DISTRUSTING YOUNG CHILDREN WHO ALLEGE SEXUAL ABUSE: WHY STEREOTYPES DON'T DIE AND WAYS TO FACILITATE CHILD TESTIMONY

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INTRODUCTION

In the nearly seven years since *Crawford v. Washington*,[1] the United States Supreme Court has offered no guidance about how to interpret the "testimonial" ban when the declarant is a young child. As a result, conflicting judicial views have emerged regarding the admissibility of the types of hearsay most commonly sought to be introduced when young children do not testify: statements to medical personnel and videotaped interviews conducted by multidisciplinary teams. Although many courts find forensic interviews to be testimonial,[2] estimating *Crawford*'s specific impact is difficult given the hesitancy of prosecutors to try child sexual abuse cases in the absence of the victim.[3] However, it is likely that *Crawford* adds to the pressure on prosecutors to have children testify about their abuse. Moreover, the judicial system benefits when children answer questions and can be evaluated by fact-finders, regardless of whether the child is a witness in criminal, delinquency or dependency court, or on occasion in divorce or other civil proceedings.

This Article presents an overview of the psychological research on child testimony to explain the undue skepticism about its reliability in cases involving claims of sexual abuse, and briefly discusses competency before turning to the use of remote testimony permitted by *Maryland v. Craig*[4] in criminal cases, and under the Due Process Clause in the child welfare context.[5]

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

2. *See, e.g.*, Bobadilla v. Carlson, 575 F.3d 785, 793 (8th Cir. 2009) (rejecting Minnesota Supreme Court's view that child's statement to social worker as part of a police investigation was not testimonial as an unreasonable application of existing law), *cert. denied*, 130 S. Ct. 1081 (2010); State v. Bentley, 739 N.W.2d 296, 301-02 (Iowa 2007) (collecting cases); *see also* Coronado v. State, 310 S.W.3d 156 (Tex. App. 2010) (holding that the procedure which permitted the defense to submit written interrogatories to a child who was found unavailable to testify was sufficient to overcome a Confrontation Clause challenge to a child's forensic interview that was testimonial).

3. John E.B. Myers et al., *Jurors' Perceptions of Hearsay in Child Sexual Abuse Cases*, 5 PSYCHOL. PUB. POL'Y & L. 388, 411 (1999) (suggesting "prosecutors are reluctant to take child sexual abuse cases to trial unless the victim is available to testify"); *see also* Theodore P. Cross et al., *Prosecution of Child Abuse: A Meta-Analysis of Rates of Criminal Justice Decisions*, 4 TRAUMA VIOLENCE & ABUSE 323, 326 (2003) (concluding that, compared to national data, child abuse less likely results in filing charges and incarceration than other felonies).

4. Maryland v. Craig, 497 U.S. 836 (1990).

5. Parts of this Article rely on, expand, and update previous writings of the author, particularly Myrna S. Raeder, *Comments on Child Abuse Litigation in a "Testimonial" World: The Intersection of Competency, Hearsay, and Confrontation*, 82 IND. L.J. 1009 (2007) [hereinafter Raeder,

It argues that having young children testify out of the presence of their alleged abusers when they demonstrate fear is currently the best way to accommodate the disparate goals of prosecutors, defense counsel and child advocates in criminal child sexual abuse cases, and should be the presumptive rule in other proceedings. This Article concludes that while expanded use of remote testimony and testimony in chambers will lessen potential trauma to young child witnesses, it will not ensure a better quality of child testimony unless combined with best practices in forensic interviewing and court initiatives such as those identified in the Children's Courtroom Bill of Rights.[6]

CHILD WITNESSES: WHO ARE THEY AND CAN WE BELIEVE WHAT THEY SAY? THE ADVENT OF THE CHILD WITNESS

Young children are a relatively recent addition to the witnesses that have traditionally populated our courtrooms. The common law typically set high age thresholds for child witnesses, often excluding children under twelve years old from testifying.[7] The 1975 adoption of the Federal Rules of Evidence firmly rejected arbitrary age barriers, and instead presumed all witnesses were competent.[8] This view became the model for later state evidence rules,[9] yet it did not eliminate the pervasive hostility to presuming young children to be competent. By 1990, due in large measure to the growing influence of the victims' rights movement,[10] Congress passed the Victims of Child Abuse Act (VCAA), which specifically included a provision presuming children to be competent and required a compelling reason beyond young age to obtain a competency hearing.[11]

Similarly, child physical and sexual abuse did not become a staple for judicial intervention until the early 1980s, when state reporting requirements

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Comments on Child Abuse]; Myrna S. Raeder, *Enhancing the Legal Profession's Response to Victims of Child Abuse*, CRIM. JUST., Spring 2009, at 12 [hereinafter Raeder, *Response to Victims*]; and Myrna S. Raeder, *Litigating Sex Crimes in the United States: Has the Last Decade Made Any Difference?*, INT'L COMMENT. ON EVIDENCE, May 2009, at 1 [hereinafter Raeder, *Litigating Sex Crimes*].

6. *See* Victor I. Vieth, *A Children's Courtroom Bill of Rights: Seven Pre-Trial Motions Prosecutors Should Routinely File in Cases of Child Maltreatment*, 1 CENTER PIECE (Nat'l Ass'n to Prevent Sexual Abuse of Children/Nat'l Child Prot. Training Ctr., Winona, Minn.), Issue 1: 2008, at 1.

7. *See* Thomas D. Lyon & Raymond LaMagna, *The History of Children's Hearsay: From Old Bailey to Post*-Davis, 82 IND. L.J. 1029, 1032-34 (2007) (mentioning various presumptions against competency for children under certain ages, with specific ages ranging from twelve to seven years).

8. *See* FED. R. EVID. 601.

9. *See* 27 CHARLES ALAN WRIGHT &VICTOR JAMES GOLD, FEDERAL PRACTICE AND PROCEDURE § 6001 (2d ed. 1987).

10. *See generally* Raeder, *Response to Victims*, *supra* note 5; Raeder, *Litigating Sex Crimes*, *supra* note 5.

11. 18 U.S.C. § 3509(c) (2006).

mandated by the federal Child Abuse Prevention and Treatment Act[12] (CAPTA) began to identify large numbers of cases in which child testimony would be important to determine whether a criminal defendant was guilty of child abuse or endangerment, or a child was maltreated and should be placed under the supervision of the state.[13] As a result, today young children testify regularly about their own abuse in both criminal and dependency cases. Indeed, in criminal court they overwhelmingly appear as victims, rather than bystanders.[14]

The universe of such potential child witnesses is quite large. Children have been estimated to compose some seventy-one percent of all reported sex crime victims.[15] A 2008 representative survey of adolescents and caretakers of young children found "nearly one in five girls ages 14 to 17 . . . had been the victim of a sexual assault or attempted sexual assault" at some previous time, six percent of all children surveyed suffered a sexual assault in the past year, and nearly ten percent of the total surveyed had been sexually victimized during their lifetime.[16] Similarly, in 2006, the Department of Health and Human Services (DHHS) identified approximately 79,000 child victims of sexual abuse after investigation by child protective services agencies.[17] This number is understated because it is unlikely that protective services see the approximately twenty percent of child rape victims who are abused by a stranger,[18] as well as the large percentage of cases currently not reported to the authorities.[19]

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12. Child Abuse Prevention and Treatment Act, Pub. L. No. 93-247, 88 Stat. 4 (1974) (codified as amended at 42 U.S.C. §§ 5101-07 (2006)).

13. *See, e.g.*, David Finkelhor & Richard Ormrod, *Characteristics of Crimes Against Juveniles*, JUV. JUST. BULL. (U.S. Dep't of Justice/Office of Juvenile Justice & Delinquency Prevention, Rockville, Md.), June 2000, at 1, 1, *available at* http://www.ncjrs.gov/html/ojjdp/2000_6_4/contents.html (by 1997, the Federal Bureau of Investigation National Incident-Based Reporting System (NIBRS) reported that child victims made up twelve percent of all crime victims known to police).

14. Gail S. Goodman et al., *Innovations for Child Witnesses: A National Survey*, 5 PSYCHOL. PUB. POL'Y & L. 255, 264-65 (1999) (describing a survey of 140 district attorneys offices nationwide, which identified the most common cases in which children testify are child sexual assault and incest).

15. Finkelhor & Ormrod, *supra* note 13.

16. David Finkelhor et al., *Children's Exposure to Violence: A Comprehensive National Survey*, JUV. JUST. BULL. (U.S. Dep't of Justice/Office of Juvenile Justice & Delinquency Prevention, Rockville, Md.), Oct. 2009, at 1-2, 5, *available at* http://www.ncjrs.gov/pdffiles1/ojjdp/227744.pdf.

17. ADMIN. ON CHILDREN, YOUTH & FAMILIES, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD MALTREATMENT 2006, at 26-27 (2008), *available at* http://www.acf.hhs.gov/programs/cb/pubs/cm06/chapter3.htm#types.

18. David Finkelhor et al., *Sexually Assaulted Children: National Estimates and Characteristics*, NISMART BULL. (U.S. Dep't of Justice/Office of Juvenile Justice & Delinquency Prevention, Rockville, Md.), Aug. 2008, at 1, 2, *available at* http://www.ncjrs.gov/pdffiles1/ojjdp/214383.pdf (describing findings based on statistics from 1999).

19. *See, e.g.*, Erna Olafson & Cindy S. Lederman, *The State of the Debate About Children's Disclosure Patterns in Child Sexual Abuse Cases*, JUV. & FAM. CT. J., Winter 2006, at 27, 29, *available at*

THE SUGGESTIBILITY BACKLASH

Unfortunately, the public's first and lasting impression of young children as witnesses is inextricably tied to the mass hysteria that accompanied the spate of preschool sexual abuse scandals that shook the country from the mid 1980s to 1990s.[20] The suggestive interviewing techniques used on many of the preschool children[21] and a number of high profile acquittals, as well as questionable convictions,[22] created a backlash that called into question the general reliability of all child testimony. It may be no coincidence that offenders were arrested in only nineteen percent of the sexual assaults of children under age six in the 1990s,[23] given the likely absence of corroboration and distrust of the complainants. The distrust of child testimony still persists today and is fueled in part by the psychological literature.[24]

The constant stream of studies designed to test the suggestibility of children and their ability to lie undoubtedly has been influential in generating negative attitudes toward their testimony. In contrast, relatively little academic attention has been given to questioning the methodological issues that often plague such psychological experiments.[25] Moreover, while such studies may have some

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http://www.ncjfcj.org/images/stories/dept/ppcd/pdf/winter%202006childtraumajournal.pdf (summarizing literature that most adults did not disclose child sexual abuse as children).

20. *See, e.g.*, Anna Richey-Allen, Note, *Presuming Innocence: Expanding the Confrontation Clause Analysis to Protect Children and Defendants in Child Sexual Abuse Prosecutions*, 93 MINN. L. REV. 1090, 1104-07 (2009).

21. *See, e.g.*, F. James Billings et al., *Can Reinforcement Induce Children to Falsely Incriminate Themselves?*, 31 LAW & HUM. BEHAV. 125 (2007) (examining the effects of reinforcement on the tendency of children to falsely implicate themselves); Sena Garven et al., *More Than Suggestion: The Effect of Interviewing Techniques from the McMartin Preschool Case*, 83 J. APPLIED PSYCHOL. 347 (1998) (demonstrating that techniques in the McMartin case could lead to false complaints).

22. *See, e.g.*, Samuel R. Gross et al., *Exonerations in the United States, 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 539-40 (2005) (discussing the child care sexual abuse cases), *cited in* Kennedy v. Louisiana, 128 S. Ct. 2641, 2663 (2008).

23. HOWARD N. SNYDER, NAT'L CTR. FOR JUVENILE JUSTICE, BUREAU OF JUSTICE STATISTICS, SEXUAL ASSAULT OF YOUNG CHILDREN AS REPORTED TO LAW ENFORCEMENT: VICTIM, INCIDENT, AND OFFENDER CHARACTERISTICS 11 (2000), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/saycrle.pdf (a National Incident-Based Reporting System (NIBRS) statistical report).

24. *See generally* Livia L. Gilstrap et al., *Child Witnesses: Common Ground and Controversies in the Scientific Community*, 32 WM. MITCHELL L. REV. 59 (2005); Michael R. Keenan, *Child Witnesses: Implications of Contemporary Suggestibility Research in a Changing Legal Landscape*, 26 DEV. MENTAL HEALTH L. 99 (2007); Olafson & Lederman, *supra* note 19; Stephen J. Ceci & Richard D. Friedman, *The Suggestibility Of Children: Scientific Research and Legal Implications*, 86 CORNELL L. REV. 33 (2000) (concluding that children are highly suggestible); Stephen J. Ceci et al., *Unwarranted Assumptions about Children's Testimonial Accuracy*, 3 ANN. REV. CLINICAL PSYCHOL. 311 (2007).

25. *See, e.g.*, Thomas D. Lyon, *False Denials: Overcoming Methodological Biases in Abuse Disclosure Research*, *in* CHILD SEXUAL ABUSE: DISCLOSURE, DELAY, AND DENIAL 41 (Margaret-Ellen Pipe et al. eds., 2007)(questioning the methodology used in abuse disclosure studies); Olafson & Lederman, *supra* note 19, at 31-34 (critiquing Kamala London et al., *Disclosure of Child*

positive aspects, their negative conclusions often appear to receive wider attention than neutral or favorable ones, particularly in the defense community, which understandably uses them to argue that a specific child's testimony is inadmissible or incredible. Of course, even without rigorous studies, anyone who has been around young children knows that they are more suggestive than adults and, if very young, may mix fantasy with fact in describing events. Yet those propensities alone do not signify that a particular child lied and was not abused, although realistically prosecutors as well as fact-finders listen for evidence of any type of corroboration in such cases. [26]

Generally, I agree with Professor Thomas Lyon, a psychologist as well as a law professor, whose studies of child abuse have been influential in both fields, that a number of the conclusions reached in the psychological research are overstated and not directly translatable to the courtroom. Professor Lyon has argued that suggestive techniques are not the norm in questioning children, and that factors including fear, loyalty, and embarrassment decrease the likelihood that children will make false accusations.[27] He explains that much of the suggestibility research is conducted in settings involving minor transgressions because it would not be ethical to place the children in harmful situations; therefore care must be taken when applying the results of such studies to claims of molestation by children who would likely have been traumatically impacted by actual sexual abuse.[28]

Yet, this analysis does not seem to have lessened the inherent distrust of child testimony endorsed by the suggestibility literature, which reappeared recently in Justice Kennedy's opinion in *Kennedy v. Louisiana,*[29] a case which

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Sexual Abuse: What Does the Research Tell Us About the Ways That Children Tell?, 11 PSYCHOL. PUB. POL'Y & L. 194 (2005), and agreeing with Professor Lyon that the study reached conclusions that did not take into account suspicion and substantiation biases that artificially inflated disclosure rates); J. Don Read et al., *An Archival Analysis of Actual Cases of Historic Child Sexual Abuse: A Comparison of Jury and Bench Trials*, 30 LAW & HUM. BEHAV. 259, 260 (2006) (noting the vast majority of child sexual abuse research has "examined the hypothetical impact of [child sexual abuse] relevant variables on mock jurors' rather than real jurors' verdicts").

26. *See, e.g.*, Olafson & Lederman, *supra* note 19, at 35 (noting that implausible details by themselves do not prove an allegation is false); Anne Lukas Miller, *Bizarre & Fantastic Elements: A Forensic Interviewer's Response, Part III*, UPDATE (Nat'l District Att'ys Ass'n/Nat'l Ctr. for Prosecution of Child Abuse, Alexandria, Va.), 2008, at 9, 10, *available at* http://www.ndaa.org/publications/newsletters/update_vol_21_no_4_2008.pdf ("[T]here are numerous explanations for the appearance of unusual information and . . . it is essential to maintain an open, nonjudgmental and nonconfrontational position. Seemingly bizarre or fantastic elements cannot and should not be viewed as justification for the dismissal of a child's disclosure."); *see also* Victor I. Vieth, *When the Child Has Spoken: Corroborating the Forensic Interview*, 2 CENTER PIECE (Nat'l Ass'n to Prevent Sexual Abuse of Children/Nat'l Child Prot. Training Ctr., Winona, Minn.), Issue 5: 2010, at 1.

27. *See* Thomas D. Lyon, *Applying Suggestibility Research to the Real World: The Case of Repeated Questions*, LAW & CONTEMP. PROBS., Winter 2002, at 97 [hereinafter Lyon, *Applying Suggestibility Research*]; Thomas D. Lyon, *The New Wave in Children's Suggestibility Research: A Critique*, 84 CORNELL L. REV. 1004 (1999) [hereinafter Lyon, *The New Wave*] (explaining suggestibility problems are overstated and controllable).

28. *See* Lyon, *The New Wave*, *supra* note 27, at 1013-15.

29. Kennedy v. Louisiana, 128 S. Ct. 2641, 2663 (2008).

banned the death penalty for child rape.[30] The thirteen year old witness in *Kennedy* was eight years old when the rape occurred.[31] In contrast to the cases that gave rise to the suggestibility controversy, which like the vast majority of child sexual abuse cases have no external corroborating evidence,[32] *Kennedy* was one of those rare instances in which the rape was so brutal that a trail of blood and extensive internal injuries confirmed it had occurred.[33] In other words, Justice Kennedy's worry about "fabrication or exaggeration, or both"[34] was unwarranted in light of the factual evidence. While the child did not originally blame her stepfather, claiming two unidentified neighborhood boys raped her,[35] her stepfather was arrested due to the physical evidence that contradicted her denials.[36] Eventually she admitted that her stepfather raped her and told her to lie,[37] a common strategy used by intra-familial sexual abusers, who compose a large percentage of child molesters.[38] Despite its seeming inapplicability to the facts of the case, the Court confidently asserted that "[t]he problem of unreliable, induced, and even imagined child testimony means there is a 'special risk of wrongful execution' in some child rape cases."[39]

Moreover, *Kennedy*'s citation of studies finding that young children are suggestible, that wrongful convictions occurred in some childcare cases, and that children four to seven years old can lie convincingly[40] appears gratuitous in the decision, not only because it is unrelated to the facts of the case, but, even when viewed in the general Eighth Amendment context, does not appear to be focused on punishment.[41] Certainly, if a defendant's guilt is questionable, that should caution against imposition of the death penalty, but it is equally

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30. *Id.* at 2677.

31. *Id.* at 2648.

32. *See generally* Lori D. Frasier & Kathi L. Makoroff, *Medical Evidence and Expert Testimony in Child Sexual Abuse*, JUV. & FAM. CT. J., Winter 2006, at 41, *available at* http://www.ncjfcj.org/images/stories/dept/ppcd/pdf/winter%202006childtraumajournal.pdf (indicating medical evidence is rare, and discussing studies showing confirmation in less than ten percent of child sexual abuse cases).

33. *Kennedy*, 128 S. Ct. at 2646.

34. *Id.* at 2663 (citing Ceci & Friedman, *supra* note 24).

35. *Id.* at 2646-47.

36. *Id.* at 2647.

37. *Id.* at 2647-48.

38. *See* LAWRENCE A. GREENFELD, BUREAU OF JUSTICE STATISTICS & OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, CHILD VICTIMIZERS: VIOLENT OFFENDERS AND THEIR VICTIMS 10-11 (1996), *available at* http://www.eric.ed.gov:80/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/14/7e/f5.pdf (explaining that one-third of child victimizers in state prison committed their crime against their own child and about half had a relationship with the victim as a friend, acquaintance, or other relative); *see also* Jennifer C. Mitchell, Note, *Crime Without Punishment: How the Legal System is Failing Child Victims of Intra-familial Abuse*, 9 J.L. & FAM. STUD. 413, 413-17 (2007) (discussing extent of intra-familial abuse).

39. *Kennedy*, 128 S. Ct. at 2663 (citing Atkins v. Virginia, 536 U.S. 304, 321 (2002)).

40. *Id.* at 2663.

41. *See id.* at 2674-75 (Alito, J., dissenting).

true in capital murder cases in which adults testify. Similarly, no one is surprised that adults can lie convincingly, so the fact that children can also do so should not provide support for questioning the inherent trustworthiness of all child witnesses, unless we somehow believe that, unlike adults, competent children do not have the moral compass to tell the truth.

The Court's reference to the literature about young children is also perplexing given the victim's age in *Kennedy*. While the most suggestible children are likely to be those under four years old,[42] it has also been found that children from three to five years old have significant developmental difficulty in successfully lying and cannot easily maintain deception when asked for explanations.[43] In fact, the same study cited by *Kennedy*[44] concerning lies by children also reached the disconcerting conclusion that children who had been touched and told the truth were the most inconsistent,[45] a result that could make them less believable to a fact-finder. Moreover, many children that young would not be found competent to testify, making it unlikely post-*Crawford* that any resulting conviction would be based only on the child's nontestimonial hearsay in a criminal case.

Not surprisingly, the article cited by the Court[46] summarizing the suggestibility research was written in 2000,[47] when revisions in forensic protocols to lessen suggestibility were not as widely employed. Even prior to 2000, more child sexual abuse cases were charged when the National Institute of Child Health and Human Development (NICHD) protocol was employed, resulting in more pleas than pre-protocol.[48] Similarly, significantly more NICHD protocol cases (ninety-four percent) than pre-protocol cases (fifty-four percent) resulted in a conviction at trial, although cases in the youngest age category still resulted in the most dismissals.[49] Indeed, the group that most benefited from the new protocol consisted of seven to nine year old

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42. *See generally* 1 JOHN E.B. MYERS, MYERS ON EVIDENCE IN CHILD, DOMESTIC AND ELDER ABUSE CASES § 3.01, at 134-36 (2005); Kamala London et al., *Post-Event Information Affects Children's Autobiographical Memory After One Year*, 33 LAW & HUM. BEHAV. 344, 352 (2009) (summarizing conflicting results as to whether younger children are more suggestible, and while finding no age difference in suggestibility, noting this might be related to the fact that studies finding no age difference used particularly suggestive questioning methods).

43. *See* Victoria Talwar et al., *Lying in the Elementary School Years: Verbal Deception and Its Relation to Second-Order Belief Understanding*, 43 DEVELOPMENTAL PSYCHOL. 804, 804-05 (2007) (discussing the results of various studies concluding children between three and five years of age were unable to maintain deception).

44. *Kennedy*, 128 S. Ct. at 2663.

45. Jody A. Quas et al., *Repeated Questions, Deception, and Children's True and False Reports of Body Touch*, 12 CHILD MALTREATMENT 60 (2007).

46. *Kennedy*, 128 S. Ct. at 2663.

47. *See* Ceci & Friedman, *supra* note 24.

48. *See* MARGARET-ELLEN PIPE ET AL., NAT'L INST. OF JUSTICE, DO BEST PRACTICE INTERVIEWS WITH CHILD ABUSE VICTIMS INFLUENCE CASE OUTCOMES? 8 (2008), *available at* http://www.ncjrs.gov/pdffiles1/nij/grants/224524.pdf.

49. *Id.* at 7 ("[C]ases involving 2.8 to 4 year olds were 2 to 3 times more likely to have all charges dismissed compared to the older age groups . . . .").

children,[50] who are typically old enough to survive a competency challenge and have the words to describe their abuse. However, despite the introduction of several interviewing protocols,[51] it would be incorrect to surmise the controversy about child suggestibility has subsided. Professor Ceci, one of the authors cited by *Kennedy*, recently cautioned against assuming that problems affecting child testimony had been corrected, arguing that experts continued to rely on "urban legends" to enhance the credibility of children.[52]

Yet not all expert testimony favors the prosecution. For example, the Court of Appeals for the Second Circuit found defense counsel in a sexual abuse case to be ineffective when he did not consult any medical experts on the physical nature and psychology of child sexual abuse.[53] On the other hand, one of the unwarranted assumptions Professor Ceci and his colleagues debunk is that "[e]rroneous [s]uggestions [i]neluctably [l]ead to [e]rroneous [r]eports by [c]hildren."[54] Their article also discusses the importance of context as a way to explain why psychological studies often reach contradictory conclusions.[55] Thus, the pendulum may be swinging back to a more balanced view of child testimony that focuses more on the particular complainant and the circumstances of the alleged abuse, rather than on global generalities evincing pro or anti child sentiments that are subject to dispute. However, *Kennedy* is not alone in viewing young age as "counsel[ing] against a finding of reliability."[56] Because the suggestibility debate intertwines with disagreements about the significance of delayed disclosure and recantation, general attacks on the testimony of young children are likely to continue for the foreseeable future.

ATTACKS ON CHILD TESTIMONY: ADMISSIBILITY VERSUS CREDIBILITY

The most comprehensive attack on child testimony has focused on "taint" hearings, which would completely exclude testimony by young children who had been adversely impacted by suggestive questioning.[57] The rationale for taint hearings is that

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50. *Id.* at 9 ("[Twenty-two percent] more cases [were] filed in protocol than pre-protocol interviews.").

51. *See id.* at 14 (noting the need to empirically test other protocols designed to lessen suggestibility).

52. *See generally* Ceci et al., *supra* note 24, at 324.

53. Gersten v. Senkowski, 426 F.3d 588, 609-15 (2d Cir. 2005).

54. Ceci et al., *supra* note 24, at 318.

55. *Id.* at 318, 325.

56. *See* Haliym v. Mitchell, 492 F.3d 680, 707 (6th Cir. 2007) (finding suggestive eyewitness identification by seven year old did not violate Due Process under totality approach). "'Studies show that children are more likely to make mistaken identifications than are adults.'" *Id.* (quoting Arizona v. Youngblood, 488 U.S. 51, 72 n.8 (1988) (Blackmun, J. dissenting) (citing Ronald L. Cohen & Mary Anne Harnick, *The Susceptibility of Child Witnesses to Suggestion*, 4 LAW & HUM. BEHAV. 201 (1980)).

57. *See* Commonwealth v. Delbridge, 855 A.2d 27, 34-36 (Pa. 2003).

> a child's memory is peculiarly susceptible to suggestibility so that when called to testify a child may have difficulty distinguishing fact from fantasy. Taint is the implantation of false memories or the distortion of real memories caused by interview techniques of law enforcement, social service personnel, and other interested adults, that are so unduly suggestive and coercive as to infect the memory of the child, rendering that child incompetent to testify.[58]

Advocates of this approach cite the United States Supreme Court's language in *Idaho v. Wright* warning that methods such as "blatantly leading questions" and interrogation "by someone with a preconceived idea of what the child should be disclosing" can create false or unreliable memories in young children.[59] *Wright* held that the admission of untrustworthy hearsay of a young child who did not testify at trial violated the Confrontation Clause.[60] While *Crawford* jettisoned the reliability framework, it did not question *Wright's* holding reversing the defendant's conviction.[61] This left open the question of how unreliability of child hearsay should be treated in the post-*Crawford* Confrontation Clause analysis,[62] but clearly signaled that concerns about suggestibility still exist.

Professor John Myers, an early opponent of taint hearings, feared that they would usher in a new era of unwarranted skepticism about all child testimony.[63] Despite a handful of jurisdictions that now consider suggestibility as an attack on competency or admissibility, rather than on the credibility of child witnesses,[64] taint hearings have not been generally accepted.[65] In addition, courts that recognize taint do not automatically set a hearing, but require a showing by the defense justifying it.[66] Even so, while rare, testimony by otherwise competent children has been excluded due to taint.[67] Moreover, although criminal defendants can be excluded from a competency hearing at

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58. *Id.* at 34-35 (internal citations omitted).

59. Idaho v. Wright, 497 U.S. 805, 813 (1990).

60. *Id.* at 826-27.

61. *See* Crawford v. Washington, 541 U.S. 36, 58 n.8 (2004) (discussing the questioned holding in White v. Illinois, 502 U.S. 346 (1992)); Raeder, *Comments on Child Abuse*, *supra* note 5, at 1011.

62. *See* Raeder, *Comments on Child Abuse*, *supra* note 5, 1011-13 (discussing possible approaches to applying *Crawford* and *Davis* fairly to all parties).

63. *See* John E.B. Myers, *Taint Hearings for Child Witnesses? A Step in the Wrong Direction*, 46 BAYLOR L. REV. 873 (1994).

64. *See, e.g.*, State v. Michaels, 642 A.2d 1372, 1380-81 (N.J. 1994); Commonwealth v. Delbridge, 855 A.2d 27, 39-40 (Pa. 2003).

65. *See* State v. Michael H., 970 A.2d 113, 121 (Conn. 2009).

66. *See, e.g.*, *id.* at 122 (declining to decide if taint hearing is required where no showing that testimony was the "product of unduly coercive or suggestive questioning"); *Delbridge*, 855 A.2d at 40 (explaining that some evidence of taint is required for a hearing); *cf.* O'Brien v. United States, 962 A.2d 282, 302-03 (D.C. 2008) (noting that, under any standard, a taint hearing is not required where court permitted a suggestivity expert and reviewed videotaped interviews).

67. *See, e.g.*, Commonwealth v. Davis, 939 A.2d 905, 910 (Pa. Super. Ct. 2007) (holding nine year old's testimony was to be excluded where limited memory of incident and suggestive interview).

which the merits of the case are not discussed,[68] the Wyoming Supreme Court recently held that the defendant's exclusion from a competency/taint hearing was reversible error.[69]

More typically, suggestibility is used to attack a child witness' credibility by focusing on a number of problem areas that may increase false reports. Unfortunately, there are countless ways that can potentially compromise testimony of young children including: the use of yes/no questions, forced choice questions, repetitious questioning, misleading questions, repeated interviewing, plausible suggestions, guided imagery, stereotyping, interpreting play with anatomical dolls, peer and parental pressure, and selective reinforcement.[70] The combination of several of these factors is viewed as increasing suggestibility.[71] Ultimately, my disappointment with the ever-increasing suggestibility literature is that relatively few researchers study questions that would better protect children and defendants, such as how to lessen suggestibility, which would both decrease the likelihood of unwarranted skepticism of children and the prosecution of false claims.[72] Recognizing the need for such research, Professor Lyon and his colleagues have engaged in a number of studies involving maltreated children, some of which focus on increasing disclosures without increasing false claims.[73] These studies are particularly noteworthy because they involve large numbers of children who belong to the very population that is most likely to have been subjected to

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68. Kentucky v. Stincer, 482 U.S. 730, 744-46 (1987).

69. Woyak v. State, 226 P.3d 841, 854 (Wyo. 2010).

70. *See, e.g.*, STEPHEN J. CECI & MAGGIE BRUCK, JEOPARDY IN THE COURTROOM: A SCIENTIFIC ANALYSIS OF CHILDREN'S TESTIMONY (1995) (discussing the negative effects of interviewer bias, repeated questioning, stereotyping, and anatomical dolls); Nancy E. Walker, *Forensic Interviews of Children: The Components of Scientific Validity and Legal Admissibility*, LAW & CONTEMP. PROBS., Winter 2002, at 149, 160-65.

71. *See* Amye R. Warren & Dorothy F. Marsil, *Why Children's Suggestibility Remains a Serious Concern*, LAW & CONTEMP. PROBS., Winter 2002, at 127, 131-32. *See generally* Ceci & Friedman, *supra* note 24 (discussing and analyzing the likely possibilities that suggestive techniques lead children to make false allegations).

72. *See, e.g.*, Monit Cheung, *Promoting Effective Interviewing of Sexually Abused Children: A Pilot Study*, 18 RES. ON SOC. WORK PRAC. 137, 142 (2008) (discussing types of open-ended questions best suited to elicit responses from children who are reticent to disclose abuse).

73. *See, e.g.*, Thomas D. Lyon et al., *Coaching, Truth Induction, and Young Maltreated Children's False Allegations and False Denials*, 79 CHILD DEV. 914 (2008); Thomas D. Lyon & Joyce S. Dorado, *Truth Induction in Young Maltreated Children: The Effects of Oath-Taking and Reassurance on True and False Disclosures*, 32 CHILD ABUSE & NEGLECT 738 (2008); Robyn Licht et al., *The Effect of Rapport Building and Putative Confessions Upon Maltreated and Nonmaltreated Children's Disclosure of a Minor Transgression* (Nat'l Inst. of Child & Human Dev., Grant No. HD047290-01A2, 2009), *available at* http://ssrn.com/abstract=1443458 (concluding that telling a child that an adult "told me everything that happened and he wants you to tell the truth" increased true disclosures without increasing false disclosures; and open-ended narrative produced more details, but did lead to more initial disclosures).

questioning: those who have substantiated cases of sexual abuse in dependency court.[74]

The focus on credibility of child witnesses is not limited to suggestibility because of the ways in which credibility attacks directed toward young children intertwine. For example, disagreements have emerged over whether children are reluctant to disclose child abuse.[75] If children disclose abuse when asked, then delay suggests falsity because they would be expected to reveal true claims when they occur.[76] At a minimum, delayed disclosures can be attacked as producing inconsistencies in the child's testimony since they often result in an initial false denial that any abuse took place, which is contradicted by the later disclosure.[77] As a result, the defense argues that the initial denial rather than the delayed disclosure was true. After a meta-analysis of previous studies concluded that children disclose abuse when asked,[78] Professor Lyon conducted a re-analysis that found significant bias in the earlier studies;[79] this position that was later endorsed in a review of child witness controversies written by a psychologist, whose co-author is a well respected juvenile court judge.[80] More recent studies appear to confirm high rates of delayed disclosure, particularly in intra-familial settings,[81] and attention is now being given to identifying factors that predict why some children disclose and others do not.[82] Partial disclosure by children is also common,[83] producing inconsistencies used by the defense as evidence of impeachment at trial. Studies concerning the effect of asking children to promise to tell the truth appear to confirm that this technique increases honesty without increasing errors when children were asked free recall or yes/no questions, even when the children were previously coached to either falsely deny or falsely claim that

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74. *See* Lyon et al., *supra* note 73, at 917; Lyon & Dorado, *supra* note 73, at 740; Licht et al., *supra* note 73, at 8.

75. *See* Thomas D. Lyon, *Abuse Disclosure: What Adults Can Tell*, *in* CHILDREN AS VICTIMS, WITNESSES, AND OFFENDERS: PSYCHOLOGICAL SCIENCE AND THE LAW 19 (Bette L. Bottoms et al. eds., 2009) (arguing nondisclosure and delayed disclosure of abuse is frequent, particularly concerning intra-familial abuse).

76. *Id.* at 19.

77. *Id.*

78. *See* London et al., *supra* note 25, at 197 (questioning the frequency of denials of abuse and recantations when children are directly asked about abuse).

79. Lyon, *supra* note 75, at 28-29 (arguing that nondisclosure and delayed disclosure of abuse is frequent, particularly concerning intra-familial abuse); *see also* Lyon, *supra* note 25, at 43-45.

80. *See* Olafson & Lederman, *supra* note 19, at 31-34.

81. *See* Thomas D. Lyon & Elizabeth C. Ahern, *Disclosure of Child Sexual Abuse: Implications for Interviewing*, *in* THE APSAC HANDBOOK ON CHILD MALTREATMENT 233, 234-35 (John E.B. Myers ed., 3d ed., 2011).

82. *See* Tonya Lippert et al., *Telling Interviewers About Sexual Abuse: Predictors of Child Disclosure at Forensic Interviews*, 14 CHILD MALTREATMENT 100 (2009) (reviewing forensic interviews of children in Child Advocacy Centers and finding that the likelihood of disclosure increased when victims were girls, a primary caregiver was supportive, a child's disclosure instigated the investigation and when the child was older when the abuse began).

83. *See* Lyon, *supra* note 25, at 53-54; Olafson & Lederman, *supra* note 19, at 30.

events occurred, though not surprisingly the positive effect diminished if the questioning was highly suggestive.[84]

The issue of whether recantation of complaints by children indicates the falsity of the original disclosure of abuse is also hotly contested.[85] In other words, if recantation is not common it is more likely to signify the original claim was false, while if recantation is simply an oft-seen artifact of the pressure that most children feel in an intra-familial child sexual abuse setting, it should be viewed more neutrally as not inconsistent with child abuse. A recent study of approximately 250 substantiated cases of sexual abuse in dependency court found that nearly one-quarter of the children recanted at some point.[86] This study also found that "children abused by a parent[al] figure were more likely to recant, as were children whose non-offending caregivers were unsupportive."[87] The study found no evidence that the recantation rate was due to complaints being false.[88] Practically, if the child recants at trial, her prior statement may be insufficient to prove abuse in many jurisdictions in the absence of other evidence.[89]

Child credibility can also be impeached because of inconsistencies caused by their reluctance to answer "I don't know" to questions calling for a "yes" or "no" response.[90] Moreover, some causes of juror disbelief are not supported by research, such as the perception that children who report multiple instances of abuse are less credible than those who report a unique instance,[91] yet it is often difficult to debunk such myths in the courtroom.

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84. *See* Lyon et al., *supra* note 73; Lyon & Dorado, *supra* note 73; *see also* Victoria Talwar et al., *Children's Lie-Telling to Conceal a Parent's Transgression: Legal Implications*, 28 LAW & HUM. BEHAV. 411, 432-33 (2004) (children three to eleven years old who were questioned about telling lies and asked to promise were more likely to tell the truth).

85. *See* Olafson & Lederman, *supra* note 19, at 34-35; Cylinda C. Parga, Note, *Legal and Scientific Issues Surrounding Victim Recantation in Child Sexual Abuse Cases*, 24 GA. ST. U. L. REV. 779 (2008); *see also* Kamala London et al., *Review of the Contemporary Literature on How Children Report Sexual Abuse to Others: Findings, Methodological Issues, and Implications for Forensic Interviewers,* 16 MEMORY 29 (2008) (concluding children often delay abuse disclosure, but in valid abuse cases denial and recantation are not common).

86. *See* Lindsay C. Malloy et al., *Filial Dependency and Recantation of Child Sexual Abuse Allegations*, 46 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 162, 164-65 (2007).

87. *Id.* at 165.

88. *Id.* at 166.

89. *See* Myrna Raeder, *Remember the Ladies and the Children Too:* Crawford*'s Impact on Domestic Violence and Child Abuse Cases*, 71 BROOK. L. REV. 311, 351-53 (2005) (discussing hearsay treatment of prior inconsistent statements).

90. *See, e.g.*, Lyon, *Applying Suggestibility Research*, *supra* note 27, at 122 ("Young children are notoriously reluctant to answer 'I don't know.'").

91. *See* Deborah A. Connolly et al., *Perceptions and Predictors of Children's Credibility of a Unique Event and an Instance of a Repeated Event*, 32 LAW & HUM. BEHAV. 92, 99 (2008).

Typically, a defense expert attacks the child's credibility,[92] which then opens the door to rebuttal by prosecution experts who downplay suggestivity in the particular instance, and argue that delay, recantation, and other inconsistencies are common among children who have been subjected to sexual abuse.[93] Unfortunately, experts on both sides of the divide tend to over-claim what the research fairly supports. For example, we really do not know how common recantation is,[94] and more importantly the cause of the recantation in a particular case. Does this mean that no expert testimony is appropriate? Professor Lyon would substantially restrict defense experts who cannot demonstrate their testimony is based on a reliable methodology,[95] a result that would apply to prosecution experts as well.[96] Moreover, while it is inaccurate for defense experts to claim that recantation signifies the original claim was false, it is equally suspect for prosecution experts to testify recantation is consistent with child abuse, which sounds more supportive than a simple factual discussion of the studies and experience would suggest.

Maybe it is time to more generally question the use of opinions by experts, limiting the language they use to communicate opinions to the fact-finder and only allowing them to present their observations and explain the studies, unless there is substantial support as to the validity of the opinion.[97] Similarly, I have argued elsewhere against expert testimony that uses the label Child Sexual Abuse Accommodation Syndrome (CSAAS) to rebut challenges to the credibility of child abuse witnesses, as being unduly prejudicial and unnecessary.[98] In other words, opinions should be reserved for topics that have substantial empirical support. Thus, in cases where intra-familial abuse is alleged, it would still be proper to say that delayed and partial disclosures are

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92. *See* Livia L. Gilstrap & Michael P. McHenry, *Using Experts to Aid Jurors in Assessing Child Witness Credibility*, COLO. LAW., Aug. 2006, at 65. *But see* Thomas D. Lyon, *Expert Testimony on the Suggestibility of Children: Does It Fit?*, *in* CHILDREN, SOCIAL SCIENCE, AND THE LAW 378 (Bette L. Bottoms et al. eds., 2002) (arguing experts should be seriously limited or excluded when they misapply research and provide testimony that does not "fit" the facts). *See also* People v. Erazo, No. B183396, 2007 WL 1470658, at *2-3 (Cal. Ct. App. May 22, 2007) (discussing case law concerning experts on suggestibility; finding no abuse to exclude expert where there is no evidence of suggestivity).

93. *See* Olafson & Lederman, *supra* note 19, at 34-35 (explaining some of the current research on the frequency of recantation by child victims).

94. *Id.* at 34.

95. Lyon, *supra* note 92, at 392-97 (discussing Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993)).

96. *See* Dara Loren Steele, Note, *Expert Testimony: Seeking an Appropriate Admissibility Standard for Behavioral Science in Child Sexual Abuse Prosecutions*, 48 DUKE L.J. 933 (1999) (arguing for admission of social science experts for the prosecution under a standard less strict than *Daubert* or *Frye*).

97. Such suggestions are currently being actively debated in the forensic arena. *See, e.g.,* Dawn McQuiston-Surrett & Michael J. Saks, *Communicating Opinion Evidence in the Forensic Identification Sciences: Accuracy and Impact*, 59 HASTINGS L.J. 1159 (2008); Michael J. Saks, *Protecting Factfinders from Being Overly Misled, While Still Admitting Weakly Supported Forensic Science Into Evidence*, 43 TULSA L. REV. 609 (2007).

98. Raeder, *Litigating Sex Crimes*, *supra* note 5, at 54.

consistent with abuse. Of course, if the court permits these opinions by defense experts this will generally open the door to appropriate rebuttal opinions of prosecution experts.[99]

Ironically, the continuing attacks on child competency and credibility have had several positive effects on procuring more and better child testimony. As previously mentioned, not only did it lead to research efforts to develop better interviewing protocols,[100] but it also spurred the creation of Child Advocacy Centers (CAC). CACs promote the use of multidisciplinary teams that are better prepared to discern the truthfulness of allegations, lessen the trauma of repeated interviewing, and provide mental health services to traumatized children.[101] While the empirical data has not yet confirmed the promise of CACs, I have heard prosecutors praise CACs, not only for better documenting true claims, but also for revealing false claims.[102]

When evaluating claims about the general unreliability of child testimony, it is useful to remember that adults are capable of lying successfully and that does not call into question their competency or credibility simply because they are an adult. The greater suggestibility of children is clearly a concern, but given the increased videotaping of children's interviews, prosecutors and jurors can better assess the individual child, rather than relying on stereotypes about their believability.

Ultimately, the deep distrust of child testimony may stem from society's resistance to accepting the extent of child sexual abuse, combined with the fear that sympathy for young children will overwhelm jurors who are ill-equipped to discern true from false claims.[103] Yet those fears ignore the

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99. *See, e.g.*, Bourdon v. State, Nos. A-7689, A-7699, 2002 WL 31761482, at *5-9 (Alaska Ct. App. Dec. 11, 2002) (where defendant "chose to open up this area by calling his expert," permitting testimony of prosecution's child abuse expert on rebuttal was not abuse of discretion).

100. *See, e.g.*, Michael E. Lamb et al., *Structured Forensic Interview Protocols Improve the Quality and Informativeness of Investigative Interviews with Children: A Review of Research Using the NICHD Investigative Interview Protocol*, 31 CHILD ABUSE & NEGLECT 1201 (2007); Thomas D. Lyon, *Speaking with Children: Advice from Investigative Interviewers*, *in* HANDBOOK FOR THE TREATMENT OF ABUSED AND NEGLECTED CHILDREN 65 (P. Forrest Talley ed., 2005); Amy Russell, *Best Practices in Child Forensic Interviews: Interview Instructions and Truth-Lie Discussions*, 28 HAMLINE J. PUB. L. & POL'Y 99 (2006) (summarizing research); *see also* Paul Wagland & Kay Bussey, *Factors that Facilitate and Undermine Children's Beliefs About Truth Telling*, 29 LAW & HUM. BEHAV. 639, 649-51 (2005) (suggesting ways to aid truth telling by children who are afraid to speak after adults have sworn them to secrecy).

101. *See generally* Theodore P. Cross et al., *Evaluating Children's Advocacy Centers' Response to Child Sexual Abuse*, JUV. JUST. BULL. (U.S. Dep't of Justice/Office of Juvenile Justice & Delinquency Prevention, Rockville, Md.), Aug. 2008, at 1-2, *available at* http://www.ncjrs.gov/pdffiles1/ojjdp/218530.pdf.

102. *See* Raeder, *Litigating Sex Crimes*, *supra* note 5, at 50.

103. *See, e.g.*, Rachel L. Laimon & Debra A. Poole, *Adults Usually Believe Young Children: The Influence of Eliciting Questions and Suggestibility Presentations on Perceptions of Children's Disclosures*, 32 LAW & HUM. BEHAV. 489 (2008) ("[C]ases with major inconsistencies and improbable events . . . sometimes [are litigated] . . . because adults usually believe young children."); Amy-May Leach et

impact of cross-examination on lessening any likelihood that adults will believe children simply because of their young age.[104] Indeed, the equally troubling question is whether jurors will simply disbelieve young children because of their age. Moreover, given studies that find the overall accuracy of discerning lies of adults is little better than chance,[105] the inability of fact-finders to figure out who is telling the truth permeates the criminal justice system and is not isolated to children. While no one wants to convict the innocent, the criminal justice system must do more to become child friendly to ensure that young sexually abused children have an opportunity to seek justice.

CHILD-FRIENDLY COMPETENCY HEARINGS

Pre-*Crawford*, child suggestibility was a major concern in Confrontation Clause analysis when statements of children who did not testify were admitted via ad hoc child hearsay exceptions, because such hearsay had to demonstrate indicia of reliability.[106] Thus, the competency decision could be critical unless the child's statements satisfied a firmly rooted hearsay exception, such as excited utterances or medical statements, which did not have to demonstrate reliability or the unavailability of the declarant in order to survive a Confrontation Clause challenge.[107] Professor Lyon's extensive psychological and legal research designed to create a child-friendly oath reflected this concern.[108] Such efforts became even more important after *Crawford* to ensure that more children could escape the testimonial ban that now also bars trustworthy hearsay when the declarant does not testify.[109] While some suggest

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al., *"Intuitive" Lie Detection of Children's Deception by Law Enforcement Officials and University Students*, 28 LAW & HUM. BEHAV. 661, 683 (2004) (concluding that adults including law enforcement professionals have a limited ability to identify children's deception).

104. *See* Victoria Talwar et al., *Adults' Judgments of Children's Coached Reports*, 30 LAW & HUM. BEHAV. 561, 568 (2006).

105. *See* Charles F. Bond, Jr. & Bella M. DePaulo, *Accuracy of Deception Judgments*, 10 PERSONALITY & SOC. PSYCHOL. REV. 214, 230 (2006) (meta-analysis of 206 studies found overall accuracy was fifty-four percent).

106. *See e.g.*, Idaho v. Wright, 497 U.S. 805 (1990) (reversing conviction where young child's statement to doctor did not satisfy trustworthiness requirement).

107. *See generally* Myrna S. Raeder, *Navigating Between Scylla and Charybdis: Ohio's Efforts to Protect Children Without Eviscerating the Rights of Criminal Defendants—Evidentiary Considerations and the Rebirth of Confrontation Clause Analysis in Child Abuse Cases*, 25 U. TOL. L. REV. 43 (1994) (discussing competency and hearsay questions pre-*Crawford*).

108. *See generally* Thomas D. Lyon, *Child Witnesses and the Oath: Empirical Evidence*, 73 S. CAL. L. REV. 1017 (2000) (proposing the use of research to evaluate oath-taking requirements for children and the adoption of a child-friendly oath); Thomas D. Lyon et al., *Reducing Maltreated Children's Reluctance to Answer Hypothetical Oath-Taking Competency Questions*, 25 LAW & HUM. BEHAV. 81 (2001) (explaining the results of a study which suggested young children may be reluctant to discuss the consequences of lying and would be wrongly viewed as not competent to understand an oath).

109. *See, e.g.*, Raeder, *Comments on Child Abuse, supra* note 5; Eileen A. Scallen, *Coping with* Crawford*: Confrontation of Children and Other Challenging Witnesses*, 35 WM. MITCHELL L. REV. 1558, 1586-90 (2009).

that competency is satisfied so long as there is a "warm body,"[110] not all courts agree.

If competency includes a requirement of understanding truthfulness in a moral or abstract context, few young children will pass the test.[111] For example, some courts declare children incompetent when they are unable to characterize the difference between truthful and false statements.[112] However, the underpinning of this approach may be problematic since it is unclear that questioning young children about their understanding of lying and truth-telling has any bearing on the truthfulness of their subsequent testimony.[113] Because young children can often distinguish true statements from false statements, even if they cannot define the nature of the difference, changing the wording of the oath for younger children who do not understand the concept of "promise" in relation to telling the truth may qualify more children.[114] Specific factors have also been identified that can facilitate truth-telling by children.[115] While some jurisdictions require satisfaction of a multi-prong test, discretionary application can produce seemingly inconsistent results.[116]

The New Jersey Supreme Court has employed a promising approach towards competency that enhances the likelihood a child will testify, permitting questions as to whether or not the child is going to tell the truth or lie, rather than requiring an oath or acknowledgment that the child understands the obligation to testify truthfully and could face adverse consequences for lying.[117] Similarly, some courts do not require any questioning concerning the child's understanding of punishment for lying.[118] Professor Lyon argues that when young children understand the concept of "truth," can identify true statements, and promise they will tell the truth, the

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110. *See* Scallen, *supra* note 109, at 1586, 1590.

111. *See, e.g.*, Thomas D. Lyon et al., *Young Children's Competency to Take the Oath: Effects of Task, Maltreatment, and Age*, LAW & HUM. BEHAV. (forthcoming), *available at* http://www.springerlink.com/content/u870k81625437321/fulltext.pdf.

112. *See* State v. Borboa, 135 P.3d 469, 474 (Wash. 2006); *see also* B.B. v. Commonwealth, 226 S.W.3d 47, 49-51 (Ky. 2007) (holding a four year old incompetent where she shook her head "no" when asked if she understood what telling the truth meant, and did not understand the concept of lying).

113. *See* Victoria Talwar et al., *Children's Conceptual Knowledge of Lying and its Relation to Their Actual Behaviors: Implications for Court Competence Examinations*, 26 LAW & HUM. BEHAV. 395, 409 (2002) (describing a study that found no relationship).

114. *See* Lyon, *supra* note 108, at 1062-63.

115. *See* Wagland & Bussey, *supra* note 100 (suggesting ways to encourage truth-telling by children who have been sworn to secrecy).

116. *Compare In re* Dependency of A.E.P., 956 P.2d 297, 305 (Wash. 1998) (en banc) (holding three year old who did not know when event occurred incompetent), *with* State v. Woods, 114 P.3d 1174, 1178-79 (Wash. 2005) (holding six year old competent, and exact date of abuse not necessary).

117. *See* State v. G.C., 902 A.2d 1174, 1182-83 (N.J. 2006) (five year old child testified to events that took place when she was three and-a-half).

118. *See, e.g.*, Davis v. State, 268 S.W.3d 683, 699 (Tex. Crim. App. 2008), *petition for discretionary review denied*, PD-1356-08, 2009 Tex. Crim. App. LEXIS 322, at *1 (Mar. 11, 2009).

fact that they do not understand the more developmentally difficult concept of what a "lie" is, should not disqualify them.[119]

While many jurisdictions presume witnesses to be competent, or require a compelling reason beyond young age to obtain a competency hearing,[120] hearings are often a fact of life until children are old enough to demonstrate testimonial capacity, which is rare before age five.[121] Judges will also hold competency hearings of older children if a specific concern about the child's capacity exists, and it is common for the prosecutor to ask preliminary questions demonstrating competency of older children.[122] Judges may also rely on a videotape of the child being interviewed,[123] as well as their own observation of the child. However, in the few jurisdictions in which the court has a duty to inquire into the competency of children under a certain age, such as ten years old, it has been plain error not to conduct a competency hearing,[124] despite the fact that these arbitrary age limits are unrealistic and should be ripe for repeal. Because the competency of younger children is somewhat problematic, about twenty percent of states either do not require abused children to take an oath or simply declare them competent.[125] Thus, the United States Supreme Court's prediction in 1895 that "no one would think of calling as a witness an infant only two or three years old"[126] no longer reflects what occurs in many courtrooms today.

Even if a child-friendly oath is administered, the child may be fearful or uncomfortable testifying at the hearing in the courtroom or in the presence of the defendant.[127] *Kentucky v. Stincer* rejected both Confrontation Clause and Due Process challenges to the exclusion of the defendant from the competency hearing when the defendant was represented, there was no questioning about the merits of the case, and competency could have been

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119. *See* Lyon, *supra* note 111; *cf.* United States v. Lamere, 337 F. App'x 669, 671 (9th Cir. 2009) (holding it was not error to administer an affirmation securing promise to tell the truth without asking if nine year old child understood consequences of lying), *cert. denied*, 130 S. Ct. 479 (2009).

120. *See, e.g.*, 18 U.S.C. § 3509(c) (2006); FED. R. EVID. 601.

121. Raeder, *supra* note 107, at 53-54 (collecting Ohio cases).

122. *See generally* MYERS, *supra* note 42, § 2.17.

123. *See, e.g.*, People v. Cogburn, No. F052142, 2008 WL 2807553, at *13 (Cal. Ct. App. July 22, 2008).

124. *See, e.g.*, State v. Holland, No. 91249, 2008 WL 2681969, at *5-6 (Ohio Ct. App. July 10, 2008) (holding it was plain error to admit confused testimony of two five year old children, and to let mother testify to hearsay of incompetent child).

125. Lyon, *supra* note 108, at 1023; *see, e.g.*, N.Y. CRIM. PROC. LAW § 60.20(2) (McKinney 2003) (permitting unsworn testimony of children if they demonstrate sufficient intelligence); *see also* People v. Dist. Court (*Ruckriegle*), 791 P.2d 682, 685 (Colo. 1990) (en banc) (statute permitted four year old victim to testify since he was able to identify defendant and could describe alleged sexual assault even though he could not understand the difference between telling the truth and telling a lie or understand what it meant to take an oath to tell the truth).

126. Wheeler v. United States, 159 U.S. 523, 524 (1895) (affirming competency of five year old).

127. *See* Raeder, *Comments on Child Abuse*, *supra* note 5, at 1015.

challenged again at trial.[128] *Stincer* also confirmed that the competency decision is made by the judge.[129] During in-chambers competency hearings, judges often conduct the direct examination of the child on the basis of questions submitted by all parties.[130] However, courts have long recognized that judges often ask children complicated, compound questions about truthfulness that even adults might find difficult to understand.[131] The VCAA permits an attorney, but not a party appearing pro se, to examine a child directly on competency when the judge is satisfied that the child will not suffer emotional trauma as a result of the examination.[132] Yet Professor Lyon recently noted that whether a child appears competent "will vary depending upon the skills of the individual questioning the child, who is likely to be an attorney or a judge with limited understanding of child development."[133]

To avoid a child being found incompetent due to insensitive adults, a representative of the child, appointed pursuant to Victims Rights statutes,[134] should ask the competency questions since that individual understands the child's mental state and is familiar and trusted by the child. It is already fairly common for prosecutors to question the child and administer the oath,[135] undoubtedly for these same reasons. Ultimately, courts should adopt a more uniform approach, mandating that a court-appointed psychologist who is knowledgeable about child development ask the questions and then make a recommendation to the judge about the child's competency. Generally, psychologists, rather than lawyers, are best suited to ask age appropriate questions that are likely to result in a finding of competency. Such procedures should withstand any constitutional challenge given the flexible standards for competency hearings, since the judge, not the fact-finder determines this

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128. Kentucky v. Stincer, 482 U.S. 730, 740-46 (1987). The Confrontation Clause also applies to the adjudicatory stage of delinquency proceedings. *See In re* Gault, 387 U.S. 1, 56 (1967) ("confrontation and sworn testimony by witnesses available for cross-examination were essential for a finding of 'delinquency'").

129. *Stincer*, 482 U.S. at 740 ("determination of competency is an ongoing one for the judge to make").

130. *See* 18 U.S.C. § 3509(c)(7) (2006) ("Examination of a child related to competency shall normally be conducted by the court on the basis of questions submitted by the attorney[s] . . . ."); *see also Stincer*, 482 U.S. at 732-33.

131. *See, e.g.*, State v. Hanson, 439 N.W.2d 133, 137 (Wis. 1989) ("The type of questions presented to the child witness in this case would have been difficult to answer even by a person much more mature"; permitting testimony of a five year old to stand where it was plausible without requiring formal oath or understanding of concept of truthfulness).

132. 18 U.S.C. § 3509(c)(7).

133. Lyon et al., *supra* note 111.

134. *See, e.g.*, 18 U.S.C. § 3509(h)(1) (authorizing guardian ad litem for child victims of abuse); 45 C.F.R. § 1340.14(g) (2009) ("State[s] [receiving CAPTA funding] must insure the appointment of a guardian ad litem or other individual . . . to represent and protect the rights and best interests of the child."). *See generally* Raeder, *Response to Victims*, *supra* note 5.

135. *See, e.g.*, State v. T.E., 775 A.2d 686, 693, 695-66 (N.J. Super. Ct. 2001) (summarizing case law concerning a variety of child-friendly procedures).

issue.[136] At a minimum, standard developmentally appropriate questions such as the protocol designed by Professor Lyon and his co-author,[137] should be mandated by court systems to avoid findings of incompetency primarily due to developmentally inappropriate questioning by adults. Some jurisdictions use these materials as part of an overall approach to training social workers and others who conduct forensic interviews of children.[138] Moreover, judges may rely on the opinion of a psychologist in deciding competency even without observing the child,[139] although caution dictates that such an approach should be saved for the most fragile children.

Yet, even post-*Crawford,* incompetency does not always mean that the child's words will be excluded from trial when the child is not permitted to testify, since reliability under a child hearsay exception may be more flexible:

> [J]ust because this boy cannot characterize a statement as truth or lie does not really get to the question. There's a tremendous difference, at least in my mind, between someone being able to characterize a statement as truth or lie or moral or immoral and being able to describe an event that happened. I saw this, this happened to me, this did not happen, and that's the crux of this case and that's the—that's the hurdle that the Prosecutor has to jump over to show that the child was competent when the statement was made. That he could—that he could accurately describe what happened. And I find—the court finds that he could.[140]

Thus, to the extent that a child's hearsay statement is nontestimonial, or offered in dependency court or other civil contexts, it may still be admissible even if the child is incompetent.[141] Similarly, excited utterances and medical statements were also admitted pre-*Crawford* when children did not testify. However, not all courts agree that testimonial incompetency is irrelevant to the hearsay reliability decision.[142]

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136. Kentucky v. Stincer, 482 U.S. 730, 740 (1987). *Cf.* Coronado v. State, 310 S.W.3d 156 (Tex. App. 2010) (affirming the admission of a testimonial forensic interview where the child had answered written questions submitted by the defense that were asked by a forensic examiner who had leeway to pose follow-up questions).

137. THOMAS D. LYON & KAREN J. SAYWITZ, QUALIFYING CHILDREN TO TAKE THE OATH: MATERIALS FOR INTERVIEWING PROFESSIONALS (2000).

138. *See, e.g.*, HARBORVIEW CTR. FOR SEXUAL ASSAULT & TRAUMATIC STRESS & WASH. STATE CRIMINAL JUSTICE TRAINING COMM'N, WASHINGTON STATE CHILD INTERVIEW GUIDE (2009), http://depts.washington.edu/hcsats/PDF/guidelines/WA%20State%20Child%20Interview%20Guide%202009%202010.pdf.

139. *See* Laurie Shanks, *Evaluating Children's Competency to Testify: Developing a Rational Method to Assess a Young Child's Capacity to Offer Reliable Testimony in Cases Alleging Child Sex Abuse* 39-40 (Albany Law Sch., Working Paper No. 32, 2009), http://works.bepress.com/context/laurie_shanks/article/1002/type/native/viewcontent/.

140. State v. C.J., 63 P.3d 765, 771 (Wash. 2003) (en banc).

141. *See id.* at 773.

142. *See* B.B. v. Commonwealth, 226 S.W.3d 47, 51 (Ky. 2007) (holding testimonial incompetency was obstacle to admission of hearsay since it affected reliability).

Moreover, in criminal cases, *Kennedy v. Louisiana*'s concerns about reliability may signal that when the Court eventually applies *Crawford*'s testimonial approach to Confrontation Clause cases regarding young children, it will not exempt them from the application of the Clause even though developmentally they are too young to understand that their statements can be used as testimony. Skepticism concerning child testimony may also cause the Supreme Court to rethink its current position that reliability for non-testimonial statements is not required,[143] which now results in the admission of statements of children who do not testify at trial as long as they are made to parents and other purely private individuals not associated with governmental entities. In other words, given the repeated concerns about child testimony made by a number of Justices in different contexts, it would not be surprising if the Supreme Court reconfirmed its pre-*Crawford* holding in *Idaho v. Wright*, excluding a seemingly nontestimonial statement made to a doctor by a young child as unreliable,[144] particularly since that holding was never questioned by *Crawford*.[145]

ALTERNATIVES TO TESTIFYING IN THE PRESENCE OF THE DEFENDANT

Victims Advocates have long worried that sexually abused children are re-traumatized when they testify in court, although the empirical support for this position is mixed.[146] As a result, closed-circuit television (CCTV) is viewed as a way to protect children when their testimony is necessary. Since there is agreement that some children will suffer severe trauma testifying in the presence of their abuser, a recent challenge to the use of CCTV failed where it was simply based on an expert's claim that testifying in the presence of one's abuser is not as harmful to children as was previously thought.[147] Yet other factors are at play in retraumatization besides fear of testifying in the presence of the defendant. The outcome of the case appears to be a significant factor in determining children's long-term dissatisfaction with the legal system and negative feelings about the effects of the legal case on their lives.[148] In other words, if children did not testify and cases were dismissed or resulted in reduced sentences, some children suffered long-term consequences, just as some children reacted badly to the experience of testifying.[149] In Professor Myers' opinion, "despite the difficulty, most children manage to testify in the

143. *See* Davis v. Washington, 547 U.S. 813, 825 n.4 (2006).

144. Idaho v. Wright, 497 U.S. 805, 826-27 (1990).

145. *See* Raeder, *Comments on Child Abuse*, *supra* note 5, at 1012-13.

146. MYERS, *supra* note 42, § 3.01, at 135.

147. *See* Lopez v. State, No. 03-06-00086-CR, 2008 WL 5423104, at *1-5 (Tex. App. Dec. 31, 2008).

148. *See* JODI A. QUAS ET AL. EDS., *Childhood Sexual Assault Victims: Long-Term Outcomes After Testifying in Criminal Court*, *in* 70 MONOGRAPHS OF THE SOC'Y FOR RES. IN CHILD DEV. 78, 88 (2005).

149 *See id.*

traditional manner, especially when they are prepared and given emotional support."[150] Similarly, the psychological literature appears to recognize that children are resilient.[151] Some commentators also emphasize that children affirmatively want to participate in judicial proceedings not only to obtain a voice in decisions that affect them, but also to be provided with "accurate information about the proceedings and their outcomes."[152]

In contrast, the Attorney General's Crime Victims' Guidelines make reduction of the trauma to child victims, caused by their contact with the criminal justice system, a primary goal, and describes "the trauma child victims and witnesses experience when they are forced to relive the crime during the investigation and prosecution of a criminal case, particularly while they are testifying in court."[153] Moreover, the zeal of some defense counsel results in their willingness to "rip . . . apart" young sexual abuse complainants and "make sure that the rest of their life is ruined."[154] Thus, the intimidation of being in a courtroom and testifying before twelve jurors is often exacerbated by cross-examination that ranges from harassing to unintelligible, though such defense tactics often backfire.[155] While prosecutors may request an order closing the courtroom while the child testifies, this requires a higher threshold showing than is necessary to permit the use of CCTV. In other words, to close the courtroom it must be shown that testimony in open court would cause "substantial psychological harm to the child or would result in the child's inability to effectively communicate."[156] More importantly, closing the courtroom also does nothing to eliminate the child's fear of testifying in the presence of the defendant, which can exponentially increase the level of stress suffered by some child witnesses.

In the twenty years since *Maryland v. Craig* affirmed the use of remote testimony of children in criminal cases,[157] laws have been enacted to permit child testimony via CCTV in forty-six states, including twenty-four states that specifically address criminal proceedings.[158] Legislation also governs the

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150. MYERS, *supra* note 42, § 3.04[C], at 170.

151. *See id.* § 3.01.

152. Victoria Weisz et al., *Children and Procedural Justice*, 44 CT. REV. 36, 41 (2008).

153. OFFICE FOR VICTIMS OF CRIME, U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL GUIDELINES FOR VICTIM AND WITNESS ASSISTANCE 48 (2005), *available at* http://www.justice.gov/olp/pdf/ag_guidelines.pdf.

154. These statements were made by Massachusetts State Representative and criminal defense attorney James Fagan during a legislative hearing concerning the proposed enactment of mandatory sentencing provisions for certain child rapists. Press Release, The Leadership Council on Child Abuse & Interpersonal Violence, Child Abuse Experts Seek to Protect Abused Children from Defense Attorneys (Aug. 6, 2008), http://leadershipcouncil.org/1/med/PR2.html.

155. *See* Angela D. Evans et al., *Complex Questions Asked by Defense Lawyers But Not Prosecutors Predicts Convictions in Child Abuse Trials*, 33 LAW & HUM. BEHAV. 258, 262 (2009).

156. 18 U.S.C. § 3509(e) (2006).

157. Maryland v. Craig, 497 U.S. 836 (1990).

158. Margaret Brancatelli, *Facilitating Children's Testimony: Closed Circuit Television,* UPDATE (Nat'l Dist. Att'ys Ass'n/Nat'l Ctr. for Prosecution of Child Abuse, Alexandria, Va.),

admission of such testimony in federal[159] and military courts.[160] The Uniform Law Commissioners (ULC) attempted to harmonize the state variations through its Uniform Child Witness Testimony by Alternative Methods Act.[161] While this Act has not been widely adopted, it recently has garnered interest in a few states.[162] Ironically, because many of the statutes were adopted pre-*Crawford*, if they have not been updated they may violate *Crawford* to the extent they permit pretrial proceedings to be substituted for trial testimony without any showing of unavailability, or limit or deny cross-examination. In addition, some of the laws appear to require a higher threshold showing than required by *Craig*, such as their definitions of what constitute trauma that is more than *de minimis*.[163] Despite the widespread adoption of laws to protect children, slightly less than 300 cases have cited the Westlaw Headnote describing the *Craig* standard,[164] a paltry number in comparison with the potential universe of child victims or citations of other Confrontation Clause cases. While this number suggests the relative disuse of shielding and use of CCTV by prosecutors, it is not necessarily an endorsement of the proposition that children do not require protection.

A telephone conversation with Victor Vieth, Director of the National Child Protection Training Center (NCPTC), confirmed my assumption that prosecutors do not appear to be employing *Craig* very often.[165] He suggested at least three possible reasons for this result. First, the belief by prosecutors that their best chance of winning is to have the child testify.[166] In other words, jurors do not like convicting defendants of such serious charges solely based on child hearsay, and courts tend to have higher reversal rates in cases where the hearsay came from a child rather than an adult.[167] Second, the lack of availability of equipment also inhibits the use of remote locations for

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2009, at 1, *available at* http://www.ndaa.org/publications/newsletters/update_vol_21_no_11.pdf.

159. 18 U.S.C. § 3509(b).

160. R.M.C. 914A, *available at* http://www.defense.gov/pubs/pdfs/Part%20II%20-%20RMCs%20(FINAL).pdf.

161. UNIF. CHILD WITNESS TESTIMONY BY ALTERNATIVE METHODS ACT (2002), *available at* http://www.law.upenn.edu/bll/archives/ulc/ucwtbama/2002final.pdf [hereinafter UNIF. CHILD WITNESS TESTIMONY].

162. *See* Uniform Law Commissioners, A Few Facts About the Uniform Child Witness Testimony By Alternative Methods Act, http://nccusl.org/Update/uniformact_factsheets/uniformacts-fs-ucwtbama.asp (last visited Aug. 14, 2010).

163. *See, e.g.*, MD. CODE ANN., CRIM. PROC. § 11-303 (LexisNexis 2009) ("[T]he child victim [will suffer] serious emotional distress such that the child victim cannot reasonably communicate.").

164. Westlaw, KeyCite Headnote Citing References, 410k228 k. Mode of Testifying in General.

165. Telephone Interview with Victor Vieth, Dir., Nat'l Child Protection Training Ctr. (Oct. 19, 2009).

166. *Id.*

167. *See* John E.B. Myers et al., *Hearsay Exceptions: Adjusting the Ratio of Intuition to Psychological Science*, LAW & CONTEMP. PROBS., Winter 2002, at 3, 44-45.

testimony.[168] Third, to many prosecutors, the mere resort to *Craig* is viewed as adding an additional issue for appeal if the defendant is convicted.[169]

The National Center for Prosecution of Child Abuse (NCPCA) has recently issued an update on CCTV,[170] which hopefully will produce more interest in remote testimony by prosecutors. But judges as well as lawyers appear skeptical of remote testimony that could satisfy *Craig*. For example, a recent ABA site visit report to a Child Advocacy Center with CCTV capability noted "[c]urrently, the CCTV is used in family and dependency cases only. . . . This is because judges in the Criminal Court are not supportive of equipment use."[171]

Yet, the failure to employ *Craig* protections has clear disadvantages, in that some children will be needlessly traumatized by testifying in the presence of the defendant, and other children will ultimately be declared incompetent because they freeze on the stand and fail to communicate with the jurors. Similarly, jurors may discount the little testimony children give before they freeze, as well as their hearsay statements admitted via other witnesses, not realizing that the reason for their terror may be fear that the defendant will harm them, which inferentially supports the allegation that the defendant abused them. Indeed, the potential conflict between the best interest of children, which is dictated by mental health concerns that are better served by not testifying in the presence of the defendant, and the prosecutor's desire for live testimony, favors the appointment of lawyers or guardians ad litem (GAL) for children in appropriate cases.

Existing legislation may govern such appointments or the participation of private attorneys for children in matters that concern them. For example, the VCAA not only funds GALs,[172] but specifically authorizes them to "attend all the depositions, hearings, and trial proceedings in which a child participates, and make recommendations to the court concerning the welfare of the child."[173] The Uniform Child Witness Testimony by Alternative Methods Act, which encourages alternative methods for children to testify, entitles a child's attorney or GAL to initiate the *Craig* request.[174] Similarly, Wisconsin permits an "adviser to assist the questioner, and upon permission of the judge, to conduct the questioning" of children in videotaped depositions.[175] While such

168. Telephone Interview with Victor Vieth, *supra* note 165.

169. *Id.*

170. Brancatelli, *supra* note 158.

171. CCTV and Recording Technology Site Visit Report, Thirteenth Judicial Circuit Court, Administrative Office of the Courts, Children's Justice Center, CAC at Mary Lee's House, Tampa, Fla. (Jan. 28, 2009), *available at* http://www.abanet.org/child/cctv/tampa_florida_site_visit_report.pdf.

172. 18 U.S.C. § 3509(h)(1) (2006).

173. § 3509(h)(2).

174. UNIF. CHILD WITNESS TESTIMONY, *supra* note 161; *see also* State v. Tarrago, 800 So. 2d 300, 301 (Fla. Dist. Ct. App. 2001) (stating GAL moved to present testimony of minor via closed-circuit television in case alleging murder and aggravated child abuse).

175. WIS. STAT. ANN. § 967.04(8)(b)(6) (West 2007). To the extent that section 967.04 (9) eliminates a showing of unavailability for admission of such testimony at trial, it would be unconstitutional after *Crawford*.

advisers may have been envisioned as child psychologists, rather than GALs, the provision is not so limited. Generally, many GALs are lawyers, and private victims rights attorneys are now beginning to appear in a number of child-oriented hearings.[176]

Even when children testify pursuant to a protective regime, this may not guarantee they are completely separated from the defendant, since a few statutes require the defendant to be in the room when the child testifies.[177] However, in most arrangements the child cannot hear or see the defendant in the same room, though she can see the defendant who is in a separate room.[178] The defense counsel is often in the same room as the child with the prosecutor and a support person, while the judge, jury and defendant remain in the courtroom.[179] Statutes may mandate either one-way or two-way CCTV.[180]

THE CRIMINAL STANDARD: *MARYLAND V. CRAIG*

I am not alone in arguing that alternatives to live testimony may be critical for children who are otherwise competent, but whose voices would be silenced in court by their fear of the defendant.[181] In other words, assuming children have the mental ability to testify, they still may be rendered incompetent due to their inability to communicate with the jury. This phenomenon is not limited to the very young.[182] Children freeze on the witness stand for a variety of reasons including: inadequate preparation about the courtroom experience, hostile and developmentally inappropriate questioning, trauma caused by reliving the event, and trauma induced by fear of testifying in front of the defendant.[183] However, *Craig* held that only the last cause for their failure to communicate permits the child to avoid face-to-face

176. *See* AM. BAR ASS'N CRIMINAL JUSTICE SECTION, REPORT TO THE HOUSE OF DELEGATES, REPORT ON CHILD VICTIMS OF CRIME RESOLUTION (2009), *available at* http://www.abanet.org/crimjust/policy/my09101d.pdf.

177. AM. BAR ASS'N CRIMINAL JUSTICE SECTION TASK FORCE ON CHILD WITNESSES, THE CHILD WITNESS IN CRIMINAL CASES 36 (2002).

178. *Id.*

179. *See* Brancatelli, *supra* note 158.

180. *Id.*

181. *See* Raeder, *Response to Victims*, *supra* note 5; Scallen, *supra* note 109, at 1592-93; Jennifer E. Rutherford, Comment, *Unspeakable*! Crawford v. Washington *and Its Effects on Child Victims of Sexual Assault*, 35 SW. U. L. REV. 137, 153-58 (2005). *See generally* Janet Leach Richards, *Protecting the Child Witness in Abuse Cases*, 34 FAM. L.Q. 393, 399-401 (2000) (describing federal efforts to allow for alternatives to live testimony by the enactment of the Child Victims' and Child Witnesses' Rights (CVCWR) statute).

182. *See, e.g.*, Styron v. State, 34 So. 3d 724, 730 (Ala. Crim. App. 2009) (holding where nine year old completely froze on stand it was error to admit her testimonial statement).

183. *See, e.g.*, Tom Harbinson, *When the Child "Freezes" in Court, Part One: Prevention*, REASONABLE EFFORTS (Nat'l Dist. Att'ys Ass'n/Nat'l Ctr. for Prosecution of Child Abuse, Alexandria, Va.), 2005, *available at* http://www.mcaa-mn.org/docs/2005/APRIReason--Part161005.pdf.

confrontation.[184] While the criminal justice system is not currently as child-friendly as it could be, the other reasons for communication failures can be significantly lessened by education directed to lawyers, judges and children, as well as by more effective judicial control of inappropriate questioning and the employment of child-friendly practices.

Craig sets the constitutional minimum to satisfy the Confrontation Clause as an individualized showing that the alternative testifying procedure is "necessary to protect the welfare of the particular child witness"; that the "child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant"; and that the "emotional distress suffered by the child witness in the presence of the defendant is more than *de minimis*, *i.e.*, more than 'mere nervousness or excitement or some reluctance to testify.'"[185] *Craig* applies this standard to any "special procedure that permits a child witness in such cases to testify at trial against a defendant in the absence of face-to-face confrontation with the defendant."[186] Shielding of children fall within this standard,[187] but because *Craig* involved one-way CCTV, courts have split as to whether the use of two-way CCTV which allows the witness to see the defendant and jurors, is subject to *Craig*.[188] However, Justice Scalia has noted in several contexts that seeing the defendant via technology is not identical to seeing him live.[189] *Craig* was recently applied to a procedure that permitted a testimonial forensic interview to be introduced at trial where the child was found to be unavailable and cross-examination was conducted via written questions submitted by the defense and asked by a forensic examiner.[190] Because *Craig* affects rights at trial, statements by children at sentencing hearings are not covered.[191]

Craig's balancing test rejects the "absolute" nature of the right to face-to-face confrontation,[192] and instead relies on the *Mattox v. United States*[193] view

184. Maryland v. Craig, 497 U.S. 836, 855-56 (1990).

185. *Id.* (quoting Wildermuth v. State, 530 A.2d 275, 289 (Md. 1987)).

186. *Id.* at 855.

187. *See* Coy v. Iowa, 487 U.S. 1012 (1988) (finding placement of child behind a screen violated the Confrontation Clause in the absence of a particularized showing of need).

188. *See* Horn v. Quarterman, 508 F.3d 306, 318-22 (5th Cir. 2007), *cert. denied*, 128 S. Ct. 2084 (2008) (non-child abuse setting; discussing split in case law and finding no Confrontation Clause violation). *Compare* United States v. Yates, 438 F.3d 1307, 1313 (11th Cir. 2006) (en banc) (holding *Craig* applied to testimony by two-way video conference), *with* Fuster-Escalona v. Fla. Dep't of Corr., 170 Fed. App'x 627, 629-30 (11th Cir. 2006) (per curiam) (finding no particularized showing necessary pursuant to *Craig* when children testified by two-way CCTV); *see also* People v. Buie, 775 N.W.2d 817, 825 (Mich. Ct. App. 2009) (per curiam) (indicating it was joining the majority of courts that require the *Craig* test for two-way CCTV).

189. *See, e.g.*, Marx v. Texas, 528 U.S. 1034, 1034-38 (1999) (Scalia, J., dissenting), *denying cert. to* 987 S.W.2d 577 (Tex. Crim. App. 1999), *aff'g* 953 S.W.2d 321 (Tex. App. 1997) (confrontation via CCTV).

190. *See* Coronado v. State, 310 S.W.3d 156 (Tex. App. 2010).

191. *See* State v. Payette, 756 N.W.2d 423, 439-41 (Wis. Ct. App. 2008) (holding no Confrontation Clause violation where defendant was told to turn around so child could not see him when she gave her impact statement).

192. Maryland v. Craig, 497 U.S. 836, 844, 857 (1990).

that personal presence "must occasionally give way to considerations of public policy and the necessities of the case."[194] Undoubtedly, *Craig* is at odds with *Crawford's* observation that "[b]y replacing categorical constitutional guarantees with open-ended balancing tests, we do violence to their design."[195] Yet, to date challenges to *Craig* have failed.[196] This result is supported by *Crawford's* concern with out-of-court hearsay, not in-court testimony, as well as by the fact that *Crawford* specifically called into question the holding of only one case, *White v. Illinois*,[197] thereby implicitly approving *Craig.*[198] However, *Craig's* continued viability is ultimately dependent upon whether Justice Scalia's concept of confrontation continues to prevail. To date, he has written all of the Supreme Court's opinions embracing "testimonialism."[199] In contrast, he dissented in *Craig*, decrying its cost-benefit analysis as "virtually" but not "actually" constitutional.[200] Moreover, Justice Scalia's decision in *Coy v. Iowa,*[201] which was limited by *Craig,* has never been overruled. *Coy* held that placement of a screen between the defendant and the testifying child sexual assault complainant violated the Confrontation Clause where it was based on a legislatively imposed presumption that the child would suffer from trauma by testifying in court.[202]

In the current testimonial regime, it would be feasible for the Supreme Court to reject *Craig's* rationale entirely, instead relying on forfeiture as a way to justify any procedures that would protect children during their testimony. However, since the current view of forfeiture requires an intent to prevent the witness from testifying, it could be difficult to prove that the defendant's conduct was intended to prevent the child from testifying in the absence of actual threats or a pattern of abuse that implicitly supplies intentionality.[203] Thus, such an approach appears to further diminish *Craig's* applicability, although at heart *Craig* is based on a forfeiture rationale. In other words, fear

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193. Mattox v. United States, 156 U.S. 237 (1895).

194. *Id.* at 243.

195. Crawford v. Washington, 541 U.S. 36, 67-68 (2004).

196. *See, e.g.*, United States v. Pack, 65 M.J. 381, 385 (C.A.A.F. 2007), *cert. denied*, 552 U.S. 1313 (2008) ("[T]he weight of authority . . . [is] that *Craig* continues to control the questions whether, when, and how, remote testimony by a child witness in a criminal trial is constitutional."); *see also* State v. Blanchette, 134 P.3d 19, 29-30 (Kan. Ct. App. 2006) (collecting cases); State v. Vogelsberg, 724 N.W.2d 649, 654 (Wis. Ct. App. 2006).

197. White v. Illinois, 502 U.S. 346 (1992), *questioned in Crawford*, 541 U.S. at 58 n.8.

198. *See, e.g.*, State v. Henriod, 131 P.3d 232, 237-38 (Utah 2006) (requiring district court to hold a hearing where the guardian ad litem and the child's therapist had presented evidence that the child would not be able to testify in the defendant's presence).

199. *See* Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527 (2009); Giles v. California, 128 S. Ct. 2678 (2008); Davis v. Washington, 547 U.S. 813 (2006); *Crawford*, 541 U.S. 36.

200. Maryland v. Craig, 497 U.S. 836, 870 (1990) (Scalia, J., dissenting).

201. Coy v. Iowa, 487 U.S. 1012 (1988).

202. *Id.* at 1020-22.

203. *Cf. Giles*, 128 S. Ct. at 2693 (explaining how intent to silence a victim can be ascertained from acts of domestic violence where such acts culminate in murder).

of testifying in the presence of the defendant suggests that the child's reason to be fearful is that the defendant abused the child, thereby permitting abridgement of the absolute right of face-to-face confrontation. In retrospect, *Craig's* requirement tying CCTV to fear of testifying in the presence of the defendant is unfortunate, since it is disconnected from the actual needs of children whose trauma results from the interplay of numerous factors. Moreover, requiring a nexus to the defendant is unduly restrictive in light of the underlying rationale of *Mattox* and *Craig* that "important public policy" justifications can limit confrontation. The only thing missing is watching the demeanor of the child when she looks at the defendant, while practically she could avoid eye contact by refusing to look at him at all.

Indeed, Justice Scalia has decried the fact that the Court denied certiorari in cases where a teenage complainant said she was not afraid of the defendant but could not be near him,[204] and where a young child was ready to testify and the doctor equivocated about whether the child would be traumatized testifying about abuse she saw happen to another child, rather than the abuse she had been subjected to.[205] In other words, the Court has refused to look closely at the evidence used by judges to grant requests for CCTV, which makes sense given that the standard is difficult to apply because it does not reflect why it is in the child's best interest not to testify in the traditional manner.

However, not all judges apply *Craig's* criteria flexibly when they determine the cause of the child's inability to testify. For example, *Hoversten v. Iowa*[206] granted a habeas petition because the trial court presumed trauma without conducting a hearing.[207] The error was not harmless because *Coy* requires the exclusion of the child's testimony in evaluating the evidence.[208] In other words, if a violation is found, only in-court evidence of other victims or a confession is likely to result in harmless error.[209] But when the record reveals sufficient evidence to support the court's use of CCTV, no constitutional error will result.[210] Failure to make particularized findings regarding statutory requirements has also been deemed harmless error.[211]

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204. *See, e.g.*, Danner v. Kentucky, 525 U.S. 1010, 1010 (1998) (Scalia, J., dissenting).

205. Marx v. Texas, 528 U.S. 1034, 1034-38 (1999) (Scalia, J., dissenting), *denying cert. to* 987 S.W.2d 577 (Tex. Crim. App. 1999), *aff'g* 953 S.W.2d 321 (Tex. App. 1997).

206. Hoversten v. Iowa, 998 F.2d 614 (8th Cir. 1993).

207. *Id.* at 616-17.

208. *Id.* at 617 (citing Coy v. Iowa, 487 U.S. 1012, 1022 (1988)) (stating that to consider whether the child's testimony, or the jury's assessment of that testimony would have changed had there been proper confrontation would be "pure speculation," and "harmlessness must therefore be determined on the basis of the remaining evidence").

209. *See, e.g.*, State v. Hill, 247 S.W.3d 34, 41-42 (Mo. Ct. App. 2008) (blocking view of defendant by podium without a finding of emotional trauma was error, but was harmless because of videotaped confession).

210. *See, e.g.*, State v. Marlyn J.J., 731 N.W.2d 382 (Wis. Ct. App. 2007) (unpublished table decision), No. 2006AP180-CR, 2007 WL 610938, at *10-11 (concluding there was sufficient evidence to find the child would suffer severe emotional distress if made to testify in

Like the Confrontation Clause approach in *Davis v. Washington* that relies on the primary purpose of the statement,[212] *Craig* appears to require a determination of primary purpose of the trauma. Thus, some courts have held that fear of testifying in front of the defendant must be predominant when combined with a general fear of testifying in court.[213] Yet, circumstantial evidence should be sufficient when fear of the defendant is significant, without requiring speculation as to whether it is the primary reason for the trauma, particularly when it is the factor that escalates the nervousness associated with testifying into a potential ordeal.[214] Similarly, in *United States v. Brown* the court held that the use of closed-circuit television did not violate the defendant's Sixth Amendment rights where the defendant was representing himself, which meant the victim would be subjected "not only to [defendant's] presence in courtroom, but also to his questioning her, face-to-face, about the traumatic events in question."[215] In *Brown*, the ten year old child's therapist testified about psychological trauma the child had suffered from personal contact with defendant.[216]

Courts disagree about the nature of the showing necessary to justify in-court regulation of testimony, as well as who can establish it.[217] Professor Myers suggests a number of factors that are relevant to this determination, including reaction to prior encounters with the defendant, reaction when testifying is discussed, symptoms of stress as the trial approaches, psychiatric diagnosis, threats, impact on the child's ability to communicate, and harm to the child's mental health.[218] Most courts do not require resort to experts,[219]

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front of the defendant where the child's therapist testified to the child's issues with anxiety and posttraumatic stress disorder).

211. *See* State v. Wedgeworth, 127 P.3d 1033 (Kan. 2006) (unpublished table decision), No. 88,903, 2006 WL 319338 (Kan. Feb. 10, 2006) (holding a failure to meet the statutory requirement that child is so traumatized by testifying in open court as to prevent her from reasonably communicating with the jury was harmless where defendant's right to test the veracity of child's testimony was preserved through the ability of defendant's counsel to cross-examine child).

212. Davis v. Washington, 547 U.S. 813, 822 (2006).

213. *See* United States v. Bordeaux, 400 F.3d 548, 553 (8th Cir. 2005) (post-*Crawford*); United States v. Turning Bear, 357 F.3d 730, 736 (8th Cir. 2004) (pre-*Crawford*). Both cases were reversed on Confrontation Clause grounds. *Bordeaux*, 400 F.3d at 562; *Turning Bear*, 357 F.2d at 742.

214. *See, e.g.*, State v. Stogner, No. 2009 KA 0172, 2009 WL 1717173, at *3-5 (La. Ct. App. June 19, 2009) (holding it was not error to allow the child victims to testify by CCTV where their counselor testified to the likelihood of severe distress caused by defendant's presence), *cert. denied*, 29 So. 3d 1249 (La. 2010).

215. United States v. Brown, 528 F.3d 1030, 1033 (8th Cir. 2008), *cert. denied*, 129 S. Ct. 331 (2008).

216. *Id.*

217. *See generally* MYERS, *supra* note 42, § 3.05 [C].

218. *Id.* § 3.05 [C][2], at 183-85.

219. State v. Crandall, 577 A.2d 483, 489 (N.J. 1990).

and may even rely on observations by the judge.[220] However, "a recitation of the GAL's impressions, coupled with the GAL's prediction of possible harm based on those impressions" was not sufficient when it concerned the "probable traumatic effect of the normal courtroom setting," and was not specifically directed to the likely impact of the presence of the child's parents on her "ability to communicate effectively with the jury."[221] On occasion, the child's reaction to prior court appearances may satisfy the showing, particularly if coupled with a psychologist's opinion.[222]

Typically a therapist's proffer alone should be enough, without requiring the child to testify, since that may cause the very harm that is sought to be avoided.[223] For example, when children demonstrate symptoms of post-traumatic stress disorder, it seems particularly cruel to require their live testimony to substantiate the request for CCTV. Generally, courts admit testimony from experienced social workers and others who have sufficient knowledge about such issues that they can provide an opinion,[224] not limiting experts to psychiatrists, psychologists, or physicians. However, relying on an expert concerning trauma has the potential downside of waiving any existing privilege for the child's mental health records.[225]

It should also be remembered that *Craig* assumes contemporaneous testimony by the child.[226] If a videotaped deposition is played at trial in the absence of the child, whether or not the child previously was shielded or testified via CCTV, *Crawford*, not *Craig*, will govern admission.[227] In that event, a showing of unavailability is required even if the child was previously cross-examined.[228] Because the Supreme Court has not addressed unavailability in such a context, arguably a showing of substantial trauma, rather than "not

220. *See, e.g.*, United States v. Rouse, 111 F.3d 561, 569 (8th Cir. 1997).

221. Blume v. State, 797 P.2d 664, 674-75 (Alaska App. 1990) (not harmless error).

222. *See, e.g.*, State v. Marlyn J.J., 731 N.W.2d 382 (Wis. Ct. App. 2007) (unpublished table decision), No. 2006AP180-CR, 2007 WL 610938, at *10-11 (concluding evidence was sufficient to support use of CCTV where therapist testified to child's anxiety, and child was so frightened at preliminary hearing that she had to be removed from courtroom).

223. *See, e.g.*, State v. Paulson, 730 N.W.2d 210 (Iowa Ct. App. 2007) (unpublished table decision), No. 06-0141, 2007 WL 461323, at *6 (holding that trained child abuse investigator's conclusion that child would be traumatized by testifying in the presence of the defendant was sufficient).

224. *See, e.g.*, State v. Blanchette, 134 P.3d 19, 25, 30 (Kan. Ct. App. 2006) (licensed social worker); State v. Naucke, 829 S.W.2d 445, 449-50 (Mo. 1992) (en banc) (social worker).

225. *See* State v. Ruiz, 34 P.3d 630, 638-40 (N.M. Ct. App. 2001) (concluding videotape request waived psychotherapist-patient privilege despite irrelevance of child's mental state to sexual assault charges against defendant).

226. *See* Maryland v. Craig, 497 U.S. 836, 841-42 (1990) (explaining the procedure of one-way CCTV by which a child testifies in a separate room while the testimony is recorded and displayed in the courtroom).

227. *See* Crawford v. Washington, 541 U.S. 36, 59, 68 (2004).

228. *Id.* at 57.

more than *de minimis*" trauma may be necessary.[229] The interrelationship between the child's potential trauma and the child's ability to communicate is also unclear. In other words, if more than *de minimis* trauma exists, it may not be necessary to show that the child's testimony would be impacted,[230] since *Craig* applies "*at least* where such trauma would impair the child's ability to communicate."[231]

Courts also differ on procedures concerning shielding. For example, in *State v. Parker*, the Nebraska Supreme Court recently held it was prejudicial error to permit a large screen to be placed blocking the defendant from view on the theory that it violated the defendant's presumption of innocence.[232] However, somewhat counter-intuitively, the court indicated that, because a proper showing had been made under *Craig*, it would have been appropriate either to have permitted pretrial videotaping of the child's testimony or CCTV.[233]

Similarly, courts vary on whether the Confrontation Clause applies to room arrangements that either block or restrict the ability to obtain eye-to-eye contact, such as by permitting the defendant only a profile view of the child. While many minor readjustments are not viewed as requiring justification under *Craig*, some courts disagree. For example, the absence of any evidence that would support a finding justifying the obstruction of the defendant's view of his daughter resulted in a reversal where the remaining evidence did not indicate sufficient evidence of guilt.[234] Similarly, restricting eye contact of witnesses with the defendant without appropriate findings may violate the Confrontation Clause, though such errors may be harmless.[235] Another court found no Confrontation Clause violation where a child chose to shield her face from the defendant, since this was "part of her demeanor and within full view of the jury, which could then draw any necessary inferences from her conduct[][,] . . . . [ranging from] untruthfulness, embarrassment, evasiveness,

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229. *See, e.g.*, Thomas v. People, 803 P.2d 144, 149 (Colo. 1990) (en banc) (stating that medical unavailability is shown when "testifying in front of the defendant would cause the child substantial and long term emotional or psychological harm").

230. United States v. Carrier, 9 F.3d 867, 869 n.2 (10th Cir. 1993); *Thomas*, 803 P.2d at 150 n.13.

231. *Craig*, 497 U.S. at 857 (emphasis added).

232. State v. Parker, 757 N.W.2d 7, 17-18 (Neb. 2008). *Contra* People v. Rose, LC No. 07-015359-FC, 2010 WL 2629721, at *11-14 (Mich. Ct. App. July 1, 2010) (holding that screen did not violate Due Process and the presumption of innocence).

233. *Parker*, 757 N.W.2d at 18.

234. *See* Bowser v. State, 205 P.3d 1018, 1022-24 (Wyo. 2009) (holding use of videotaped deposition where defendant was denied face-to-face confrontation was error, and conviction must be reversed as there was no other evidence that child was present during the indecent acts).

235. *See* United States v. Kaufman, 546 F.3d 1242, 1252-59 (10th Cir. 2008) (holding that, even assuming district court plainly erred in ordering defendants to make no eye contact with witnesses who were former residents of an unlicensed group home for the mentally ill, defendants failed to establish the error affected their substantial rights), *cert. denied*, 130 S. Ct. 1013 (2009).

or other various emotional or cognitive states."[236] Thus, it was entirely speculative to conclude that the jury would have inferred from her conduct that the defendant was guilty.[237] Of course, the better practice is to give a cautionary instruction in all cases that incorporate child-friendly approaches to confrontation or implicate *Craig*, to avoid the argument that such procedures interfere with the defendant's right to a presumption of innocence.

Other restrictions on child testimony have also been challenged. For example, *State v. Brink* held the Confrontation Clause was not violated when the prosecutor read the defendant's stepdaughter's written testimony to the jury in lieu of her oral testimony.[238] In *Brink*, the "defendant and his counsel retained an uninhibited view of [the child] and her demeanor throughout her testimony."[239] In addition, the "defendant retained a full opportunity for contemporaneous cross-examination of [the child][,] . . . . [and] had a full opportunity to explore [her] reluctance to provide an oral accusation on cross-examination."[240] Therefore, the trial court appropriately required the child to "provide her testimony, including her written accusation, in full view and awareness of defendant."[241]

In another case, counsel stipulated to having therapists selected by both sides question the child, rather than attorneys.[242] Such stipulations should routinely be requested by prosecutors when a child appears to have difficulty communicating. In appropriate cases, if the nature or tone of the defense's questions is harassing, judges should mandate the use of psychologists as questioners, so long as the defense can communicate contemporaneously with the psychologist to ask follow-up questions. Other countries not constrained by our Confrontation Clause regularly employ "intermediaries" trained in questioning children to communicate questions and even relay the child's answers.[243] Their experiences suggest that the use of psychologists as questioners is likely to result in a better quality of child testimony. Ultimately, the only way to make alternatives to live testimony or shielding more accepted in criminal cases is to educate prosecutors about their benefits, and to suggest ways to combat their questionable image via voir dire, opening statements, closing arguments, jury instructions, and, if appropriate, through expert testimony. As I have suggested elsewhere, if the defense introduces an expert or suggests in cross-examination that the child fabricated the incident or is

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236. *See* Fuson v. Tilton, No. 06-CV-0424, 2007 WL 2701201, at *13-14 (S.D. Cal. Sept. 10, 2007).

237. *Id.* at *14.

238. State v. Brink, 949 A.2d 1069, 1072-73 (Vt. 2008).

239. *Id.* at 1072.

240. *Id.* (citations omitted).

241. *Id.* at 1072-73.

242. *See, e.g.*, Thomas v. People, 803 P.2d 144, 151 (Colo. 1999) (en banc) (explaining that the court gave the parties the option of using psychologists or attorneys to question children).

243. *See, e.g.*, Helen L. Westcott & Marcus Page, *Cross-Examination, Sexual Abuse and Child Witness Identity*, 11 CHILD ABUSE REV. 137, 148-49 (2002).

untruthful, the prosecutions rebuttal expert should be permitted to dispel the myth that children are less reliable when shielded.

ALTERNATIVES TO LIVE TESTIMONY IN MALTREATMENT CASES AND OTHER CIVIL CONTEXTS

Craig is directed toward criminal cases, but most children who testify about allegations of sexual abuse do so in child protective hearings in dependency or juvenile court, where the Confrontation Clause does not apply because the proceedings are not criminal.[244] In other words, the determination of sexual abuse is required to protect the child by removing her from an unfit home, unlike the purpose in a criminal case, which is to punish a parent who has been found to have sexually abused the child. For this reason, the standard of proof in dependency court is not beyond a reasonable doubt.[245] Yet in many ways, the stakes are as high for the child as they are for the defendant in maltreatment cases. Individuals charged with sexual abuse are typically incarcerated or at a minimum are removed from the child's home after a criminal case is brought. In contrast, the focus of the dependency hearing is whether the child is safe in her home,[246] meaning that it is the child who may be removed, to be placed in foster care or with a relative, possibly separated from siblings or even placed for adoption if the conduct ultimately results in the termination of parental rights.

Reunification with the non-offending parent may occur only on the condition that the abuser does not live at home. While familial pressure may be exerted on the child to recant so the non-offending parent can be reunited with the offender in both systems, the criminal justice system is better suited to protecting the child, since the defendant is likely to be incarcerated. The same is not necessarily true in dependency court in the significant number of cases in which criminal charges have not been filed. Practically, most intra-familial offenders are male: they are the natural father, stepfather, mother's boyfriend, grandfather, or a close family relative such as an uncle, stepbrother or cousin. However, mothers may be charged criminally with endangerment for failing to protect the child, which also would justify charges in dependency court.

Indigent children usually have their own appointed GAL or attorney in dependency proceedings, who can raise the CCTV request if counsel for the state or county does not. It is likely that courts have inherent power to create alternatives to live testimony. However, state laws typically authorize such procedures, which mirror some of the *Craig* criteria, but because Due Process governs in the civil context, rather than the Confrontation Clause, a more

244. *See* U.S CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .").

245. *See, e.g.*, *In re* Brock, 499 N.W.2d 752, 756 (Mich. 1993).

246. *Id.*

flexible standard applies.[247] Generally, three factors are considered in determining what is required by Due Process:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[248]

Using this standard, the Michigan Supreme Court has held that the use of a videotape "deposition" of a child without an opportunity for the parents to personally cross-examine did not deprive them of their Due Process rights in the adjudicative phase of child protective proceedings.[249] The parents' counsel was "able to observe the child through a one-way window [and] . . . . allowed to submit questions to the examiner before and during the deposition."[250] Moreover, the clinical social worker indicated that the child would be "incapable of communicating if attorneys questioned her and that she might be traumatized presently and in her future treatment if forced to participate in cross-examination."[251]

Clearly, some showing of need is required, but not necessarily one in which the primary motivation for shielding is proof of fear of testifying in front of the defendant. For example, New Jersey law provides that in dependency court a child's testimony may be taken by CCTV out of the presence of the defendant if there is a "substantial likelihood that the witness would suffer severe emotional or mental distress if required to testify in open court,"[252] which actually appears to be more restrictive than *Craig's* "more than *de minimis*" standard would require. Depending on the jurisdiction, Family Court may also hold hearings that implicate remote testimony. *New Jersey Division of Youth and Family Services (DYFS) v. V.K.* rejected the application of the Confrontation Clause when deciding termination of parental rights, and found no error where the children's attorney was present and counsel for the parent and the DYFS were excluded while the judge questioned the child in chambers.[253] It was also appropriate for a judge to question a child in the courtroom, sitting at counsel table, while counsel submitted questions for direct examination from the gallery area of the courtroom where they could

247. *See* Mathews v. Eldridge, 424 U.S. 319, 332-35 (1976).
248. *Id.* at 335.
249. *In re Brock*, 499 N.W.2d at 758-59.
250. *Id.* at 758.
251. *Id.*
252. N.J. STAT. ANN. § 2A:84A-32.4 (West 1994).
253. New Jersey Div. of Youth and Family Services v. V.K., 565 A.2d 706, 710-11 (N.J. Super. Ct. 1989).

listen to the answers, and then submit questions for cross-examination after they heard the child's answers.[254]

Similarly, the Rhode Island Supreme Court held that the trial court did not err in excluding the attorneys from the court's chamber when the child became upset, leaving the judge to ask questions with only the stenographer present.[255] The questions and answers were read back and the attorneys formulated follow-up questions.[256] The court noted that "the parents have no right to face-to-face confrontation" with the child.[257] In *In re A.L.*, the court agreed that because parents do not have a right to face-to-face confrontation in proceedings for children in need of supervision (CHINS), the father's Sixth Amendment right was not violated.[258]

More broadly, California has enacted an option in dependency court to permit the testimony of a minor to be taken in-chambers and outside the presence of the minor's parent, who is represented by counsel, if the counsel is present and any of the following circumstances exist: "(1) the court determines that testimony in chambers is necessary to ensure truthful testimony[;] (2) the minor is likely to be intimidated by a formal courtroom setting[; or] (3) the minor is afraid to testify in front of his or her parent or parents."[259] Such standards clearly eliminate any showing that the child is in fear of the defendant in order to be protected.

The National Conference of Commissioners on Uniform State Laws passed the Uniform Child Witness Testimony by Alternative Methods Act in 2002 that provides:

> (b) In a noncriminal proceeding, the presiding officer may allow a child witness to testify by an alternative method if the presiding officer finds by a preponderance of the evidence that allowing the child to testify by an alternative method is necessary to serve the best interests of the child or enable the child to communicate with the finder of fact. In making this finding, the presiding officer shall consider: (1) the nature of the proceeding; (2) the age and maturity of the child; (3) the relationship of the child to the parties in the proceeding; (4) the nature and degree of emotional trauma that the child may suffer in testifying; and (5) any other relevant factor.[260]

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254. N.J. Div. of Youth & Family Servs. v. D.D., No. A-4642-07T4, 2009 WL 1506886, at *3, 7 (N.J. Super. Ct. June 1, 2009), *cert. denied*, 983 A.2d 199 (N.J. 2009), *cert. denied*, 130 S. Ct. 2095 (2010).

255. *In re* Michael C., 557 A.2d 1219, 1220-21 (R.I. 1989).

256. *Id.* at 1220.

257. *Id.* at 1221; *accord In re* Mary S., 230 Cal. Rptr. 726, 729 (Ct. App. 1986) (explaining the right to confrontation is not absolute in civil proceedings).

258. *In re* A.L., 669 A.2d 1168, 1170 (Vt. 1995).

259. CAL. WELF. & INST. CODE § 350(b) (West 2008) (mediation); § 366.26(h)(3)(A) (termination of parental rights or establishing guardianship).

260. UNIF. CHILD WITNESS TESTIMONY, *supra* note 161, § 5(b).

In contrast, a few jurisdictions appear to require satisfaction of *Craig* in dependency cases,[261] a result that is unjustified in a more flexible Due Process framework, and may deprive some children of protective procedures to which they are entitled. At the other extreme, Connecticut recently approved the admission of child hearsay in neglect proceedings for children who do not testify because of "psychological" unavailability based on serious emotional or mental harm that would result from testifying.[262] The Court did not require consideration of any alternative to in-court testimony before admitting the hearsay.[263] Thus, the right of cross-examination is effectively eliminated, and the judge is not even required to speak to the child in chambers when expert testimony supports the claim of trauma, a result that seems unwarranted except in cases of extremely fragile children, but survived a Due Process challenge.[264] On occasion, CCTV may also be requested in civil suits requesting damages from the alleged abuser[265] or where sexual abuse is alleged in divorce proceedings and custody is at issue.[266]

At a minimum, statutes providing for alternative procedures should be revised to reflect standards found in the Uniform Rule or California Code; and it would also be appropriate to include a presumption that the child should testify in a protected manner, unless there is no evidence warranting use of alternatives to live testimony. Advocates should review existing legislation, since some of the case law in this context appears to default to *Craig* in devising standards. Indeed, sometimes in the absence of specific criteria, the general rule reflects a standard that is arguably even higher than *Craig*. For example, Federal Rule of Civil Procedure 43(a) requires compelling circumstances for procedures other than in-court testimony in civil cases, and includes no separate provision for child testimony.[267] Generally, testimony of children given outside of the presence of their parents appears to be more widespread when sexual abuse is alleged in maltreatment cases than in criminal court, and appears to generate relatively few appeals due to the more flexible Due Process standard. Since the judge who is typically the fact-finder is often in the same room as the child, the concerns about jury acceptance of shielded child testimony is not a factor.

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261. *See, e.g.*, *In re* K.S., 966 A.2d 871, 877 (D.C. 2009); *In re* B.H., 671 S.E.2d 303, 307-08 (Ga. Ct. App. 2008).

262. *In re* Tayler F., 995 A.2d 611, 626-29 (Conn. 2010) (determining that a hearsay exception required a showing of unavailability).

263. Id. at 629.

264. *Id*. at 631-33.

265. *See, e.g.*, Parkhurst v. Belt, 567 F.3d 995, 1001, 1002-03 (8th Cir. 2009) (relying on FED. R. CIV. PRO. 43(a), court found compelling circumstances justified CCTV in suit against child's biological father, and affirmed total award of $1 million), *cert. denied*, 130 S. Ct. 1143 (2010).

266. *See* ANN M. HARALAMBIE, CHILD SEXUAL ABUSE IN CIVIL CASES: A GUIDE TO CUSTODY AND TORT ACTIONS 328-29 (1999).

267. *See* FED. R. CIV. P. 43(a).

WHAT CAN WE LEARN FROM CCTV EXPERIENCES IN OTHER COUNTRIES?

The actual experience of other countries that employ alternatives to live testimony in criminal cases is much more favorable than the psychological studies in the United States would suggest. The studies here generally demonstrate jurors have a bias against children who do not testify live, which includes not simply admission of their hearsay, but also videotaped and remote testimony.[268] In contrast, in Scotland, an early evaluation of cases in which children testified via CCTV showed no statistically significant difference in conviction rates to those in which children testified in court.[269] In England, the use of remote testimony for children is common and a pretrial videotaped interview can substitute for or corroborate live testimony.[270] An evaluation of the use of CCTV, called "livelinks" in England and Wales, found the majority of judges and lawyers had a favorable reaction, and while the sample of barristers who had represented defendants was relatively small, they too were favorably inclined.[271] A small study in Australia that included reactions of child witnesses, police, social workers, judges and lawyers, including those representing defendants, also found widespread acceptance of CCTV.[272] In some parts of Australia, a rebuttable presumption exists in favor of a "video-link" for child testimony.[273]

South Africa's Constitutional Court recently cited the United Nation's Economic and Social Council's Guidelines on Justice Matters Involving Child Victims and Witnesses of Crime for the proposition that:

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268. *See, e.g.*, Gail S. Goodman et al., *Hearsay Versus Children's Testimony: Effects of Truthful and Deceptive Statements on Jurors' Decisions*, 30 LAW & HUM. BEHAV. 363 (2006) (summarizing research and finding when statements of child participants coached to lie were presented either live, by videotape, or through social worker's testimony, jurors had difficulty discerning true from false statements, but perceived child less likely to be false in live); David F. Ross et al., *The Impact of Protective Shields and Videotape Testimony on Conviction Rates in a Simulated Trial of Child Sexual Abuse*, 18 LAW & HUM. BEHAV. 553, 563 (1994) (stating conviction rate in mock trials was 60.8 percent for videotaped testimony and 76.7 percent for live testimony); *see also* Aaron Haas, *Videoconferencing in Immigration Proceedings*, 5 PIERCE L. REV. 59, 61 (2006) (suggesting loss of nonverbal clues and "lack of eye contact . . . [has] profound impacts on the cognitive and emotional response of the listener and the perception of the speaker's credibility").

269. KATHLEEN MURRAY, THE SCOTTISH OFFICE CENTRAL RESEARCH UNIT, LIVE TELEVISION LINK: AN EVALUATION OF ITS USE BY CHILD WITNESSES IN SCOTTISH CRIMINAL TRIALS (1995), *discussed in* MYERS, *supra* note 42, § 3.05[H], at 188-89.

270. Goodman et al., *supra* note 268, at 366 (discussing that substituting for videotape testimony has become acceptable with the 1991 Criminal Justice Act).

271. Helen L. Westcott & Graham M. Davies, *Children's Welfare in the Courtroom: Preparation and Protection of the Child Witness*, 7 CHILD. & SOC'Y 388, 391 (1993).

272. *Id.* at 392.

273. *See* AUSTL. LAW REFORM COMM'N, ALRC REPORT 84, SEEN AND HEARD: PRIORITY FOR CHILDREN IN THE LEGAL PROCESS § 14.103 (1997); ANDREAS KAPARDIS, PSYCHOLOGY AND LAW: A CRITICAL INTRODUCTION 99 (2d ed. 2003).

> The best interests of the child demand that children should be shielded from the trauma that may arise from giving evidence in criminal proceedings. Child complainants and witnesses should testify out of sight of the alleged perpetrator and in a child-friendly atmosphere.[274]

South Africa's Constitution requires that "in all matters concerning a child, the child's best interests must be of *paramount importance*."[275] Thus, the South African Criminal Procedure Act not only allows CCTV, but also permits children to be asked questions and provide answers through intermediaries via CCTV, and while discretionary, the judge must give reasons for refusing to permit either procedure.[276]

Obviously, these countries are not governed by an American Confrontation Clause framework. However, their experiences suggest that the perceived negativity of American attitudes towards CCTV and shielding may be an artifice caused by studies that do not compare actual case outcomes because of the small number of cases here that use CCTV in criminal cases. To the extent negative attitudes exist in the United States, this may result from the technology not being commonly used, and can be overcome by educational efforts and jury instructions. Indeed, studies here indicate that children may actually testify more accurately when protected, since they do not have the additional stress posed by their fear of the defendant.[277] Elsewhere, where children can affirmatively choose whether or not to testify traditionally or by CCTV, their sense of control has been found to lead to better outcomes for children and the criminal justice system.[278] It is time for victims' advocates and prosecutors to rethink their distrust of technology. While the stress on a child caused by coming to court and being cross-examined cannot be eliminated, it can be decreased by CCTV or rearrangement of the courtroom.

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274. Dir. of Pub. Prosecutions, Transvaal v. Minister for Justice & Constitutional Dev. 2009 (4) SA 222 (CC) at 79, 111-14 (S. Afr.), *available at* http://www.saflii.org/za/cases/ZACC/2009/8.pdf (citing Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime, ECOSOC Res. 2005/20, ¶¶ 30(d), 31(b) (July 22, 2005)) (upholding constitutionality of discretionary appointment of intermediaries for child witnesses, and indicating the law contemplates in every case with a child witness that the trial court will inquire about desirability of appointing an intermediary).

275. *Transvaal*, 2009 (4) SA 222 (CC) at 2, (citing S. AFR. CONST. 1996 § 28(2)) (emphasis added).

276. *Id.* at 152-53 (citing Criminal Procedure Act 51 of 1977 s. 158(5), 170A(7), *available at* http://www.kzntransport.gov.za/reading_room/acts/national/Criminal%20Procedure%20 Act%20&%20Regulations.pdf.

277. *See* Dorothy F. Marsil et al., *Child Witness Policy: Law Interfacing with Social Science*, LAW & CONTEMP. PROBS., Winter 2002, at 209, 238-39 (summarizing research).

278. Westcott & Davies, *supra* note 271, at 392-93 (describing New South Wales study finding children who testified traditionally were unhappier, less cooperative and provided fewer details during cross-examination than children who opted either to use video link or to testify in open court).

CONCLUSION

While child-friendly oaths, remote testimony, shielding or rearranging the courtroom can assist children in testifying more effectively, testimony is the last step in the process. The first steps begin with appropriate forensic interviewing protocols and corroboration of disclosures, followed by positive interaction with professionals.[279] Only when the public understands that attention is being given to reducing suggestive questioning, and jurors can evaluate forensic videotapes of child witnesses for themselves, will negative stereotyping of child testimony lessen. Psychologists can provide valuable insights about how to lessen suggestivity, decrease false denials and recantations, and increase true disclosures, but must realize that their studies need to be relevant to the courtroom.

Judges and lawyers who interact with children in the courtroom also must become more child-friendly. For example, the VCAA encourages multidisciplinary teams to provide "training services for judges, litigators, court officers and others that are involved in child victim and child witness cases, in handling child victims and child witnesses."[280] In addition, the use of psychologists identified by the court to interview children and make recommendations about their competency should be mandated. Many prosecutors attempt to familiarize children with the courtroom and court schools should become standard. The American Prosecutors' Research Institute (APRI) has published a valuable resource on the internet that discusses best practices for interviewing and courtroom preparation that should be mandatory reading for lawyers and law enforcement.[281] Just as victim advocates are now commonplace in domestic violence cases, specialized child advocates should be routinely available to help children and their families cope with the trial process in child abuse cases,[282] though care must be taken

279. *See generally* Lisa M. Jones et al., *Criminal Investigations of Child Abuse: The Research Behind "Best Practices"*, 6 TRAUMA VIOLENCE & ABUSE 254 (2005) (discussing need for more research regarding best practices); Victor I. Vieth, *When a Child Stands Alone: The Search for Corroborating Evidence*, UPDATE (Nat'l Dist. Att'ys Ass'n/Am. Prosecutors Research Inst., Alexandria, Va.), 1999, *available at* http://www.ndaa.org/publications/newsletters/apri_update_vol_12_no_6_1999.html (detailing ways to corroborate abuse of young children); Victor Vieth, *When the Victim is Very Young: Assessing Allegations of Sexual Abuse in Pre-School Children (Part 2 of 2)*, REASONABLE EFFORTS (Nat'l Dist. Att'ys Ass'n/Nat'l Child Protection Training Ctr., Winona, Minn.), 2006.

280. *See* 18 U.S.C. § 3509(g)(2)(G) (2006).

281. SUSAN WALTERS ET AL., AM. PROSECUTORS RESEARCH INST., FINDING WORDS: HALF A NATION BY 2010: INTERVIEWING CHILDREN AND PREPARING FOR COURT (2003), *available at* http://ndaa.org/pdf/finding_words_2003.pdf.

282. *See, e.g.*, Mark K. Cavins & Lori Smith, *Keeping Kids on Your Side: An Innovative Approach to Child Sex Abuse Victims*, 37 PROSECUTOR 20 (2003) (discussing the Cook County State Attorney's Office's child sexual abuse specialist).

that such interactions do not result in discoverable information that could turn advocates into potential adversaries.[283]

Judges have the ultimate responsibility to ensure that children are treated appropriately in court. The VCAA provides a comprehensive model for a child-friendly courtroom that states have adopted in part,[284] and addresses competency hearings, psychological evaluations, the use of videotaped depositions and two-way CCTV at trial, privacy protection, courtroom closure, multidisciplinary child abuse teams, and expediting the trial.[285] The VCAA also includes a number of provisions that directly affect the manner in which children testify, such as giving the court discretion to "permit a child to use anatomical dolls, puppets, drawings, mannequins, or any other demonstrative device [it] deems appropriate for the purpose of assisting a child in testifying."[286] While the VCAA permits adult attendants to stay in close proximity or contact when the child testifies,[287] there is currently a split between jurisdictions that assume that the use of a support person is standard procedure versus those that require a showing of substantial or even compelling need, on the rationale that such individuals interfere with the defendant's presumption of innocence.[288] Similarly, now that dogs are appearing in more courtrooms at the feet of children who may pet them when they become stressed, challenges concerning potential jury bias are expected.[289]

It is insensitive to expect young children to conform to adult standards without any assistance, particularly when any potential prejudice of a child having a support person or a teddy bear can be addressed by instructions. Unlike other countries, in the United States, the protection of children does not appear to weigh heavily when balancing the facilitation of child testimony against any *de minimis* impact on a defendant's rights. It sometimes appears that we lack compassion for young witnesses, placing them in untenable positions that suggest society will only punish or protect them from their abusers if they can jump through hoops that are too high for them to be developmentally able to reach. Progress has occurred in taking child sexual abuse seriously, in part due to increased awareness about the frequency of such abuse and best practices in treating children in and out of court. However, the pace seems much slower than steps taken against domestic violence. Eventually,

283. *See* Raeder, *Response to Victims*, *supra* note 5.

284. 18 U.S.C. § 3509.

285. *Id.*

286. § 3509(l).

287. § 3509(i).

288. *See, e.g.*, Czech v. State, 945 A.2d 1088, 1093-95 (Del. 2008) (collecting cases, and finding absence of extraordinary circumstances and cautionary instruction to be harmless error); *cf.* Reynolds v. Yates, No. EDCV 07-637-DDP (AGR), 2010 WL 2757207, at *10-11 (C.D. Cal. Mar. 15, 2010) (holding that presence of grandfather as support person did not violate Confrontation Clause).

289. *See, e.g.*, Justin Berton, *Courtroom Canines Calm Kids, Raise Bias Fears*, S.F. CHRONICLE, Dec. 26, 2009, *available at* http://articles.sfgate.com/2009-12-26/news/17461761_1_new-dog-abuse-case-vivian.

facilitating child testimony may require the creation of specialized child abuse courts in urban locations, similar to domestic violence courts that have helped to increase successful prosecutions and assist victims. In the meantime, it is key that the general public and legal community recognize that we can better protect children in the courtroom and facilitate their testimony while still satisfying constitutional concerns.