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The Presumption of Innocence: Patching the Tattered Cloak after Maryland v. Craig.

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THE PRESUMPTION OF INNOCENCE: PATCHING THE TATTERED CLOAK AFTER *MARYLAND v. CRAIG*

RALPH H. KOHLMANN*

I. Introduction: A Tear in the Cloak of the Presumption of Innocence 390
II. Sixth Amendment Right to Confrontation 394
   A. Historical Foundation of the Confrontation Clause 394
   B. *Coy v. Iowa*: Alternative Forms of Testimony and the Confrontation Clause 396
   C. *Maryland v. Craig*: Carving a Sixth Amendment Exception 397
   D. Reliability of Evidence: Contrasting the *Craig* Exception with Exceptions to Other Express Constitutional Provisions 399
   E. Expansion of the *Craig* Exception 402
III. Alternative Forms of Testimony and the Presumption of Innocence 405
   A. The Presumption of Innocence As a Matter of Due Process 405
   B. The Demotion of the Presumption of Innocence in *Coy* and *Craig* 408
   C. Effects of Courtroom Procedures on the Presumption of Innocence 410
      1. Binding or Shackling the Defendant 410
      2. Alternative Forms of Testimony: A New Type of Shackling 412
IV. Patching Instructions 414

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St. Mary's Law Journal, Vol. 27 [1995], No. 2, Art. 4

A. Inadequacy of the Standard Presumption of Innocence Instruction 415
B. A Proposed Instruction 416
V. Conclusion 420

If it suffices to accuse, what will become of the innocent?[1]

I. Introduction: A Tear in the Cloak of the Presumption of Innocence

There you are, sitting on a park bench, minding your own business, when you get up and catch the sleeve of your jacket on a small nail protruding from the arm of the bench. The problem is, this is not just any jacket. This jacket has belonged to your family for over one hundred years. The most remarkable thing about this jacket is that it has always been in style, despite a few signs of wear. You rush to a tailor, hoping the tear can be mended so that the damage will go unnoticed. The tailor's judgment, however, is swift. No one makes fabric like that anymore—the tear is there to stay. The tailor tells you that the tear is going to get worse unless you put some kind of patch on it. It will still show, but at least you will not lose the whole sleeve.

The American justice system also has an heirloom garment that, like your jacket, has been in style for over a century. It is a garment that has become an essential and indispensable addition to America's wardrobe of due process. Known as the presumption of innocence, this garment has clothed every criminal defendant who has entered a court of law for over one hundred years. Despite decades of wear, this garment has remained remarkably well-preserved and seemingly untouched. Closer examination of the garment in recent years, however, exposes a tear too large to be ignored, a tear represented by the alternative procedures for receiving live testimony of alleged victims of child abuse. Though the tear has not yet rendered the cloak useless, it must be repaired in order to prevent further damage to the presumption of innocence.

1. Coffin v. United States, 156 U.S. 432, 455 (1894) (quoting anecdote related by Ammianus Marcellinus in Rerum Gestarum, lib. xviii, c. 1). The Emperor Julian the Apostate reportedly made this statement in response to the question: "Oh, illustrious Caesar! if it is sufficient to deny, what hereafter will become of the guilty?" *Id.*

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Over one hundred years ago, the United States Supreme Court recognized the importance of the presumption of innocence in a criminal justice system that is based on due process.[2] The Court declared that the presumption of innocence is "the undoubted law, axiomatic, and elementary, and its enforcement lies at the foundation . . . of our criminal law."[3] The accused, the Court concluded, enters the courtroom cloaked with a presumption of innocence that is "an instrument of proof created by the law in favor of one accused whereby his innocence is established until sufficient evidence is introduced to overcome the proof which the law has created."[4] An examination of the law today discloses that the protective cloak of the presumption of innocence is becoming tattered and torn.[5] The Supreme Court's changing view of the Sixth Amendment's Confrontation Clause is the most recent contribution to the reduction in the practical value of the presumption of innocence.

In *Maryland v. Craig*,[6] the United States Supreme Court decided that "[a]lthough face-to-face confrontation forms the core of the values furthered by the Confrontation Clause," the use of a one-way, closed-circuit television system for receiving testimony by alleged victims of child sexual abuse does not violate the Sixth Amendment.[7] In reaching this decision, the Court balanced the rights of the accused against the state's interest in protecting an alleged victim from the trauma of testifying in the presence of an

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2. *See id.* at 453 (1894) (describing importance of presumption of innocence in criminal law as distinguished from reasonable doubt standard).

3. *Id.* at 453.

4. *Id.* at 459.

5. *See* 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, 494 n.189 (1993) (acknowledging studies indicating that presumption of innocence is seriously compromised in child abuse cases where alternative testimony is received, because such cases involve particularly heinous crimes); Susan H. Evans, Note, *Criminal Procedure—Closed Circuit Television in Child Sexual Abuse Cases: Keeping the Balance Between Realism and Idealism*—Maryland v. Craig, 26 WAKE FOREST L. REV. 471, 499–500 (1991) (observing lack of discussion pertaining to presumption of innocence in cases utilizing alternative testimonial procedures); Deborah H. Patterson, Note, *The Other Victim: The Falsely Accused Parent in a Sexual Abuse Custody Case*, 30 J. FAM. L. 919, 926 (1991) (observing virtual elimination of presumption of innocence in child abuse cases).

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

7. *Craig*, 497 U.S. at 847, 860 (quoting California v. Green, 399 U.S. 149, 157 (1970)) (internal quotation marks omitted).

St. Mary's Law Journal, Vol. 27 [1995], No. 2, Art. 4

alleged perpetrator.[8] The Court concluded that, in some cases, traditional face-to-face confrontation requirements must give way to policy considerations when child sexual abuse victims are involved.[9]

Though admirable in its attempt to protect actual victims from the trauma of confronting their abusers, *Craig* failed to address the damage that its Sixth Amendment exception causes to the procedural cloak of the presumption of innocence.[10] *Craig* neglected to acknowledge that the special treatment of an alleged victim sends an unspoken message to the jury that the judge has determined the witness needs special protection from the accused.[11] Lower courts and legislatures following *Craig* have further aggravated the due process problem by allowing various procedural substitutes for traditional live testimony, which will be collectively referred to in this Article as "alternative forms of testimony."[12] As in *Craig*, sub-

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8. *See id.* at 850 (disagreeing that states' interest in protecting victims of child abuse from trauma of testifying is outweighed by defendant's right to confrontation in every case).

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

10. *See* People v. Lord, 36 Cal. Rptr. 453, 458 (Ct. App. 1994) (explaining how *Craig* addressed infringement of defendant's right to confrontation and ignored effect of alternative testimonial procedure on due process). The issue presented by the defendant in *Craig* was admittedly limited to the Sixth Amendment right to confrontation. *See Craig*, 497 U.S. at 842–43 (reviewing disposition of case in trial and appellate courts on Confrontation Clause issue presented by defendant).

11. *See* Kerry R. Callahan, Comment, *Protecting Child Sexual Abuse Victims in Connecticut*, 21 CONN. L. REV. 411, 459 (1989) (asserting that alternative forms of testimony for children implicitly brand defendant as "dangerous, intimidating monster"); *see also* Peter D. Blanck, *What Empirical Research Tells Us: Studying Judges' and Juries' Behavior*, 40 AM. U. L. REV. 775, 794 (1991) (explaining result of study indicating that judge's verbal and nonverbal channels of communication often convey strong messages to jury which impact perception of defendant's guilt or innocence).

12. *See, e.g.*, MD. CODE ANN., CTS. & JUD. PROC. § 9-102 (1995) (authorizing trial judge to make finding of necessity regarding use of alternative testimonial procedure in child abuse case); N.J. STAT. ANN. § 2A:84A-32.4 (West 1995) (enabling trial court, after evidentiary hearing, to order taking of witness's testimony on closed-circuit television, regardless of whether witness is alleged child abuse victim); United States v. Carrier, 9 F.3d 867, 870-71 (10th Cir. 1993) (validating testimonial procedure employed by trial court as authorized by federal statute where child witness testified from separate room via video camera), *cert. denied*, 114 S. Ct. 1571 (1994); State v. Schaal, 806 S.W.2d 659, 663 (Mo. 1991) (allowing use of alleged child abuse victim's video testimony at trial even though recorded out of presence of defendant's attorney), *cert. denied*, 502 U.S. 1075 (1992); State v. Crandall, 577 A.2d 483, 487 (N.J. 1990) (approving use of testimonial procedure in which alleged child abuse victim testified from another room via video camera even though trial judge elicited no expert testimony or evaluation regarding necessity of procedure); *see also*

sequent appellate decisions concerning alternative forms of testimony have given short shrift to the collateral impact that their Sixth Amendment rulings have on the presumption of innocence and an accused's right to due process.[13] By sanctioning alternative forms of testimony, courts promote an inference of guilt with respect to a "presumably innocent" accused, even before the judge or jury has had an opportunity to determine whether a witness is being truthful, or whether the defendant is guilty of any conduct beyond standing accused of a crime.[14]

This Article reviews the impact of *Craig* on the accused's confrontation rights and analyzes the resulting tear in the presumption of innocence cloak. Most commentators and legal scholars exploring issues raised by the use of alternative forms of testimony have concentrated on the impact of the procedures on the defendant's right to confrontation and the corresponding effect on the reliability of the testimony received.[15] Although this Article addresses

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United States v. Helms, 39 M.J. 908, 910–11 (C.M.A. 1993) (approving procedure whereby alleged child abuse victim testified from library across from courtroom using video link); United States v. Williams, 33 M.J. 754, 756 (C.M.A. 1991) (upholding conviction in which child witness was allowed to whisper answers to interpreter from special chair facing away from defendant, despite defendant's request for testimony by way of closed circuit video).

13. *See* Fields v. Murray, 49 F.3d 1024, 1034–35 (4th Cir. 1995) (approving trial court procedure that allowed out-of-court testimony of child witnesses, subject only to cross-examination by written questions of defendant); Spigarolo v. Meachum, 934 F.2d 19, 23 (2d Cir. 1991) (finding no Sixth Amendment violation in trial court's admission of video testimony of complaining child witness, while briefly discussing *Craig* opinion and position that Confrontation Clause merely represents preference for face-to-face confrontation subject to interest in protecting child). *But see* Lowery v. Collins, 988 F.2d 1364, 1369 (5th Cir. 1993) (finding violation of Confrontation Clause due to trial court's failure to establish whether witness was competent to testify and under oath at time testimony was taped, and whether defendant had contemporaneous opportunity for cross-examination during interview).

14. *See* 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, 494 n.189 (1993) (doubting that use of alternative forms of testimony in child sexual-abuse case allows defendant to be presumed innocent); Charles E. Wilson, Jr., Note, *Criminal Procedure—Presumed Guilty: The Use of Videotaped and Close-Circuit Televised Testimony in Child Sex Abuse Prosecutions and the Defendant's Right to Confrontation—*Coy v. Iowa, 11 CAMPBELL L. REV. 381, 390 (1989) (asserting that alternative forms of testimony tend to enhance credibility of witness and negatively impact defendant's presumption of innocence).

15. *See, e.g.*, Robert H. King, Jr., *The Molested Child Witness and the Constitution: Should the Bill of Rights Be Transformed into the Bill of Preferences?*, 53 OHIO ST. L.J. 49, 49–50 (1992) (criticizing *Craig's* exception to confrontation requirement in child abuse cases); Robert P. Mosteller, *Remaking Confrontation Clause and Hearsay Doctrine Under*

St. Mary's Law Journal, Vol. 27 [1995], No. 2, Art. 4

these concerns, it focuses on the harmful effects that alternative testimonial procedures have on the defendant's presumption of innocence—damage that occurs even *before* any testimony is heard by the jury or trier of fact. Several procedural rules and appellate decisions applying alternative forms of testimony are especially harmful to the accused, and this Article analyzes these rules and decisions in view of their impact on the presumption of innocence. Finally, because the practice of utilizing alternative forms of testimony in child abuse cases is so widely accepted, this Article ultimately proposes a jury instruction calculated to minimize the likelihood that a jury will draw improper inferences about the defendant's presumption of innocence from the procedure.

II. Sixth Amendment Right to Confrontation

A. *Historical Foundation of the Confrontation Clause*

Some legal scholars maintain that the origins of the Confrontation Clause can be traced to the 1603 treason conviction of Sir Walter Raleigh.[16] At Raleigh's trial, an important part of the evidence against him was the written confession of an absent, alleged co-

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the Challenge of Child Sexual Abuse Prosecutions, 1993 U. ILL. L. REV. 691, 701 (discussing court determinations regarding admission of hearsay statements and alternative forms of testimony in context of ensuring reliability of testimony received); Kerry R. Callahan, Comment, *Protecting Child Sexual Abuse Victims in Connecticut*, 21 CONN. L. REV. 411, 455 (1989) (arguing that use of alternative forms of testimony in child abuse case enhances otherwise unreliable testimony); Anthony S. Parise, Note, Maryland v. Craig: *Ignoring the Letter and Purpose of the Confrontation Clause*, 1991 B.Y.U. L. REV. 1093, 1100 (discussing impact of *Craig* and concern over reliability of evidence received through alternative forms of testimony).

16. *See* FRANCIS H. HELLER, THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES 104 (1951) (explaining that right to confront witnesses originated at common law in response to abuses in trial of Sir Walter Raleigh); Robert P. Mosteller, *Remaking Confrontation Clause and Hearsay Doctrine Under the Challenge of Child Sexual Abuse Prosecutions*, 1993 U. ILL. L. REV. 691, 752 (suggesting that Confrontation Clause may have been influenced by inquisitorial methods of vice admiralty courts, as well as treason trial of Sir Walter Raleigh). *But see* Stanley A. Goldman, *Not So 'Firmly Rooted': Exceptions to the Confrontation Clause*, 66 N.C. L. REV. 1, 3 (1987) (explaining that modern scholars believe effect of Sir Walter Raleigh's trial on drafting of Sixth Amendment has been overstated). Allowing an accused the opportunity to confront witnesses is a trial procedure that significantly predates Sir Walter Raleigh's trial. *See* Greene v. McElroy, 360 U.S. 474, 496 n.25 (1958) (recounting trial of Apostle Paul before King Agrippa more than 2000 years ago in which King Agrippa employed Roman practice of providing accused opportunity to confront witnesses prior to invoking death sentence).

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Kohlmann: The Presumption of Innocence: Patching the Tattered Cloak after M

conspirator.[17] Raleigh was convicted and eventually executed, despite an intervening recantation by the alleged co-conspirator.[18] Whether fact or fable, the tale of Sir Walter Raleigh has served well as the basis for the truism in American jurisprudence that "[i]t is always more difficult to tell a lie about a person to his face than behind his back."[19]

Perhaps with this truism in mind, the Framers of the United States Constitution ratified the Bill of Rights in 1791, believing that the Sixth Amendment would require those who accuse another of a crime to confront the accused before a finding of guilt is entered.[20] In relevant part, the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him."[21] Generations of lawyers have learned that direct confrontation is critical to the effective operation of our adversarial system and the Supreme Court has recognized that it is "the greatest legal engine ever invented for the discovery of the truth."[22] In 1965, the Court noted: "There are few subjects, perhaps, upon which this Court and other courts have been more unanimous in their expressions of belief than that of confrontation and cross-examination as an essential and fundamental requirement for the kind of fair trial which is this country's con-

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17. *See* James E. Beaver, *The Residual Hearsay Exception Reconsidered*, 20 FLA. ST. U. L. REV. 787, 788 (1993) (reviewing historical account of Sir Walter Raleigh's trial in which statement of alleged co-conspirator, Lord Cobham, was used in Raleigh's conviction though Lord Cobham was in prison at time of trial and statement was later retracted).

18. *Id.*

19. 5 JOHN H. WIGMORE, WIGMORE ON EVIDENCE § 3167 (1974).

20. *See* Ohio v. Roberts, 448 U.S. 56, 78 (1980) (Brennan, J., dissenting) (explaining that inclusion of Confrontation Clause in Bill of Rights reflects Framers' belief that opportunity of defendant to face accuser at trial is fundamental to fair judicial process); *see also* Long v. State, 694 S.W.2d 185, 188 (Tex. App.—Dallas 1985) (explaining that Framers intended Confrontation Clause of Sixth Amendment to ensure opportunity for effective cross-examination, further ensure reliability of testimony by requiring witness to testify under oath, enable face-to-face confrontation, and allow jury to evaluate demeanor of witness), *aff'd*, 742 S.W.2d 302 (Tex. Crim. App. 1987), *cert. denied*, 485 U.S. 993 (1988); Maria H. Bainor, Note, *The Constitutionality of the Use of Two-way Closed Circuit Television to Take Testimony of Child Victims of Sex Crimes*, 53 FORDHAM L. REV. 995, 1014 (1985) (explaining that purpose of face-to-face confrontation, as element of Confrontation Clause, is to allow fact finder opportunity to observe demeanor of witness in order to determine truthfulness).

21. U.S. CONST. amend. VI.

22. *See* California v. Green, 399 U.S. 149, 158 (1970) (discussing importance of direct confrontation).

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stitutional goal."[23] Notwithstanding the venerated pedestal upon which the Confrontation Clause has historically been placed, recent advances in alternative forms of testimony have begun to erode the confrontation rights of criminal defendants.

B. Coy v. Iowa: *Alternative Forms of Testimony and the Confrontation Clause*

The Supreme Court first addressed the use of alternative forms of testimony in *Coy v. Iowa*,[24] when it considered whether an alternative form of testimony should be employed for the purpose of shielding child witnesses.[25] In *Coy*, the appellant was convicted of two counts of lascivious acts with a child following a jury trial in which a screen, placed between the accused and the two alleged child victims, blocked the accused from the victims' sight.[26] Coy appealed, contending that this procedure violated his Sixth Amendment right to confront the witnesses against him.[27] Coy also claimed that the procedure violated due process because it eroded his constitutional right to a presumption of innocence.[28]

Writing for the majority, Justice Scalia affirmed traditional notions of confrontation and their relationship to fundamental due process, noting that "the perception that confrontation is essential to fairness has persisted over the centuries because there is much truth to it."[29] A witness, Justice Scalia observed, "may feel quite differently when he has to repeat his story looking at the man whom he will harm greatly by distorting or mistaking the facts."[30]

23. Pointer v. Texas, 380 U.S. 400, 405 (1965).

24. 487 U.S. 1012 (1988).

25. *See Coy*, 487 U.S. at 1015 (concluding that use of screen to shield child witness from accused violates right to confrontation).

26. *Id.* at 1014.

27. *Id.*

28. *Id.* at 1015.

29. *Coy*, 487 U.S. at 1019.

30. *Id.* (quoting Z. CHAFEE, THE BLESSINGS OF LIBERTY 35 (1956)) (internal quotation marks omitted). Justice Scalia noted:

> The Confrontation Clause does not, of course, compel the witness to fix his eyes upon the defendant; he may studiously look elsewhere, but the trier of fact will draw its own conclusions. Thus, the right to face-to-face confrontation serves much the same purpose as a less explicit component of the Confrontation Clause that we have had more frequent occasion to discuss—the right to cross-examine the accuser; both "ensur[e] the integrity of the fact-finding process."

Id. at 1019–20 (quoting Kentucky v. Stincer, 482 U.S. 730, 736 (1987)).

The majority concluded that "the Confrontation Clause of the Sixth Amendment guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact."[31] Accordingly, the Court found that the screening procedure violated Coy's confrontation rights and reversed his conviction without reaching his due process claim concerning the presumption of innocence.[32]

C. Maryland v. Craig: *Carving a Sixth Amendment Exception*

Less than two years after *Coy*, a majority of the Supreme Court reached a different conclusion in *Maryland v. Craig*,[33] prompting Justice Scalia to write a powerful dissent.[34] In *Craig*, a jury convicted the appellant of sexually abusing a six-year-old child.[35] During trial, the complaining child witness testified from a separate room in the presence of the prosecutor and defense counsel by using a one-way, closed-circuit television.[36] The judge, jury, and defendant remained in the courtroom.[37] While Craig's attorney participated in the direct and cross-examination of the complaining witness, Craig was left to communicate with her lawyer by means

31. *Id.* at 1016.

32. *See id.* at 1022 (determining that Confrontation Clause violation was independently sufficient to reverse and remand). Justice O'Connor concurred, joined by Justice White, and concluded that the Confrontation Clause does not always require a face-to-face encounter between the witness and the accused. *See id.* (O'Connor, J., concurring) (agreeing that right to confrontation was violated under facts of case, but asserting that some situations may warrant use of certain procedural devices to prevent direct contact between witness and accused). Justice O'Connor asserted that confrontation rights are not absolute and "may give way in an appropriate case to other competing interests so as to permit the use of certain procedural devices designed to shield a child witness from the trauma of courtroom testimony." *Id.* Justice O'Connor suggested that allowances for alternative forms of live testimony should be viewed as exceptions to the normal requirement for face-to-face confrontation, rather than as universally acceptable alternative forms of confrontation. *See id.* (emphasizing that rights granted under Confrontation Clause may be subjugated to other interests in appropriate cases).

33. 497 U.S. 836 (1990).

34. *See Craig*, 497 U.S. at 860–70 (Scalia, J., dissenting) (criticizing majority for subordinating constitutional text in favor of public policy).

35. *Id.* at 836.

36. *Id.* at 843. Pursuant to a Maryland statutory procedure, a judge may allow a child suffering from serious emotional distress that interferes with the child's ability to reasonably communicate to testify outside the courtroom. *See* MD. CODE ANN., CTS. & JUD. PROC. § 9-102 (1989) (outlining procedural exception to Confrontation Clause).

37. *Craig*, 497 U.S. at 452.

St. Mary's Law Journal, Vol. 27 [1995], No. 2, Art. 4

of an open telephone line.[38] Craig, in full view and hearing of the jury, had to speak loudly enough for her attorney to hear her voice from a telephone receiver that had been placed on a table in the room in which examination of the witness took place.[39] Craig appealed her conviction, contending that this procedure violated her Sixth Amendment right to confront the witness against her.[40]

The Supreme Court disagreed with Craig's contention and held that Maryland's statutory procedure, taken with the trial court's particularized finding that the procedure was necessary to protect the welfare of the child witness, did not offend the "truthseeking or symbolic purposes of the Confrontation Clause."[41] At first glance, this holding would seem to imply that the closed-circuit television procedure did not violate the accused's Sixth Amendment rights. However, the Court referred to the shielded testimony as an "exception to the Confrontation Clause's preference for face-to-face confrontation at trial."[42] The Court explained that this exception to traditional Sixth Amendment confrontation requirements was necessary to further the "important state interest . . . [of] protecting children who are allegedly victims of child abuse from the trauma of testifying against the alleged perpetrator."[43]

The Court's characterization of the shielding procedure as an *exception* to the requirement of face-to-face confrontation evidences the Court's recognition that the procedure violated the literal pro-

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38. Respondent's Brief at 1 n.1, Maryland v. Craig, 110 S. Ct. 3157 (1990) (No. 89-478).

39. *Id.*

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

41. *Id.* at 852; *see id.* at 842 (explaining that case-specific finding of necessity is required before alternative testimonial procedure can be employed by court). Although the trial court in *Craig* heard expert testimony pertaining to each of the child witnesses and concluded that the alternative form of testimony was necessary, the Supreme Court remanded the case to the Maryland Court of Appeals for reconsideration of the issue of necessity in light of the new legal standard established by the Court. *Id.* at 860.

42. *Id.*

43. *Id.* at 852. The Court held that before an alternative form of testimony may be employed for a child witness, the prosecutor must establish that use of the procedure is necessary. *Id.* at 855. To establish necessity, the prosecution must show: (1) the alternative procedure is necessary to protect the welfare of the child witness; (2) the child would otherwise be traumatized by testifying in front of the defendant, as opposed to merely testifying in a courtroom setting; and (3) the trauma or stress resulting from testifying in the presence of the defendant would produce more than mere nervousness or reluctance to testify. *Id.* at 855–56.

visions of the Sixth Amendment.[44] The Court merely concluded in *Craig* that the greater good served by allowing the procedure outweighed its infringement on the Confrontation Clause.[45] Although the Court did not expressly state that an accused's rights should be balanced against the state's interest in protecting a complaining witness, the Court determined that the Sixth Amendment's preference for direct confrontation "must occasionally give way to considerations of public policy and the necessities of the case."[46] This is the language of balancing tests and exceptions.[47]

D. *Reliability of Evidence: Contrasting the* Craig *Exception with Exceptions to Other Express Constitutional Provisions*

The *Craig* court's creation of an exception to face-to-face confrontation is only one example of the Supreme Court tinkering with admissibility standards after balancing the constitutional rights of an accused against important public policies. For instance, in *New York v. Quarles*,[48] the Court carved out a "public safety" exception to the requirement that *Miranda* warnings be given prior to custodial interrogations if a suspect's statements are to be admissible at trial.[49] Additionally, the Court has created exceptions

44. *See Craig*, 497 U.S. at 844 (acknowledging historical and literal understanding of Confrontation Clause as protecting defendant's right to face-to-face meeting with accusers).

45. *See id.* at 845 (explaining that trial court's finding that child witnesses needed special protection against defendant warranted exception of type described in *Coy*, which allows exception only in furtherance of public policy).

46. *Id.* (quoting Mattox v. United States, 156 U.S. 237, 243 (1895)).

47. The United States Supreme Court often balances the interests of society in general with individual rights when evaluating the constitutionality of certain state policies and procedures. *See, e.g.*, Planned Parenthood v. Casey, 112 S. Ct. 2791, 2805 (1992) (considering various provisions of Pennsylvania's abortion statute, and balancing legitimate state interest in obtaining important medical information with individual right to privacy); Burdick v. Takushi, 504 U.S. 428, 439 (1992) (balancing Hawaii's legitimate interest in ban on write-in ballots with individual right to vote, and concluding that state's interest outweighed right to vote by way of write-in ballot); Press-Enterprise Co. v. Superior Ct. of Cal., 464 U.S. 501, 501–02 (1984) (determining that defendant's right to fair trial and jurors' right to privacy were outweighed by public interest in open court procedures, including transcripts of voir dire examination); Wooley v. Maynard, 430 U.S. 705, 715 (1977) (holding state law unconstitutional that forbade motor vehicle operators from obscuring words "live free or die" on license plate because right to free speech, and restraint thereof, outweighed state's interest in requiring display of motto).

48. 467 U.S. 644 (1984).

49. *See Quarles*, 467 U.S. at 655–56 (applying public safety exception to requirement for *Miranda* warnings, and holding that information solicited from handcuffed defendant

St. Mary's Law Journal, Vol. 27 [1995], No. 2, Art. 4

premised on good faith,[50] attenuation of the taint associated with illegal police conduct due to time or intervening events,[51] and the doctrine of inevitable discovery to allow the admission of evidence obtained in violation of constitutional requirements.[52]

The Supreme Court developed these exceptions to the Fourth and Fifth Amendment's exclusionary rules because it determined that suppression of the challenged evidence would not further the deterrent function of the rules.[53] The Court has also noted that noncompliance with Fourth and Fifth Amendment prophylactic procedures does not necessarily affect the intrinsic reliability of the evidence obtained.[54] In fact, one Justice has concluded that the

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regarding location of weapon should have been admitted at trial). The Court also explained that the subjective motivation of the arresting officer was irrelevant in determining whether the public safety exception should apply. *Id.*

50. *See* United States v. Leon, 468 U.S. 897, 913 (1984) (concluding that Fourth Amendment exclusionary rule should not bar evidence obtained by officers acting in good faith).

51. *See* Wong Sun v. United States, 371 U.S. 471, 491 (1963) (concluding that confession of defendant made voluntarily and several days after initial illegal search by police was sufficiently attenuated to allow confession to be used against defendant).

52. *See* Nix v. Williams, 467 U.S. 431, 448 (1984) (determining that "inevitable discovery" exception to exclusionary rule applied when search party consisting of 200 volunteers would have eventually found body of victim, though discovery was hastened by defendant's confession obtained outside presence of counsel); *see also* Segura v. United States, 468 U.S. 796, 805 (1984) (asserting that exclusionary rule is not to be applied when illegally obtained evidence is also obtained from independent source). *See generally* New York v. Belton, 453 U.S. 454, 457 (1981) (outlining several exceptions to exclusionary rule created by Court, including exigency, search incident to arrest, and safety of arresting officer); Bradley C. Graveline, Note, *Fourth Amendment—An Acceptable Erosion of the Exclusionary Rule:* Murray v. United States, 79 J. CRIM. L. & CRIMINOLOGY 647, 650–54 (1988) (discussing three general exceptions to exclusionary rule: independent source, attenuation, and inevitable discovery).

53. *See* Deborah Connor, *The Exclusionary Rule*, 82 GEO. L.J. 755, 757 (1994) (explaining that Supreme Court developed exceptions to exclusionary rule in four situations when exclusion of evidence would not further deterrent purposes of rule). The Supreme Court developed exclusionary rules to deter misconduct, not because illegally obtained evidence was inherently unreliable. *See* Elkins v. United States, 364 U.S. 206, 217 (1960) (noting that exclusionary rule was intended to prevent, not cure, constitutional violation by taking away incentive to ignore Fourth Amendment); *see also* People v. Cahan, 282 P.2d 905, 910 (Cal. 1955) (asserting that purpose of exclusionary rule is not to prevent invasion of privacy of defendant in criminal trial, because intrusion has already occurred, but to prevent future unwarranted intrusions by government); Lawrence Crocker, *Can the Exclusionary Rule Be Saved?*, 84 J. CRIM. L. & CRIMINOLOGY 310, 311 (1993) (discussing notable success of exclusionary rule as deterrent to police error or misconduct).

54. *See* Adams v. New York, 192 U.S. 585, 596 (1904) (noting that trespasser's testimony was not unreliable simply because evidence was obtained illegally); *see also Cahan*, 282 P.2d at 908 (asserting that evidence illegally obtained is often as true and reliable as

Kohlmann: The Presumption of Innocence: Patching the Tattered Cloak after M

failure to give *Miranda* warnings where public safety is involved has a negligible effect on the intrinsic reliability of the evidence obtained during an arrest.[55]

Unlike the prophylactic goals of Fourth and Fifth Amendment procedures, however, the principal purpose of the Confrontation Clause is to promote fairness by screening unreliable evidence from the trial process.[56] As Justice Scalia observed in *Craig*, although "the Confrontation Clause does not guarantee reliable evidence[,] it guarantees specific trial procedures that [are] thought to *assure* reliable evidence, undeniably among which [is] 'face-to-face' confrontation."[57] In this regard, there is an important difference between the Fourth and Fifth Amendment exceptions and the developing Sixth Amendment exception for alternative forms of testimony. Removing the Sixth Amendment requirement of face-to-face testimony actually diminishes the reliability of the resulting evidence, while the Fourth and Fifth Amendment exceptions ar-

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evidence lawfully acquired); People v. Defore, 150 N.E. 585, 586–87 (N.Y. 1926) (allowing admission of illegally obtained evidence because evidence was not rendered unreliable merely by unlawful acquisition), *cert. denied*, 270 U.S. 657 (1926).

55. *See* Withrow v. Williams, 113 S. Ct. 1745, 1759 (1993) (O'Connor, J., concurring in part and dissenting in part) (asserting that confessions given in violation of *Miranda* were not necessarily untrustworthy, though obtained without proper warnings). This assertion is certainly subject to dispute. *Miranda* warning requirements were developed out of concern for a suspect's free exercise of the privilege against self-incrimination. *See* Miranda v. Arizona, 384 U.S. 436, 457–58 (1966) (explaining that police interrogation, even when conducted without threat of physical violence, hinders suspect's ability to exercise privilege against self incrimination). Absent the prophylactic warning, one might argue that any resulting statement is not only involuntary as a matter of law, but also inherently unreliable because the coercive effect of custodial interrogation has not been dispelled. *See Withrow*, 113 S. Ct. at 1753 (stating that criminal justice system that relies upon confessions obtained through interrogation will not be as reliable as one that depends upon independent investigation); Escobedo v. Illinois, 378 U.S. 478, 488 (1964) (relating history's lesson that law enforcement is more effective when using extrinsic evidence obtained through independent investigation rather than custodial interrogation).

56. *See, e.g.*, White v. Illinois, 502 U.S. 346, 357 (1992) (asserting that primary purpose of Confrontation Clause is to ensure reliability of fact-finding process); Coy v. Iowa, 487 U.S. 1012, 1019–20 (1989) (explaining that Confrontation Clause serves purpose of ensuring that witnesses will provide reliable, truthful testimony); Carson v. Collins, 993 F.2d 461, 464 (5th Cir.) (stating that Confrontation Clause, which applies to states through Fourteenth Amendment, serves to promote integrity of trial process by encouraging reliable testimony), *cert. denied*, 114 S. Ct. 265 (1993).

57. Maryland v. Craig, 497 U.S. 836, 862 (1990) (Scalia, J., dissenting) (emphasis added).

St. Mary's Law Journal, Vol. 27 [1995], No. 2, Art. 4

guably do not.[58] Additionally, despite the state's interest in protecting the welfare of child victims, child witnesses are "substantially more vulnerable to suggestion than adults, and often unable to separate recollected fantasy (or suggestion) from reality."[59] As Justice Scalia recognized in *Coy*, while face-to-face confrontation may upset a child witness, "it may . . . reveal the child coerced by a malevolent adult."[60] Accordingly, it is especially disturbing that one of the principle trial procedures developed to promote reliable testimony—face-to-face confrontation—has been deemed dispensable for this class of witnesses.

E. *Expansion of the* Craig *Exception*

Since the Supreme Court's decision in *Craig*, the use of alternative forms of testimony in child sexual abuse cases has acceler-

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58. *Compare* United States v. Benfield, 593 F.2d 815, 821 (8th Cir. 1979) (implying that defendant's inability to cross-examine witness through face-to-face confrontation negatively impacts witness's tendency for truthfulness) *with* United States v. Lee, 540 F.2d 1205, 1211 (4th Cir.) (allowing use of illegally obtained evidence at sentencing and noting that illegal manner of acquisition generally does not affect reliability of evidence), *cert. denied*, 429 U.S. 894 (1976). As Justice Scalia noted, a witness's unwillingness to testify "cannot be a valid excuse under the Confrontation Clause whose very object is to place the witness under the sometimes hostile glare of the defendant." *Craig*, 497 U.S. at 866 (Scalia, J., dissenting). *But cf. Coy*, 487 U.S. at 1032 n.5 (Blackmun, J., dissenting) (arguing that reliability of child abuse victim's testimony may actually be enhanced by use of alternative testimonial procedure).

59. *Craig*, 497 U.S. at 868 (Scalia, J., dissenting); *see also, e.g.*, John R. Christiansen, *The Testimony of Child Witnesses: Fact, Fantasy, and the Influence of Pretrial Interviews*, 62 WASH. L. REV. 705, 709 (1987) (asserting that cues posed by interviewer to jog memory of child witness may actually contribute to inaccuracy of memories recalled by children, because children are often unable to distinguish between memories of actual events and memories of dreams or fantasies); Thomas L. Feher, *The Alleged Molestation Victim, the Rules of Evidence, and the Constitution; Should Children Really Be Seen and Not Heard?*, 14 AM. J. CRIM. L. 227, 231–33 (1987) (arguing that interviewing process in child-abuse case may actually change what exists in child's memory, such change being irreversible for purposes of trial testimony); Julie A. Dale, Comment, *Ensuring Reliable Testimony from Child Witnesses in Sexual Abuse Cases: Applying Social Science Evidence to a New Fact-Finding Method*, 57 ALB. L. REV. 187, 195 (1993) (reporting that suggestive questioning during interview affects children more than adults, and recognizing that accuracy of children's recollections can decrease with suggestive questioning); Diana Younts, Note, *Evaluating and Admitting Expert Opinion Testimony in Child Sexual Abuse Prosecutions*, 41 DUKE L.J. 691, 722 (1991) (noting research conducted by Cornell University professor Stephen J. Ceci, who found that children, when prompted by adults, may modify their stories to fit events as described or suggested by adult questioners).

60. *Coy*, 487 U.S. at 1020 (Scalia, J., dissenting).

Kohlmann: The Presumption of Innocence: Patching the Tattered Cloak after M

ated.[61] Courts have begun to employ this confrontation exception with increased acceptance and frequency in child abuse cases, and have even proposed and applied alternative forms of testimony in situations and to classes of witnesses not considered by *Craig*. For example, in *Simpson v. Lewis*,[62] the United States Court of Appeals for the Ninth Circuit approved the trial court's placement of the *accused*, over his objection, in a separate room where he could watch the proceedings and communicate with his counsel, but could not be seen by the complaining witness.[63] The trial judge had explained to the jury that the witness was "nervous" about testifying.[64] The Ninth Circuit found that this procedure met the requirements of *Coy* and *Craig*.[65]

Furthermore, in *Gonzales v. Texas*,[66] the Texas Court of Criminal Appeals condoned the use of an alternative form of testimony

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61. *See, e.g.*, United States v. Carrier, 9 F.3d 867, 871 (10th Cir. 1993) (upholding trial court's decision to allow alleged child abuse victims to testify via two-way, closed-circuit television), *cert. denied*, 114 S.Ct. 1571 (1994); United States v. Farley, 992 F.2d 1122, 1124-25 (10th Cir. 1993) (finding that trial court's determination regarding trauma to alleged child sexual assault victim from defendant's presence in court satisfied *Craig* standard for allowing victim to testify by closed-circuit television); Spigarolo v. Meachum, 934 F.2d 19, 23 (2d Cir. 1991) (allowing admission of video testimony of alleged child sexual abuse victim, which was taped in presence of judge and attorneys, but outside presence of defendant); Hardy v. Wigginton, 922 F.2d 294, 296, 302 (6th Cir. 1990) (denying writ of habeas corpus by holding admission of alleged child victim's prior video deposition appropriate under *Craig*); Thomas v. Guenther, 754 F. Supp. 833, 834 (D. Colo. 1991) (mem.) (maintaining constitutionality of alleged child sexual assault victims' testimony in form of video tape, when questions were asked by therapists while judge and counsel observed through one-way mirror); People v. Sharp, 29 Cal. Rptr.2d 117, 120 (Ct. App. 1994) (declining to invalidate prosecutor's practice of placing herself between alleged victim and defendant so that witness did not have to look at defendant while testifying against him); Hicks-Bey v. United States, 649 A.2d 569, 572 n.6 (D.C. 1994) (per curiam) (listing options given to defendant for examination of victim/witness, including one-way mirror observation, simulcast closed-circuit television, and live testimony of witness in presence of judge and counsel, but not defendant); Carmona v. State, 880 S.W.2d 227, 232-34 (Tex. App.—Austin 1994, writ granted) (finding no Confrontation Clause violation when witness's sister held witness's hand during testimony against defendant regarding alleged sexual abuse).

62. No. 92-15281, 1993 WL 74384 (9th Cir. Mar. 17, 1993), *cert. denied*, 114 S. Ct. 209 (1993).

63. *Simpson*, 1993 WL 74384, at *1.

64. *Id.*

65. *Id.* at *2; *see also* United States v. Romey, 32 M.J. 180, 182-83 (C.M.A. 1991) (approving use of alternative form of testimony based on implied finding of necessity). In *Romey*, the trial judge overruled defense counsel's objection to the proposed alternative form of testimony without conducting a detailed examination of the child, hearing testimony, or explaining why the procedure was necessary. *Id.*

66. 818 S.W.2d 756 (Tex. Crim. App. 1991), *cert. denied*, 113 S. Ct. 1334 (1993).

St. Mary's Law Journal, Vol. 27 [1995], No. 2, Art. 4

for a child witness who was not the alleged victim of the charged offense.[67] The court approved this procedure even though a Texas statute expressly limited the use of alternative forms of testimony to situations involving alleged child victims.[68] Despite the United States Supreme Court's reliance in *Craig* on the existence of legislation as evidence of the important state interest in protecting alleged victims of child abuse,[69] the *Gonzales* court had little trouble finding public policy interests beyond those addressed by the statutory language.[70] In fact, the court expressly concluded that it should not be limited to acts or statutes in discerning public policy considerations.[71] This view was shared by a concurring judge who decided that the *Craig* rule should be "applicable to all children testifying in criminal cases and to all alternative testimonial procedures, whether imposed by the legislature or by the courts."[72]

Commentators have also predicted the logical extension of the *Craig* rule to classes of witnesses beyond alleged child victims.[73] After all, if *Craig* essentially allows the state to protect a class of witnesses from the trauma of testifying in the presence of the accused upon a showing of necessity, it follows that an argument for necessity could be persuasively asserted on behalf of rape victims, victims of vicious assaults, or elderly victims.[74] Further yet, ad-

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67. *Gonzales*, 818 S.W.2d at 764.

68. *See id.* at 766 (disputing contention that trial court's actions allowing nonvictim's testimony needed enabling legislation to be constitutionally permissible without face-to-face confrontation). The applicable Texas statute is limited to testimony of alleged child victims. TEX. CODE CRIM. PROC. ANN. art. 38.071, § 1 (Vernon Supp. 1995).

69. *See* Maryland v. Craig, 497 U.S. 836, 853 (1990) (considering abundance of state statutes protecting victims of child abuse as indicative of strong public policy).

70. *See Gonzales*, 818 S.W.2d at 765 (rejecting notion that statute sets parameters of public policy).

71. *Id.*

72. *Id.* at 767 (Benavides, J., concurring).

73. *See* Jacqueline M. Beckett, Note, *The True Value of the Confrontation Clause: A Study of Child Sex Abuse*, 82 GEO. L.J. 1605, 1640–41 (1994) (criticizing *Craig* opinion for failing to limit use of alternative forms of testimony to cases of child abuse and predicting expansion to other classes of witnesses); Theresa Cusick, Note, *Televised Justice: Toward a New Definition of Confrontation Under* Maryland v. Craig, 40 CATH. U. L. REV. 967, 998 (1991) (noting Court's reasoning in *Craig* may allow alternative forms of testimony to be used with broader class of witnesses); Brian L. Schwalb, Note, *Child Abuse Trials and the Confrontation of Traumatized Witnesses: Defining "Confrontation" to Protect Both Children and Defendants*, 26 HARV. C.R.-C.L. L. REV. 185, 217 n.52 (1991) (speculating that *Craig* exception will be expanded to other deserving classes of witnesses).

74. *See* Jacqueline M. Beckett, Note, *The True Value of the Confrontation Clause: A Study of Child Sex Abuse*, 82 GEO. L.J. 1605, 1640–41 (1994) (arguing that pertinent public

Kohlmann: The Presumption of Innocence: Patching the Tattered Cloak after M

vances in video technology could also have a significant impact on the credibility, and thus on judicial acceptance, of alternative forms of testimony.[75] Now that the constitutional dam concerning face-to-face confrontation has been broken, it is difficult to predict with any certainty where the river of logical extension will flow.[76]

III. Alternative Forms of Testimony and the Presumption of Innocence

A. *The Presumption of Innocence As a Matter of Due Process*

Maryland v. Craig is essentially a Sixth Amendment Confrontation Clause case and, in its proper context, furthers the legitimate dual interests of protecting the welfare of children and ensuring the reliability of testimony received. The Court in *Craig*, however, failed to consider the effect that alternative forms of testimony may have on the defendant's due process rights beyond the Sixth Amendment right to confront adverse witnesses, namely, the effect on the presumption of innocence. The Due Process Clause of the Fifth Amendment is broad and requires that "no person shall . . .

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policy exception created by *Craig* leaves room for expansion to other classes of individuals, such as witnesses of heinous crimes and adult rape victims); Theresa Cusick, Note, *Televised Justice: Toward a New Definition of Confrontation Under* Maryland v. Craig, 40 CATH. U. L. REV. 967, 998 (1991) (commenting that rationale used by Court in *Craig* does not prevent use of alternative forms of testimony from being extended to broader class of witnesses who may have special needs); Brian L. Schwalb, Note, *Child Abuse Trials and the Confrontation of Traumatized Witnesses: Defining "Confrontation" to Protect Both Children and Defendants*, 26 HARV. C.R.-C.L. L. REV. 185, 217 n.52 (1991) (noting that other classes of victims, such as elderly and rape victims, arguably deserve same treatment as child-abuse victims).

75. Commonwealth v. Willis, 716 S.W.2d 224, 230–31 (Ky. 1986) (explaining constitutionality of Kentucky statute permitting use of video testimony in child abuse cases, and citing advances in video technology that allow adequate cross-examination and confrontation without necessity of physical presence); Brian L. Schwalb, Note, *Child Abuse Trials and the Confrontation of Traumatized Witnesses: Defining "Confrontation" to Protect Both Children and Defendants*, 26 HARV. C.R.-C.L. REV. 185, 205 (1991) (asserting that advances in video technology can be utilized to more closely approximate face-to-face confrontation and legitimize use of video testimony in child abuse cases); *cf.* Rebecca W. Berch, *A Proposal to Amend Rule 30(B) of the Federal Rules of Civil Procedure: Cross-Disciplinary and Empirical Evidence Supporting Presumptive Use of Video to Record Depositions*, 59 FORDHAM L. REV. 347, 353 (1990) (reviewing courts' gradual acceptance and employment of video-taped testimony as video technology has advanced).

76. The aquatic analogy springs from the opening line of Justice Scalia's dissenting opinion in *Craig*: "Seldom has this Court failed to conspicuously sustain a categorical guarantee of the Constitution against the tide of prevailing current opinion." *Craig*, 497 U.S. at 860 (Scalia, J., dissenting).

be deprived of life, liberty, or property, without due process of law."[77] Notably, the Supreme Court has held that the presumption of innocence is the most basic component of this broad guarantee of a fair trial.[78]

One of the earliest Supreme Court cases to discuss the importance of the presumption of innocence as a matter of due process was *Coffin v. United States.*[79] In *Coffin*, the Court considered whether a presumption of innocence instruction should be given upon request in addition to a jury instruction addressing the government's burden to prove guilt beyond a reasonable doubt.[80] The Court unanimously decided that a separate presumption of innocence instruction should be given.[81] Writing for the Court, Justice White demonstrated the necessity of a separate instruction by tracing the lineage of the presumption of innocence from the Bible, to Sparta, to Roman law, to England, and finally to the colonies that became the United States.[82] A recurring theme in Justice White's catalogue of historical references was that the presumption of innocence is of immeasurable value in a fair system of justice.[83] Both courts and legal scholars have since observed the systemic impor-

77. U.S. CONST. amend. V.

78. *See, e.g.*, Norfolk v. Flynn, 475 U.S. 560, 567 (1986) (stating that presumption of innocence is primary interest guaranteed by due process); Kentucky v. Whorton, 441 U.S. 786, 790 (1979) (Stewart, J., dissenting) (describing presumption of innocence as principle most firmly established in American criminal justice system); Taylor v. Kentucky, 436 U.S. 478, 479 (1978) (noting Court's recognition of presumption of innocence as basic component of due process); Estelle v. Williams, 425 U.S. 501, 503 (1976) (recognizing that presumption of innocence is basic component of due process); *In re* Winship, 397 U.S. 358, 363 (1970) (proclaiming that presumption of innocence is foundational to administration of criminal law).

79. 156 U.S. 432 (1894).

80. *See Coffin*, 156 U.S. at 460–61 (comparing meaning of terms "reasonable doubt" and "presumption of innocence," and holding that failure to include presumption of innocence instruction was reversible error).

81. *See id.* (explaining that separate instruction on presumption of innocence must be given and may not be inferred from charge).

82. *Id.* at 454–59. In fact, the Court declared in *Coffin* that the presumption of innocence is "an instrument of proof created by the law in favor of one accused, whereby his innocence is established until sufficient evidence is introduced to overcome the proof which the law has created." *Id.* at 459. The Court subsequently retreated from the position that the presumption of innocence is evidence in favor of the accused. *See* Agnew v. United States, 165 U.S. 36, 51-52 (1897) (noting that portion of defendant's requested instruction that directed jury to treat presumption of innocence as evidence was misleading).

83. *See Coffin*, 156 U.S. at 484–86 (stressing that presumption of innocence is essential to enforcement of rights protected by Due Process Clause).

Kohlmann: The Presumption of Innocence: Patching the Tattered Cloak after M

tance of the presumption of innocence and have concluded that it is far better for many guilty parties to go free than for a single innocent accused to suffer.[84]

In recent years, the United States Supreme Court has affirmed the importance of the presumption of innocence, adding to its historical foundation. In *Estelle v. Williams*,[85] decided in 1976, the Supreme Court observed that the "presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice."[86] Two years later, in *Taylor v. Kentucky*,[87] the Court identified the Due Process Clause as the specific constitutional basis for the presumption of innocence.[88] The Court acknowledged that the Constitution does not expressly require the use of the particular phrase "presumption of innocence," but the Court urged trial judges to utilize the Due Process Clause to safeguard "against dilution of the principle that

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84. *See Winship*, 397 U.S. at 372 (Harlan, J., concurring) (explaining that 'reasonable doubt' standard required in criminal proceedings ensures practical, substantive enforcement of presumption of innocence, and is founded on principle that "it is far worse to convict an innocent man than to let a guilty man go free"); *see also* Schlup v. Delo, 115 S. Ct. 851, 853 (1995) (describing execution of wrongly convicted defendant as "quintessential miscarriage of justice," and noting that concern over possible wrongful convictions is at core of criminal justice system). Clearly, no criminal justice system can ensure total accuracy in the conviction of criminals. Inherent in any system utilizing human fact finders is the potential for erroneous convictions. *See* Jon O. Newman, *Beyond "Reasonable Doubt,"* 68 N.Y.U. L. REV. 979, 980 (1993) (discussing risk of wrongful convictions and acquittals in jury system employing fallible factfinders). However, procedural safeguards, such as the "reasonable doubt" burden of proof, attempt to ensure that an error, if made, more often results in wrongful acquittals than wrongful convictions. *See id.* at 980–81 (explaining that mistaken acquittals should significantly outnumber wrongful convictions, though ratio is subject to debate).

85. 425 U.S. 501 (1976).

86. *Estelle*, 425 U.S. at 503.

87. 436 U.S. 478 (1978).

88. *See Taylor*, 436 U.S. at 485–86 n.13 (1978) (interpreting Fourteenth Amendment's mandate of determining guilt only on basis of evidence as fundamental to presumption of innocence). In *Taylor*, the Supreme Court described the procedural status of the presumption of innocence as follows:

> It is now generally recognized that the "presumption of innocence" is an inaccurate, shorthand description of the right of the accused to "remain inactive and secure, until the prosecution has taken up its burden and presented evidence and effected persuasion . . . ."

Id. at 484 n.12 (quoting 9 J. WIGMORE, EVIDENCE § 2511 (3d ed. 1940)). The Court further asserted that the presumption of innocence is better described as an "assumption" rather than a "presumption," since it is "indulged in favor of the accused" absent evidence to the contrary. *Id.*

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St. Mary's Law Journal, Vol. 27 [1995], No. 2, Art. 4

guilt is to be established by probative evidence and beyond a reasonable doubt."[89]

In *Holbrook v. Flynn*,[90] the Supreme Court reiterated the constitutional underpinnings of the presumption of innocence.[91] The Court recognized that jurors know defendants do not appear before them by choice, and acknowledged that courts cannot eliminate every reminder that the state has chosen to pursue a charge against a defendant.[92] That being the case, the Court stressed that both defense counsel and the trial judge must work diligently to impress upon jurors the need to presume the defendant's innocence.[93] The Court explained that the presumption of innocence and the adversary system jointly serve to protect the due process rights of defendants and ensure a fair trial.[94]

Despite its importance in prior Supreme Court jurisprudence, the concept of the presumption of innocence has begun to erode.[95] The manner in which alternative forms of testimony have been utilized and approved in child abuse cases indicates that the Supreme Court has lost sight of the vital role played by both trial judges and defense counsel in enforcing the presumption of innocence, as described in *Coffin, Taylor,* and *Holbrook.* Rather than viewing the presumption of innocence as a cherished principle, the Supreme Court has sanctioned the broadcasting of an assumption of guilt to the jury by shielding complaining witnesses in the courtroom.

B. *The Demotion of the Presumption of Innocence in* Coy *and* Craig

In the two cases in which the Court has considered the use of alternative forms of testimony, the Court has paid little attention to

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89. *Id.* at 485-86 (quoting Estelle v. Williams, 425 U.S. 501, 503 (1976)); *cf. Coffin*, 156 U.S. at 459 (asserting that judges, at request of defendant, must explain presumption of innocence to jurors).

90. 475 U.S. 560 (1986).

91. *See Holbrook*, 475 U.S. at 567 (emphasizing that guilt or innocence of accused is determined by trial evidence alone (citing Taylor v. Kentucky, 436 U.S. 478, 486 (1987))).

92. *Id.*

93. *Id.* at 567-68.

94. *Id.*

95. *See* LeRoy Pernell, *The Reign of the Queen of Hearts: The Declining Significance of the Presumption of Innocence—A Brief Commentary*, 37 CLEV. ST. L. REV. 393, 393 (1989) (claiming that ideal of presumption of innocence has become "inconvenienent technicality as opposed to a valued principle").

the effect that these procedures may have on the defendant's presumption of innocence. A discussion of the presumption of innocence is conspicuously absent from the *Craig* opinion,[96] and only Justice Blackmun addressed the presumption of innocence in *Coy*.[97] In his dissent in *Coy*, Justice Blackmun noted the potentially "eerie" effect and "dramatic emphasis" created by dimming courtroom lights and placing a screen between the defendant and the complaining child witness, but he nonetheless insisted that the effect did not improperly impact the presumption of innocence afforded to the defendant.[98] The procedure, explained Justice Blackmun, did not brand the defendant with an unequivocal stamp of guilt.[99] Remarkably, Justice Blackmun brushed the due process issue aside and concluded that because "a screen is not the sort of trapping that is generally associated with those who have been convicted," there was little chance that the use of the screen affected the jury's attitude toward the defendant.[100] Justice Blackmun correctly observed that implementing extraordinary procedures on behalf of complaining child witnesses does not literally stamp a scarlet "G" on the forehead of the accused; however, a fair reading of *Coffin* and its progeny suggests that courts should strive to place more than a little distance between the presumption of innocence and the inference of guilt or other trappings associated with the criminally accused.

96. *See* Susan Evans, Note, *Closed Circuit Television in Child Sexual Abuse Cases: Keeping the Balance Between Realism and Idealism*—Maryland v. Craig, 26 WAKE FOREST L. REV. 471, 501 (1991) (observing absence of presumption of innocence discussion in *Craig*, and speculating that Court could later rely on issue to limit or reverse *Craig*).

97. *See* Coy v. Iowa, 487 U.S. 1012, 1034 (1988) (Blackmun, J., dissenting) (concluding use of alternative form of testimony did not create unacceptable risk to presumption of innocence). The Court ruled in *Coy* that the placement of a screen between the defendant and the alleged child sexual assault victims during the victims' testimony at trial violated the defendant's right to face-to-face confrontation under the Confrontation Clause. *Id.* at 1022.

98. *See id.* at 1034–35 (describing trial court's setting for witnesses' testimony, but dismissing presumption of innocence argument).

99. *Id.* at 1034.

100. *Id.* at 1035 (Blackmun, J., dissenting).

St. Mary's Law Journal, Vol. 27 [1995], No. 2, Art. 4

C. *Effects of Courtroom Procedures on the Presumption of Innocence*

The United States Supreme Court has repeatedly emphasized that trial courts must exercise caution when using a courtroom procedure that may impact a defendant's presumption of innocence.[101] In other words, when a courtroom procedure has the potential effect of branding a scarlet "G" on the forehead of the accused, the court must determine that the procedure is actually necessary and employ measures to ensure that the impact of the procedure on the jury's perception of the defendant's guilt or innocence is minimized.[102]

1. Binding or Shackling the Defendant

A courtroom procedure requiring the defendant to appear for trial physically restrained by handcuffs or shackles is one example of a procedure that can have a detrimental impact on the defendant's presumption of innocence.[103] Obviously, the danger inherent in such a procedure is that a jury will presume the defendant's guilt

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101. *See, e.g.*, Holbrook v. Flynn, 475 U.S. 560, 567 (1986) (explaining that procedures likely to have negative impact on defendant's right to fair trial are subject to close judicial scrutiny); Taylor v. Kentucky, 436 U.S. 478, 487 (1978) (concluding that prosecutor's impermissible remarks pertaining to defendant's alleged guilt, combined with trial court's failure to issue proper presumption of innocence instruction, warranted reversal of conviction); Estelle v. Williams, 425 U.S. 501, 503–04 (1976) (noting that because impact of some judicial procedures cannot be accurately ascertained, courts must be alert to factors and variables that may affect fairness of fact-finding process); Illinois v. Allen, 397 U.S. 337, 344 (1970) (discussing undesirable impact that binding and gagging defendant would have on presumption of innocence, but declining to conclude that these procedures would never be permissible if defendant's behavior warranted restraint).

102. *See, e.g.*, *Holbrook*, 475 U.S. at 568 (noting that restraint during trial "must be subjected to close judicial scrutiny"); Castillo v. Stainer, 983 F.2d 145, 147 (9th Cir. 1992) (explaining that danger to presumption of innocence prohibits use of restraints unless court is convinced of need to maintain security and has pursued less restrictive measures), *cert. denied*, 114 S. Ct. 609 (1993); Hamilton v. Vasquez, 882 F.2d 1469, 1472 (9th Cir. 1989) (holding that trial court has duty to consider less restrictive measures before resorting to physical restraint), *cert. denied*, 114 S. Ct. 2706 (1994); *cf.* Wilson v. McCarthy, 770 F.2d 1482, 1485 (9th Cir. 1985) (affirming conviction even though defendant's key witness was required to appear in shackles, but criticizing trial court's failure to instruct jury regarding defendant's presumption of innocence).

103. *See, e.g.*, Harrell v. Israel, 672 F.2d 632, 635 (7th Cir. 1982) (explaining that courtroom procedure of placing handcuffs on defendant may unnecessarily mark defendant as dangerous person and suggest guilt); Mapp v. State, 397 S.E.2d 476, 477 (Ga. Ct. App. 1990) (reversing conviction because court failed to clearly explain that shackles placed on defendant during trial were not to be considered by jury as indication of guilt); *see also*

based on appearance alone.[104] Jurors will likely reason that because the court deemed restraints necessary, the defendant must be dangerous and therefore guilty.[105]

Because of this danger to the defendant's presumption of innocence, the Supreme Court has disallowed the use of visible, physical restraints on a defendant during trial except as a last resort.[106] Numerous lower courts have addressed this issue and have allowed a defendant to be restrained during trial only after the prosecution has established that the defendant would pose a threat to people in the courtroom if left unrestrained.[107] Even if a court deems the restraints necessary, however, the judge must ensure that every effort is made to minimize the visual evidence of the restraint so as to remove, as much as possible, the potential threat to the fairness of the trial process.[108] Thus, a defendant's right to appear before a

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State v. Crawford, 577 P.2d 1135, 1145 (Idaho 1978) (noting presumption of innocence concerns inherent in use of physical restraints on defendant before jury).

104. *See* United States v. Gambina, 564 F.2d 22, 24 (8th Cir. 1977) (noting that absence of physical indicia of innocence undermines presumption of innocence); Eric Wertheim, Note, *Anonymous Juries*, 54 FORDHAM L. REV. 981, 991 (1986) (recognizing that when "ruling on challenges to either physical restraint of the defendant or extraordinary courtroom security measures, courts often emphasize the defendant's right to the physical indicia of innocence during trial"). *But see* Gates v. Zant, 863 F.2d 1492, 1501 (11th Cir.) (holding that accused was not prejudiced by jury's brief or incidental viewing of restrained defendant), *cert. denied*, 493 U.S. 945 (1989).

105. *See Hamilton*, 882 F.2d at 1470 (asserting that shackling is strongly disfavored because it endangers defendant's presumption of innocence); *Harrell*, 672 F.2d at 635 (explaining that courts have duty to guard defendant's presumption of innocence and, therefore, must avoid practices before jury that may mark defendant as dangerous person or suggest guilt); *Mapp*, 397 S.E.2d at 477 (reversing conviction because defendant had been shackled and judge failed to clearly explain to jury that shackles were not to be considered in determination of guilt or innocence).

106. *See Allen*, 397 U.S. at 344 (asserting that trying defendant while in shackles may be necessary in some instances, but only as "last resort"); *see also Harrell*, 672 F.2d at 636 (requiring showing of "extreme need" to justify use of visible restraints on defendant during trial in light of potential for prejudice to defendant).

107. *See, e.g.*, Morgan v. Bunnell, 24 F.3d 49, 51 (9th Cir. 1994) (finding that trial court used shackles appropriately on defendant who had repeatedly disrupted courtroom procedures, attempted to escape, and threatened witnesses against him); Woodard v. Perrin, 692 F.2d 220, 221-22 (1st Cir. 1982) (determining that shackles were necessary because defendant's pretrial behavior toward police and hospital staff demonstrated that to leave defendant free during trial would subject others to risk of harm); *see also Crawford*, 577 P.2d at 1145 (requiring court to state, on record and out of presence of jury, reasons for restraining defendant during trial and to give counsel opportunity to present evidence refuting need for restraints).

108. *See, e.g.*, *Wilson*, 770 F.2d at 1486 (declaring that trial judge should consider less drastic alternatives to shackling defendant, though defendant bears burden of suggesting

jury unrestrained and with the appearance of innocence may be reduced or waived only due to his or her own conduct.[109] Essentially, the courtroom procedure of physically restraining the defendant is only invoked when necessary to prevent the defendant from engaging in previously demonstrated dangerous conduct and is then carried out with much caution.

2. Alternative Forms of Testimony: A New Type of Shackling

Alternative forms of testimony can have the effect of placing shackles on the defendant in the eyes of the jury because these forms of testimony create an image of the defendant as a person to be feared. Unlike shackles, however, alternative testimonial procedures are employed because of an *accuser's* inability or unwillingness to testify in the defendant's presence, not because the *defendant's* courtroom or pretrial conduct indicates that he or she represents a present physical threat to the witness at the time of trial.[110] When alternative forms of testimony are used, no judicial finding has been made to confirm accusations pertaining to the defendant's dangerous conduct or character. Instead, the defendant has entered the courtroom cloaked with a presumption of innocence. Yet, at perhaps the most important moment of the trial—

alternatives); *Mapp*, 397 S.E.2d at 477 (reversing conviction and noting trial judge's failure to take any measures to prevent jurors from seeing defendant in shackles); *Crawford*, 577 P.2d at 1145 (explaining that restraints, if necessary, should be utilized as subtly as possible, preferably so that jury is unable to see restraints, due to presumption of innocence concerns).

109. *See, e.g.*, *Estelle*, 425 U.S. at 505 (concluding that identifiable prison clothing on defendant during trial would be impermissible, while shackles or gag would be allowed if defendant's disruptive and disorderly behavior in courtroom warranted such measures); *Allen*, 397 U.S. at 344 (holding that defendant's right to be present at trial can be waived by disorderly conduct, and deciding that defendant may also, in extreme situations, be made to stand trial while bound and gagged); Bass v. Scully, 556 F. Supp. 778, 780 (S.D.N.Y. 1983) (explaining that binding and gagging defendant is disfavored, but that it is constitutionally permissible if defendant's behavior makes it difficult to proceed with trial).

110. *See, e.g.*, United States v. Carrier, 9 F.3d 867, 870 (10th Cir. 1993) (reviewing trial court's determination that alternative testimonial procedure was necessary for child witness based on evidence that witness would not be able to testify in courtroom); State v. Rupe, 534 N.W.2d 442, 443 (Iowa 1995) (approving trial court's use of closed-circuit television for testimony of child witness in sexual abuse case after hearing evidence indicating that witness would be unable to testify in front of defendant); *In re* Stradford, 460 S.W.2d 173, 175-76 (N.C. Ct. App. 1995) (noting that courts often provide for special testimonial procedures when child witness is unable or unwilling to testify in presence of accused).

during the testimony of a key government witness—the court makes a nonverbal statement that the accused represents such a threat to the witness that normal trial procedures must be set aside, and the witness must be permitted to testify from behind a barrier or from another room. As one commentator discussing the procedure used in *Craig* noted, a jury may become suspicious when the defendant is suddenly isolated from a witness, and the jury may conclude that the witness's obvious fear of the defendant establishes the defendant's guilt.[111]

Although the mode of transmission may be subtle, the message received by some jurors will be that the court is protecting the witness from the accused. This message creates a serious problem. Even though prosecutors, social workers, and psychiatrists may all agree that a particular child is a victim, when the child begins to testify, he or she should not be viewed by the fact finder as anything more than a complaining witness.[112] The jury, not the trial judge, has the responsibility to determine whether the child is a victim and whether the accused is guilty of some wrongdoing.[113] Affording complaining witnesses special treatment by separating them from the accused implicitly indicates to the jury that the court has deemed the witness a victim, and the accused a threat to the witness. Such implicit messages from the court may, in some instances, impart an unmistakable mark of guilt to the defendant, increasing the likelihood that the procedure will violate the defend-

111. Robert H. King, Jr., *The Molested Child Witness and the Constitution: Should the Bill of Rights Be Transformed into the Bill of Preferences?*, 53 OHIO ST. L.J. 49, 97 (1992).

112. *See* Wildermuth v. State, 530 A.2d 275, 292 (Md. 1987) (stating that trial judge's instruction properly explained to jury that weight given to testimony of alleged child abuse witness delivered in separate room should be no greater than if child witness testified in courtroom); Jean Montoya, *On Truth and Shielding in Child Abuse Trials*, 43 HASTINGS L.J. 1259, 1304 (1992) (observing that special procedure for alleged child victim gives prosecution strategic advantage because jury views witness differently than it otherwise might). *See generally* LeRoy Pernell, *The Reign of the Queen of Hearts: The Declining Significance of the Presumption of Innocence—A Brief Commentary*, 37 CLEV. ST. L. REV. 393, 412–13 (1989) (discussing harm to presumption of innocence resulting from use of alternative testimonial procedures in child abuse cases due to implied message of guilt imputed to defendant).

113. *See* Coy v. Iowa, 487 U.S. 1012, 1021-22 (1988) (asserting that use of alternative testimonial procedure may have improperly affected jury's role in determining guilt or innocence of defendant); Hoversten v. Iowa, 998 F.2d 614, 617 (8th Cir. 1993) (disapproving procedure whereby child witnesses testified from behind two-way mirror because Confrontation Clause was violated and procedure may have interfered with jury's proper role in determining guilt of defendant).

St. Mary's Law Journal, Vol. 27 [1995], No. 2, Art. 4

ant's right to due process. As Chief Justice Taft stated in *Tumey v. Ohio*:[114]

> [T]he requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice. Every procedure which would offer a possible temptation to the average man . . . to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.[115]

IV. PATCHING INSTRUCTIONS

The Supreme Court has recognized that an accused's due process rights are protected primarily by the adversarial system and the presumption of innocence.[116] The adversarial system and the presumption of innocence also act together to promote the balanced truth-finding function of the criminal trial process.[117] When the impact of one of these dynamics is altered, the result of the trial process becomes less reliable. In *Craig*, the Supreme Court sanctioned a modification of the confrontation aspect of the adversarial system in favor of the state's interest in shielding child witnesses from alleged perpetrators.[118] Accordingly, in order to maintain reliability and fairness in criminal trials involving alternative forms of testimony, trial courts must compensate for the diminished nature of the accused's confrontation rights by bolstering the defendant's presumption of innocence. The burden of taking corrective action falls to the trial judge and defense counsel.[119]

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114. 273 U.S. 510 (1927).

115. *Tumey*, 273 U.S. at 532.

116. Holbrook v. Flynn, 475 U.S. 560, 567 (1986).

117. *See id.* (explaining that legal system relies on joint effects of adversarial system and presumption of innocence to reach fair result).

118. *See* Maryland v. Craig, 497 U.S. 836, 853 (1990) (holding that defendant's right to confrontation may, in some instances, give way to public policy of protecting child witness from trauma of testifying in front of accused); *see also* Spigarolo v. Meachum, 934 F.2d 19, 23 (2d Cir. 1991) (discussing holding in *Craig* that state's interest in protecting child witness from trauma of testifying may outweigh defendant's right to confrontation).

119. *See* Estelle v. Williams, 425 U.S. 501, 504 (1976) (explaining responsibility of court to evaluate any procedure that may affect defendant's right to fair trial, including procedures that may have bearing on presumption of innocence).

Kohlmann: The Presumption of Innocence: Patching the Tattered Cloak after M

Trial judges and defense attorneys may meet this burden in one of three ways. First, they may seek to have *Craig* overturned on the basis that alternative forms of testimony exact irreparable harm on the due process rights of the accused. Second, they may seek to prevent the use of alternative forms of testimony when the witness is not a child victim. Third, they may ensure that juries hearing alternative forms of testimony are thoroughly instructed as to how their duty is affected by the use of this unusual trial procedure. The following discussion is limited to the third course of action.

A. *Inadequacy of the Standard Presumption of Innocence Instruction*

Though some form of a presumption of innocence instruction is clearly mandated in every criminal case, when alternative forms of testimony are utilized, courts and defense counsel must carefully consider what precise form of instruction will adequately safeguard a defendant's presumption of innocence. Relying on existing presumption of innocence instructions may be a tempting method of dealing with the due process problems created by alternative forms of testimony; however, the instructions that courts have used thus far present several problems. For the most part, the instructions merely restate the standard presumption of innocence instruction without cautioning against inferences of guilt that may arise as a result of alternative forms of testimony.[120] For example, in *Wildermuth v. State*,[121] the trial judge instructed the jury not to give the televised testimony of the complaining witness any greater or lesser weight than if it had been given in the courtroom.[122] The appellate court in *Wildermuth* noted that while no instruction was given to explain the use of the alternative form of testimony, the jury likely assumed that the procedure was simply used to reduce the trauma any child might suffer through public testimony.[123] Moreover, in *Simpson v. Lewis*,[124] the jury was simply told that the alternative

120. *See* People v. McGravey, 14 F.3d 1344, 1347 (9th Cir. 1994) (approving presumption of innocence instruction given by trial court despite fact that it did not refer to or explain use of alternative form of testimony employed by child witness in case).

121. 530 A.2d 275 (Md. Ct. App. 1987).

122. *Wildermuth*, 530 A.2d at 278–79.

123. *Id.* at 292.

124. No. 92-15281, 1993 WL 74384 (9th Cir. Mar. 17, 1993), *cert. denied*, 114 S. Ct. 209 (1993).

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St. Mary's Law Journal, Vol. 27 [1995], No. 2, Art. 4

form of testimony was used because the child witness was "nervous" about testifying.[125]

Even the instruction that Justice Blackmun noted with approval in his dissenting opinion in *Coy* is problematic, despite its discussion of the form of testimony and its warning against inferences of guilt.[126] The trial judge in *Coy* told the jury:

> It's quite obvious to the jury that there's a screen device in the courtroom. The General Assembly of Iowa recently passed a law which provides for this sort of procedure in cases involving children. Now, I would caution you now and I will caution you later that you are to draw no inference of any kind from the presence of that screen. You know, in the plainest of language, that is not evidence of the defendant's guilt, and it shouldn't be in your mind as an inference as to any guilt on his part. It's very important that you do that intellectual thing.[127]

This instruction is inadequate because it fails to account for the fact that jurors might improperly conclude that the judge has deemed the child a victim rather than a complaining witness in an ongoing factfinding proceeding. In sum, existing presumption of innocence instructions inadequately compensate for the assumption of guilt that may occur when the court shields the complaining witness from the accused.

B. *A Proposed Instruction*

In a routine criminal trial, a standard presumption of innocence instruction may adequately dispel any inference of guilt arising from "official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial."[128] When alternative forms of testimony are used, however, instructions should go be-

125. *See Simpson*, 1993 WL 74384, at *1 (finding that trial judge's particularized findings of necessity, which evidenced that child would be traumatized by presence of defendant while testifying, were sufficient to satisfy *Craig* test even though explanation to jury simply stated that child was "nervous" about testifying).

126. *See* Coy v. Iowa, 487 U.S. 1012, 1035 (1988) (Blackmun, J., dissenting) (concluding that instruction given by trial judge, which explained to jury that use of alternative procedure was not evidence of defendant's guilt, was helpful in ensuring that jury would not draw improper inferences from use of procedure).

127. *Id.*

128. *See* Taylor v. Kentucky, 436 U.S. 478, 485 (1978) (holding that presumption of innocence instruction adequately conveys to jury prosecution's burden to prove defendant's guilt).

yond boilerplate admonitions concerning the presumption of innocence. The instructions should explain that the special provisions are due to a general public policy favoring protection of alleged child abuse victims. Additionally, because a balancing test is employed by courts addressing the Sixth Amendment rights of accused individuals, judges should instruct jurors that they may choose to give less weight to the testimony of a witness who has not directly confronted the accused.[129] Such an instruction would allow for the desired protection of alleged child victims, acknowledge the reduced reliability of the protected witness's testimony, and take an important step toward protecting the accused's presumption of innocence. The following is a proposed instruction that could be given upon defense counsel's request, or when the court otherwise deems it appropriate because a witness has testified against an accused by an alternative form of live testimony:

> Due to special provisions available under the law for children who are alleged victims or witnesses of criminal acts, provisions were made in this case for *CHILD WITNESS* to testify in a different manner than the other witnesses. The special provisions that were made for *CHILD WITNESS's* testimony do not imply that the court has made any determination concerning *CHILD WITNESS's* truthfulness and should in no way affect the presumption of innocence afforded to *DEFENDANT* in this case. The jurors may consider, however, whether the weight given to *CHILD WITNESS's* testimony is diminished by the fact that he/she did not provide his/her testimony in a face-to-face confrontation with *DEFENDANT*.

The value of this instruction lies in its honest and impartial posture, and in its recognition of the constitutional exception made on behalf of the witness. The instruction does not make any excuses

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129. *See, e.g.*, Maryland v. Craig, 497 U.S. 836, 837 (1990) (balancing Maryland's interest in protecting child witnesses from trauma of testifying against accused's right to confrontation, and concluding that confrontation rights must sometimes give way to necessities of case); Coy v. Iowa, 487 U.S. 1012, 1022 (1988) (O'Connor, J., concurring) (asserting that confrontation rights may give way to interest of protecting alleged child abuse victim from testifying in front of defendant); *see also* United States v. Williams, 33 M.J. 754, 756 (C.M.A. 1991) (concluding that trial judge properly balanced confrontation rights of accused with interest of child witness in allowing witness to testify from chair facing away from defendant); United States v. Thompson, 29 M.J. 541, 542 (C.M.A. 1989) (noting that procedures employed for children in legal system often differ from those applied to adults because public policy reasons offset otherwise constitutionally granted rights such as right to face-to-face confrontation), *aff'd*, 31 M.J. 168 (C.M.A. 1990), *cert. denied*, 498 U.S. 1084 (1991).

St. Mary's Law Journal, Vol. 27 [1995], No. 2, Art. 4

for the witness or improperly imply that the witness is, in fact, a victim being protected from the accused. Instead, the jury is truthfully instructed about legislative concern for child victims, and reminded that it is the jury's job to determine the facts. Finally, the instruction informs the jury that the alternative procedure sacrifices a portion of the accused's constitutional protection. The jury is advised that they may consider whether the departure from standard procedures for the benefit of the witness diminishes the weight of the witness's testimony.[130] The last sentence of the proposed instruction would also encourage prosecutors to carefully consider whether their child witness actually needs the exceptional treatment provided by an alternative form of testimony.

Without this type of instruction, the prosecutor's decision to pursue an alternative form of live testimony for a complaining witness is relatively unfettered by any tactical cost-benefit analysis.[131] In fact, several commentators have suggested that, in addition to the assumption of guilt that arises from these procedures, the credibility of witnesses is *enhanced* by their presentation in a televised format.[132] For example, one commentator noted:

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130. One commentator has previously suggested the following instruction addressing the Confrontation Clause aspect of alternative forms of testimony:

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

Jean Montoya, *On Truth and Shielding in Child Abuse Trials*, 43 HASTINGS L.J. 1259, 1300 n.202 (1992). Professor Montoya's proposed instruction addresses the issues raised by alternative forms of testimony with more precision than the standard presumption of innocence instruction. Unfortunately, it suggests that the fact-finding process is enhanced by the alternative procedure. While appearing to move one step forward, this instruction may actually take two steps back in connection with the presumption of innocence.

131. *See id.* at 1304–05 (noting strategic advantage that prosecution gains by utilizing alternative form of testimony in child sexual abuse case because procedure often enhances credibility of testimony in eyes of jury).

132. *See, e.g.*, Carolyn Hertzberg, *Clever Tool or Dirty Pool? WPPSS, Closed Circuit Testimony and the Rule 45(E) Subpoena Power*, 21 ARIZ. ST. L.J. 275, 283 (1989) (observing that testimony presented via video camera may actually enhance credibility of witness due to public's infatuation with media); James S. O'Brien, Jr., Comment, *Television Trials and Fundamental Fairness: The Constitutionality of Louisiana's Child Shield Law*, 61 TUL. L. REV. 141, 163–64 (1986) (explaining that testimony presented by closed-circuit television may legitimize status of witness); Charles E. Wilson, Jr., Note, *Criminal Procedure—*

Kohlmann: The Presumption of Innocence: Patching the Tattered Cloak after M

> [T]he fact that the testimony is being televised may give it enhanced credibility due to the status-conferral function of the media . . . [S]tudies in the field of jury communication dynamics tend to support the theory that introduction of alternative testimony techniques will, at the very least, focus the jury's attention on the unusual method, and could upset the impartiality that the presumption [of innocence] is intended to support.[133]

Accordingly, although *Craig* and various statutes call for alternative forms of testimony only on an as-needed basis, prosecutors may increasingly seek authorization for their use as a matter of general practice. For these reasons, the proposed jury instruction is necessary to protect the due process rights of the accused and prevent prosecutors from gaining an unbargained-for and unwarranted tactical advantage.

Presumed Guilty: The Use of Videotaped and Closed-Circuit Televised Testimony in Child Sex Abuse Prosecutions and the Defendant's Right to Confrontation—Coy v. Iowa, 11 CAMPBELL L. REV. 381, 390 (1989) (noting studies revealing that people tend to give credibility to what they see on television, and asserting similar tendency to give more weight to testimony seen on video monitor); *see also* Maria H. Bainor, Note, *The Constitutionality of the Use of Two-way Closed Circuit Television to Take Testimony of Child Victims of Sex Crimes*, 53 FORDHAM L. REV. 995, 1014 (1985) (describing techniques used to offset prejudicial effect of televised testimony, including use of proper camera angles and capturing of first impressions such as witness's approach to witness stand and initial remarks). *But see* Fredric Lederer, *Technology Comes to the Courtroom, and . . .*, 43 EMORY L.J. 1095, 1117–18 (1994) (describing various technological advances in use of video equipment in courtroom and discussing drawbacks of video testimony). Professor Lederer observed:

> Arguably, [remote television testimony] might be lacking in three particulars: (1) the factfinder might find the demeanor of the witness toward the defendant too difficult to evaluate; (2) the electronic media or the physical set up may impair some other sense or senses; or (3) perhaps the very use of remote testimony might suggest a lack of importance that would defeat the hoped-for tendency of direct confrontation, in-courtroom testimony to impel solemn truthfulness.

Id. at 1121.

133. Kathleen A. Barry, Comment, *Witness Shield Laws and Child Sexual Abuse Prosecutions: A Presumption of Guilt*, 15 S. ILL. U. L.J. 99, 115 (1990) (footnote omitted). In addition, Barry noted:

> The status conferral function of the mass media is the description given to the phenomenon whereby people appearing in the media are perceived to have a higher status than members of the community as a group, because they have received a type of validation by virtue of being singled out in the press or on the electronic media.

Id. at 115 n.108; *see also* Paul W. Ritsema, Note, *Testimony of Children Via Closed-Circuit Television in Indiana: Face (to Television) to Face Confrontation*, 23 VAL. U. L. REV. 455, 463 (1989) (suggesting that camera limits jury's ability to evaluate child's demeanor).

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St. Mary's Law Journal, Vol. 27 [1995], No. 2, Art. 4

V. Conclusion

Maryland v. Craig exemplifies recent attempts of courts and legislatures to safeguard the physical and psychological well-being of child witnesses. Unfortunately, however, *Craig* also reveals a disturbing erosion of confrontation and due process rights, and has created a tear in the cloak of the presumption of innocence. By making special accommodations for an alleged victim's testimony, the trial judge sends a subtle signal to the jury endorsing the veracity of the witness. A judicial finding that an alleged victim will be harmed by testifying in close proximity to the accused influences the jury with regard to the issue of guilt or innocence—the very issue that the jury was convened to decide. Accordingly, the use of alternative forms of testimony casts doubt on the presumption of innocence at the critical moment when the State's key witness takes the stand. Though the potential for prejudice to the accused is greatest in cases tried before a jury, dangers are also present in trials before a judge alone, because the judge is compelled to make a finding of fact concerning the necessity of separating the witness from the accused before the judge decides whether the accused has actually committed a crime.

Too often, counsel entrust the formation and issuance of jury instructions to the trial judge. Most experienced litigators would agree, however, that the jury charge and accompanying instructions can significantly reinforce an important aspect of a case, or reduce the effect of a particular piece of evidence that would otherwise play an important role in the deliberation process. Until *Craig* is reviewed in a direct due process appeal, defense attorneys should request special instructions that bolster the eroding presumption of innocence and attempt to patch the tear left by *Craig*. Trial counsel should formulate proposed instructions to assist the jury in properly evaluating an alleged victim's testimony whenever that testimony is given through an alternative procedure.

Because of the potentially negative impact that alternative forms of testimony have on the defendant's presumption of innocence, courts should tailor the use of these procedures to ensure that they further the narrow goals that they are designed to serve. Alternative forms of testimony may be acceptable, and even necessary, for the purpose of protecting alleged child abuse victims from the trauma of testifying in a courtroom setting face to face with their abusers. These procedures may also, in some instances, legiti-

Kohlmann: The Presumption of Innocence: Patching the Tattered Cloak after M

mately serve to enhance the reliability of testimony received. Nonetheless, courts should not, by action or inaction, allow juries to presume guilt from the fact that a child witness has been allowed to testify outside of the defendant's presence. If a proper instruction is given, courts may be able to patch the tattered cloak of the presumption of innocence, while maintaining the alternative forms of testimony sanctioned in *Craig*.

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