellate courts, on the same variables, thus improving predictability.

A critique meriting consideration is that expanding the practical availability of shielding in effect expands infringement of defendants' rights and interests. Such expansion, it could be argued, should be judiciously undertaken, particularly when there are concerns regarding shielding's efficacy to reduce trauma. Admittedly, one likely—and unintended—consequence of the reforms advanced herein will be to increase the absolute number of cases in which shielding occurs. Yet, any danger posed to defendants by the expansion of shielding is substantially mitigated by the imposition of strict requirements for ultimately allowing shielding. Thus, the overall number of cases in which shielding is requested will likely increase, but each particular case will be more closely scrutinized for necessity than under prior versions

345. *Id*.
346. *Id*.
347. *See* Maryland v. Craig, 497 U.S. 836, 860 (1990).
348. *See id*. at 855–56.
349. UNIF. CHILD WITNESS TESTIMONY BY ALT. METHODS ACT § 6, 12 U.L.A. at 89. An early draft of the Act explicitly required a finding of necessity before an alternative method could be used. UCWTAMA DRAFT, *supra* note 331, § 2(1). This language was deleted from the final version. *See* UNIF. CHILD WITNESS TESTIMONY BY ALT. METHODS ACT § 6, 12 U.L.A. at 89.
350. UNIF. CHILD WITNESS TESTIMONY BY ALT. METHODS ACT § 6, 12 U.L.A. at 89.
351. *See Craig*, 497 U.S. at 855–56.

of shielding laws. In short, granting more children the ability to secure shielding protections should not, given the broader context in which shielding decisions are made, lead to substantial infringements of defendants' rights.

C. Means: Avoid the Lure of New Technologies

Data reveals that prosecutors have not used shielding because it is cost-prohibitive or because cheaper innovations may accomplish the same goals or are less risky.[352] Many state shielding statutes specify that shielding will be accomplished through the use of out-of-courtroom testimony via closed-circuit television.[353] Such statutes require the availability of electronic technology to effectuate closed-circuit television (e.g., monitors, cameras, microphones, speakers), private physical space outside the courtroom for the witness to testify, and manpower to utilize and maintain the technology.[354] These requirements may create undesirable, substantial outlays for jurisdictions.[355]

On the other hand, low-cost and low-technology means of shielding exist, including the use of a physical screen, the alteration of the physical layout of the courtroom, or relocation of persons in the courtroom.[356] Additionally, depending on the particularities of any case, other low-cost non-shielding innovations may remediate trauma to a child that may occur because of the defendant's presence. For example, prior to trial, preparing the child through a visit to the courtroom, counseling, or testimony prep sessions may be helpful.[357] During trial, the presence nearby of an adult attendant or companion animal may facilitate the child's testimony.[358] These measures exist alongside modern era shielding technologies.

During the initial adoption of shielding, legislators would have been wise to avoid enacting statutes that mandated shielding via high-technology means. Their choice to embrace technology was not viewed positively by prosecutors who lacked funding to implement the measure, or who could find funding but observed that use of technologies would divert resources from other areas of need.[359]

The concerns of prosecutors suggest two useful improvements. First, statutes should not specify that shielding is to be accomplished only through use of electronic technologies. Society embraces technological advances. More technology is viewed as a net benefit. Draw-

352. *See supra* section II.D.
353. *See supra* section II.B.
354. *See* HALL & SALES, *supra* note 311, at 33–34.
355. AM. PROSECUTORS RESEARCH INST., *supra* note 18, at 455.
356. *See supra* section II.B.
357. Goodman et al., *supra* note 42, at 267.
358. *Id*.
359. *See id*. at 270; *supra* section II.D.

backs to technology are often ignored or minimized. In this instance, legislators needlessly circumscribed the technologies that may be utilized for shielding. Prosecutors and courts long used low-technology means for shielding, and these means have been used effectively.[360] There is no reason to eliminate the use of a wide variety of shielding mechanisms. Statutes should be drafted to allow for both low- and advanced-technology shielding.[361] Here again, the UCWTAMA is instructive. When the use of an "alternative method" is approved under the Act, technology may or may not play a role in implementation.[362] Technology-based alternative methods include the use of video-recordings of children's testimony and the employment of one-way or two-way closed-circuit television to contemporaneously transmit the child's testimony from a location outside the courtroom into the courtroom where the defendant remains.[363] Arranging the courtroom or participants to avoid direct confrontation between the child witness and defendant is also permitted.[364] Second, if legislatures are going to dictate a particular form of high-technology shielding, they should allocate sufficient funding to renovate courthouses, purchase technology, and provide for the necessary personnel.

V. CONCLUSION

This Article has considered the criminal justice system's experience with juvenile shielding laws. Its aims were two-fold: to show why prosecutors have neglected to use this innovation and to ascertain whether and how it might be revitalized to the benefit of children. The Article concludes that the initial legislative design and subsequent Supreme Court approval of juvenile shielding statutes understandably contributed to prosecutorial disregard of their existence. Nevertheless, when prosecutors neglect to use the statutes, they potentially leave needy child witnesses un-shielded. The Article recommends that shielding laws be redesigned in three respects to take account of past failings. The next generation of shielding statutes should vest standing in children, broaden the eligible applicant pool to all juvenile witnesses while setting forth specific standards to ensure that only those who would benefit from shielding are granted approval, and move away from reliance on electronic technology to implement shielding.

In closing, it is worth considering for a moment whether the reform proposals advanced herein will be embraced. These reforms are

360. *See, e.g.*, AM. PROSECUTORS RESEARCH INST., *supra* note 18, at 326–27.
361. *E.g.*, UNIF. CHILD WITNESS TESTIMONY BY ALT. METHODS ACT § 5 cmt., 12 U.L.A. 87 (2002).
362. *See id.*
363. *Id.*
364. *Id.*

driven in large part by a desire to take fair account of the interests of child witnesses caught up in the criminal justice process. By definition, they are vulnerable and at-risk through no fault of their own. Thus, the legal system should take the greatest possible care to protect their interests under the circumstances. The changes suggested here are in keeping with current data and should be reconsidered in light of new data that becomes available.

Finally, the remedies suggested do not significantly threaten the interests of criminal defendants. First, these revisions are aimed at reaching the neediest child witnesses. Though the reforms proposed may expand the total number of applications for shielding, it should be approved in only the direst of cases. Second, empirical data hints that jurors were not biased against defendants in cases in which shielding was used.[365] Third, a leading alternative recommendation is far more troubling than the proposals advanced in this Article. Some children's advocates have proposed measures that would allow for prosecution without the child witness appearing at all to testify in court before the jury and before the defendant.[366] The proposals offered here do not embrace such a radical departure from longstanding adversarial practice. Rather, targeted reform of shielding laws that will reduce trauma to child witnesses who need help, but not result in an unnecessary increase in the use of shielding or unfair or erroneous convictions, is recommended.

365. *See* HALL & SALES, *supra* note 311, at 84–86 (describing results of studies and concluding more research needed).

366. *See id*. at 255 (recommending admission of videotaped hearsay testimony in lieu of in-court testimony to protect child witnesses from the trauma of courtroom confrontation); SHARED HOPE INT'L ET AL., REPORT FROM THE U.S. MID-TERM REVIEW ON THE COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN IN AMERICA 16 (2006) ("Procedural reforms are also needed to allow prosecution of perpetrators without victim/witness testimony.").