

# Comments on Child Abuse Litigation in a “Testimonial” World: The Intersection of Competency, Hearsay, and Confrontation

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## INTRODUCTION

I agree with many of the conclusions reached by Professors Mosteller<sup>1</sup> and Lyon<sup>2</sup> in their significant articles concerning children caught in a testimonial world. These comments will give my perspective on a number of the issues that they have raised.

Child abuse cases are difficult for prosecutors to win because the abuse takes place in secret, and no physical evidence of molestation may be present either because of the nature of the abuse or because children heal quickly and the crime is often reported well after it occurred. The fact that children disclose in stages also increases the likelihood of inconsistencies in their descriptions of the abuse. Questioning by a family member, doctor, psychologist, or police officer may also be perceived as leading, resulting in unreliable answers. Moreover, children often recant their accusations. Thus, their statements are viewed skeptically by jurors because of concerns about their susceptibility to suggestion, manipulation, coaching, or confusing fact with fantasy, whether or not they testify. In practice, hearsay is a dominant feature of child abuse litigation, primarily introduced in the context of excited utterances, statements for medical diagnosis or treatment, forensic interviews, or via ad hoc exceptions.<sup>3</sup> Even pre-*Crawford v. Washington*,<sup>4</sup> reversals based on the admission of child hearsay were more frequent than hearsay reversals in other types of cases.<sup>5</sup> However, *Crawford* and *Davis v. Washington*<sup>6</sup> up the ante for prosecutors who are trying to protect vulnerable young children who are unable or unwilling to testify at trial, because they defeat the admission of testimonial statements, including the highly regarded best practice of videotaping multidisciplinary forensic interviews.<sup>7</sup>

It should come as no surprise that eighteenth-century values would silence the voices of children in the twenty-first-century courtroom.<sup>8</sup> The trouble with a

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1. Robert P. Mosteller, *Testing the Testimonial Concept and Exceptions to Confrontation: “A Little Child Shall Lead Them,”* 82 IND. L.J. 917 (2007) [hereinafter Mosteller, *A Little Child Shall Lead Them*].

2. Thomas D. Lyon & Raymond LaMagna, *The History of Children’s Hearsay: From Old Bailey to Post-Davis*, 82 IND. L.J. 1029 (2007) [hereinafter Lyon & LaMagna, *History of Children’s Hearsay*].

3. See, e.g., TASK FORCE ON CHILD WITNESSES, AM. BAR ASS’N CRIM. JUST. SEC., *THE CHILD WITNESS IN CRIMINAL CASES* 40–42 (2002).

4. 541 U.S. 36 (2004).

5. John E.B. Myers, Ingrid Cordon, Simona Ghetti & Gail S. Goodman, *Hearsay Exceptions: Adjusting the Ratio of Intuition to Psychological Science*, 65 LAW & CONTEMP. PROBS. 3, 44–45 (2002) [hereinafter *Hearsay Exceptions*].

6. 126 S. Ct. 2266 (2006).

7. See *infra* text accompanying notes 105–117; see generally Mosteller, *A Little Child Shall Lead Them*, *supra* note 1.

8. See generally Myrna S. Raeder, *Remember the Ladies and Children Too: The Impact of*

testimonial approach grounded in 1791 is the rarity of child abuse cases in that time frame, coupled with the view that children should not be presumed competent until they reached ages ranging from seven to twelve years old. Generally, restrictive evidentiary rules excluded most modern hearsay from being heard by jurors of the period, who one should remember would not have included women, blacks, servants, non-taxpayers, or non-land holders.<sup>9</sup> Thus, relying on an approach that did not consider the unique issues concerning child testimony or the total shift in community values and evidentiary practices is a recipe for the exclusion of children's voices, despite some prosecutors' wishful thinking that young children can never utter testimonial statements because an objective standard would always exclude them due to their developmental inability to understand how trials work and the role witnesses play in creating testimony.<sup>10</sup>

Moreover, Justice Scalia's interpretation of the standards for admissible criminal evidence at the time of the framing<sup>11</sup> has been dramatically challenged.<sup>12</sup> For example, Professor Davies, a legal historian, disputes that several key English cases cited in *Crawford* would have been available to the Framers when they were drafting the Bill of Rights.<sup>13</sup> Even Justice Scalia apparently abandoned *Crawford's* rigid originalist approach when he noted in *Davis* that "[r]estricting the Confrontation Clause to the precise forms against which it was originally directed is a recipe for its extinction."<sup>14</sup> Generally, the testimonial approach appears to exalt cross-examination for a limited category of statements, while viewing it as constitutionally unnecessary for everything else, which in a world of expansive modern statutory hearsay exceptions seems to promote the wrong message. In other words, cross-examination and live witnesses are not essential for a fair trial, unless the defendant has the good luck of facing a testimonial statement. Ironically, this framework ignores the fact that most nontestimonial hearsay would not be admitted today, but for the governmental action of sponsoring and adopting broad exceptions, which did not exist in 1791, to admit statements of all manner of private individuals including medical personnel.

The testimonial approach not only disadvantages defendants facing nontestimonial hearsay, but also the government, which has no way of overcoming a testimonial

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*Crawford on Domestic Violence and Child Abuse Cases*, 71 BROOK. L. REV. 311 (2005) [hereinafter *Remember the Ladies*].

9. See, e.g., William E. Nelson, *The Eighteenth-Century Background of John Marshall's Constitutional Jurisprudence*, 76 MICH. L. REV. 893, 919 (1978).

10. See, e.g., Allie Phillips, *Child Forensic Interviews after Crawford v. Washington: Testimonial or Not?*, 39 PROSECUTOR 17, 21 (Aug. 2005) (arguing for a reasonable child standard and rejecting an objective person standard for children under the age of ten).

11. See *Crawford v. Washington*, 541 U.S. 36, 43–51 (2004).

12. See, e.g., Thomas Y. Davies, *Not the Framers' Design: How the Framing-Era Ban Against Hearsay Evidence Refutes the Crawford-Davis "Testimonial" Formulation of the Scope of the Original Confrontation Clause*, 15 BROOK. J.L. & POL'Y (forthcoming 2007); Randolph N. Jonakait, *The (Futile) Search for a Common Law Right of Confrontation: Beyond Brasier's Irrelevance to (Perhaps) Relevant American Cases*, 15 BROOK. J. L. & POL'Y (forthcoming 2007); Randolph N. Jonakait, *The Too-Easy Historical Assumptions of Crawford v. Washington*, 71 BROOK. L. REV. 219 (2005); Mosteller, *A Little Child Shall Lead Them*, *supra* note 1.

13. See Thomas Y. Davies, *What Did the Framers Know, and When Did They Know It? Fictional Originalism in Crawford v. Washington*, 71 BROOK. L. REV. 105, 156–62 (2005).

14. *Davis v. Washington*, 126 S. Ct. 2266, 2278 n.5 (2006).

statement when the declarant is unavailable to testify, despite any lack of negligence or wrongdoing on its part, or its inability to duplicate the statement through other witnesses, even when the statement is critical to its case. While the impetus for the testimonial approach was to prohibit the admission of declarations against interest given by cohorts and accomplices to law enforcement, a conclusion I completely agree with, other formulations of confrontation doctrine including *Ohio v. Roberts*<sup>15</sup> could have reached this result without totally eliminating the introduction of other testimonial statements when the declarant does not testify. Indeed, if this strict originalist approach were applied to other constitutional guarantees it would likely strip away many of the rights criminal defendants now enjoy.<sup>16</sup> However, the testimonial world is not likely to disappear anytime soon, given the Court's near unanimity in adopting it. Thus, the pragmatic question is how to apply *Crawford* and *Davis* in a way that neither cripples child abuse prosecutions, nor eviscerates the ability of defendants to obtain a fair trial with live witnesses who are subject to cross-examination.

#### I. REFERENCES TO CHILD ABUSE CASES IN *CRAWFORD* AND *DAVIS*

So far, while neither case specifically addressed the testimony of children, several oblique references appear to discount the wholesale rendering of child statements as nontestimonial. For example, the only case questioned by *Crawford* was *White v. Illinois*,<sup>17</sup> in which some of the admitted hearsay included a child's statement to a police officer.<sup>18</sup> Only if statements of children could be testimonial would this reference make sense.<sup>19</sup> Similarly, *Crawford* did not challenge the holding in *Idaho v. Wright*,<sup>20</sup> which excluded child testimony under the *Roberts* reliability standard as being untrustworthy.

*Davis* seemingly approved *King v. Brasier*,<sup>21</sup> which while subject to multiple meanings, appears to reject child hearsay repeated by a mother in court.<sup>22</sup> Professor Mosteller's thoughtful and meticulously researched article in this Symposium debunks the historic approach to confrontation by its vivid portrayal of the difficulty of relying on early cases that are reported differently by varied sources, with potentially conflicting explanations and results.<sup>23</sup> My own view is that *Brasier* does no more than confirm that an incompetent child's hearsay cannot be introduced because the child could not be a witness at trial. Unlike others, I am not troubled by an approach that accepts that there is no justification for admitting the out-of-court statement of

15. 448 U.S. 56 (1980).

16. See, e.g., Donald A. Dripps, *Sixth-Amendment Originalism's Collision Course with the Right to Counsel: What's Titanic, What's Iceberg?* 35 (San Diego Legal Stud. Res. Paper Series, Paper No. 07-79, 2006), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=952508](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=952508).

17. *Crawford v. Washington*, 541 U.S. 36, 58 n.8 (2004) (discussing *White v. Illinois*, 502 U.S. 346 (1992)).

18. *White*, 502 U.S. at 351, 357.

19. See *Commonwealth v. DeOliveira*, 849 N.E.2d 218, 226 n.10 (Mass. 2006).

20. 497 U.S. 805 (1990).

21. (1779) 1 Leach 199, 168 Eng. Rep. 202 (K.B.).

22. See *Davis v. Washington*, 126 S. Ct. 2266, 2277 (2006).

23. See Mosteller, *A Little Child Shall Lead Them*, *supra* note 1, at 923-33.

someone who could not testify to the same words at trial. Indeed, I think this is one of the reasons that so much child hearsay has been funneled into the excited utterance exception. Since the stress of the event is deemed to defeat the ability to lie, we need not rely on whether the individual child is competent because the general ability to discern and tell the truth is not at issue. Similarly, many courts recognize that statements introduced under medical exceptions are only admissible if the child understands the negative consequences of giving medical personnel false information,<sup>24</sup> a concept intertwined with truthfulness.

However, I reject the easy suggestion that all child hearsay is admissible because children do not understand the trial process until well after the age that they would typically be found to be competent. Such a view would only be feasible if *Wright* were overruled, which has not occurred. While the Court has assiduously avoided any mention of *Wright* in *Crawford* and *Davis*, I do not agree with Professor Mosteller's predication that its fate has already been sealed. Several possible alternatives exist. The most likely is that *Wright* will be cabined by recharacterizing it as a case involving a police proxy or agent who engages in the "functional equivalent" of police questioning,<sup>25</sup> since the doctor was chosen by the police after the child had been taken into protective custody. However, *Wright* could ultimately be reaffirmed as requiring a reliability check for nontestimonial hearsay, although dicta in *Davis* challenges this result.<sup>26</sup> Another possibility would be to interpret *Wright* as affirming the interpretation of *Brasier* that asserts that the statement of an incompetent child cannot be introduced at trial. The child in *Wright* was only two and a half years old when the statement was made, and three years at the time of trial. The judge concluded and the parties agreed that she was "not capable of communicating to the jury,"<sup>27</sup> which rendered her incompetent. *White* can be distinguished because the child was slightly older, and the trial court did not issue any decision about her competency or unavailability.<sup>28</sup>

I believe the Supreme Court, like the majority of appellate courts, would reject interpreting the objective observer standard from the perspective of a child of similar age. As *State v. Snowden*<sup>29</sup> found, this would insulate "statements by a young child made in an environment and under circumstances in which the investigators clearly contemplated use of the statements at a later trial."<sup>30</sup> The *Davis* test, which focuses on the interrogation, accords with this conclusion even though the Court muddies its

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24. See generally Robert P. Mosteller, *The Maturation and Disintegration of the Hearsay Exception for Statements for Medical Examination in Child Sexual Abuse Cases*, 65 LAW & CONTEMP. PROBS. 47 (2002) (discussing interpretation of medical exceptions as applied to children).

25. See *Crawford v. Washington*, 541 U.S. 36, 51 (2004).

26. See Myrna S. Raeder, *Domestic Violence Cases After Davis: Is the Glass Half Empty or Half Full?*, 15 BROOK. J.L. & POL'Y (forthcoming 2007) [hereinafter *Domestic Violence Cases*].

27. *Idaho v. Wright*, 497 U.S. 805, 809 (1990) (quoting trial record).

28. See *White v. Illinois*, 502 U.S. 344, 350 (1992).

29. 867 A.2d 314 (Md. 2005).

30. *Id.* at 329; cf. *Commonwealth v. DeOliveira*, 849 N.E.2d 218, 225–26 (Mass. 2006) (finding statement nontestimonial because child understood question was medical; questioning whether "the Supreme Court would indorse a rule of such encompassing latitude").

analysis in a footnote that indicated ultimately that the declarant's statements, and not the questions, are key to the analysis.<sup>31</sup>

Of course, just as I do not believe that all child hearsay is admissible, I also do not believe the other extreme—signified by *Brasier*—that no child hearsay is admissible. The child's cry in *Brasier* was after the event, when the child returned home, and as Justice Scalia opined in *Crawford*, "to the extent the hearsay exception for spontaneous declarations existed at all, it required that the statements be made 'immediat[ely] upon the hurt received.'"<sup>32</sup> Thus, the child's outcry would not have fit the 1791 excited utterance exception, and therefore, even a restrictive interpretation of *Brasier* does not preclude the admissibility of excited utterances made by incompetent witnesses. Moreover, if child hearsay could not be admitted, *Crawford's* questioning of *White* would not have been limited to statements made to the police. In other words, by implication, *Crawford* suggests the remainder of the child's statements made to her mother, babysitter, nurse, and doctor were admissible as nontestimonial, rather than simply inadmissible, given the child's young age (four years when the statements were made, five at trial).<sup>33</sup> In addition, some of the statements implicitly approved in *White* were statements admitted under a medical hearsay exception, signifying that either the child in *White* was presumed competent, or that competency is not required for that exception.

## II. COMPETENCY IN A TESTIMONIAL WORLD

Professor Lyon, whose research about children is empirical as well as scholarly,<sup>34</sup> has come to the eminently sensible conclusion that we should be flexible about child competency in order to ensure the admission of statements of young children.<sup>35</sup> However, care must be taken in not reading too much into the Old Bailey cases that appear to be generous in finding children competent, both because of the relative rarity of child witness cases at the time, and, more importantly, the fact that most of the children were of an age that in today's world would not even raise a question about their competency.<sup>36</sup> Obviously, the reason for incompetency is significant, since the inability to discern truth from falsity cannot be immediately fixed, while the failure to communicate with the jury often can. As Professor Lyon suggests, programs that expose children to the courtroom, explain what will happen to them in developmentally appropriate terminology, and sensitize lawyers and judges to questions that are age appropriate, may substantially reduce the latter type of disqualification.<sup>37</sup>

31. See *Davis v. Washington*, 126 S. Ct. 2266, 2274 & n.1 (2006).

32. *Crawford v. Washington*, 541 U.S. 36, 58 n.8. (2004) (citing *Thompson v. Trevanion*, Skin. 402, 90 Eng. Rep. 179 (K.B. 1693)); see also Lyon & LaMagna, *History of Children's Hearsay*, *supra* note 2, at 1053 (concluding that *Brasier* established an unavailability requirement for child hearsay; admitting a child's statement if it was the best evidence that a party could offer in child rape and assault prosecutions).

33. See *White v. Illinois*, 502 U.S. 344, 349–50 (1992).

34. See, e.g., Thomas D. Lyon, *Child Witnesses and the Oath: Empirical Evidence*, 73 S. CAL. L. REV. 1017, 1022 (2000) [hereinafter Lyon, *Child Witnesses*].

35. See Lyon & LaMagna, *History of Children's Hearsay*, *supra* note 2.

36. See *id.*

37. See *id.*

I have always been ambivalent about completely eliminating the oath, as a handful of states permit, when children testify about their own abuse.<sup>38</sup> However, several judges who have let very young children testify have told me that they consider this essential so that jurors can gauge the child's demeanor if the judge has admitted the child's hearsay. I had not previously realized that this view could be traced as far back as Lord Hale who urged that children be heard without an oath, since the adults that repeated their statements may falsify or misrepresent them.<sup>39</sup> My qualms arise from wondering whether the jury learns enough from viewing a young child like a frightened doe caught in a car's headlights to offset both the potential trauma to the child and the illusion that mere presence completely satisfies the defendant's confrontation concerns. However, it may serve both sides to have otherwise incompetent children called simply to be asked questions about competency, assuming that the child could be shielded pursuant to *Maryland v. Craig*,<sup>40</sup> if necessary. Of course, some children still might be deemed unavailable for this practice if shielding cannot alleviate their trauma.

The result would be similar to that of having a defendant try on an article of clothing, show a tattoo, or undertake some other act not considered testimonial. The jurors would benefit by being able to evaluate the child, but no testimony would be given concerning the crime that could raise testimonial concerns about the effectiveness of cross-examination. In other words, it is unclear how many children who are incompetent due to developmental concerns could answer enough questions about the incident to satisfy the "opportunity for cross-examination." This approach would only work when nontestimonial hearsay is being offered, since the opportunity for cross-examination must exist for testimonial statements. However, the approach may also provide a feasible compromise in cases involving testimonial statements where the prosecution argues forfeiture because the child was warned not to disclose the abuse.<sup>41</sup>

To me, focusing on the term "oath" is a red herring. The modern trend also permits affirmations. An oath has not been required if a child affirms that he or she will "promise to tell the truth today," or "I won't tell a lie."<sup>42</sup> Similarly, the New Jersey Supreme Court found it was sufficient to ask a five-year-old child who was testifying to events that took place when she was three and a half whether or not she was going to tell the truth or lie, rather than require an oath or acknowledgment that she understood the obligation to testify truthfully and that she could face adverse consequences for lying.<sup>43</sup> I believe that courts are generally far too technical in determining competency; that the insensitivity of lawyers and judges often causes the child's perceived incompetency; that individual children can be competent even by age three;<sup>44</sup> and that

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38. See Lyon, *Child Witnesses*, *supra* note 34, at 1023.

39. 1 MATTHEW HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* 634–35 (1736) (Professional Books Ltd. 1971) (discussed in Mosteller, *A Little Child Shall Lead Them*, *supra* note 1, at 931).

40. 497 U.S. 836, 855 (1990).

41. See *infra* text accompanying notes 75–77.

42. *In re Z.C.*, 2006 WL 2934264, ¶ 9 (Ohio Ct. App. Oct. 13, 2006); see FED. R. EVID. 603.

43. See *State v. G.C.*, 902 A.2d 1174, 1182–83 (N.J. 2006).

44. See, e.g., Carole Peterson & Brenda Parsons, *Interviewing Former 1- and 2-Year Olds About Medical Emergencies 5 Years Later*, 29 *LAW & HUM. BEHAV.* 743 (2005) (finding most

adults often ask the wrong competency questions, thereby obtaining answers that do not reveal the child's ability to meet the competency standard.<sup>45</sup> But developmentally, the testimony of most children who are under four will always be problematic unless in addition to not requiring a showing of competency, the child can also respond to questions about the incident, or, in the alternative, the statements are admitted due to the defendant forfeiting the confrontation right.

Except for such very young children, in my view a more concerted effort to ensure that children are comfortable in the courtroom, or can testify while shielded,<sup>46</sup> will permit prosecutors to avoid the testimonial ban and continue to introduce child hearsay, including forensic interviews. Together with expert testimony and prior acts of the defendant,<sup>47</sup> this will bolster the credibility of children. However, I recognize that defendants will argue that *Crawford*'s reach extends beyond mere presence and oath-taking to the opportunity for effective cross-examination.<sup>48</sup>

### III. EXPANDING THE APPLICATION OF *CRAIG*

If lack of competency is caused solely by the child's inability to communicate with the jury, *Maryland v. Craig*<sup>49</sup> provides the best solution. *Craig* permits children to testify from a different location via some type of television arrangement, or simply to be placed in the courtroom with a screening device, when particularized need is demonstrated, showing that the child is fearful of testifying in the defendant's presence.<sup>50</sup> *Craig* appears anathema to *Crawford*, which decried open-ended balancing tests that "do violence" to "categorical constitutional guarantees."<sup>51</sup> However, *State v. Vogelsberg*<sup>52</sup> rejected a direct challenge to *Craig*, finding that had the Supreme Court intended to overrule *Craig*, it would have done so explicitly. *Vogelsberg* distinguished the confrontation issue raised by *Crawford*, which focuses on when confrontation is required, from the issue raised by *Craig*, which addresses the procedures required in regulating confrontation.<sup>53</sup> It is also important to remember that the *Craig* approach to

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former two-year-olds recalled a great deal); *Hearsay Exceptions*, *supra* note 5 (generally discussing psychological literature concerning children).

45. See, e.g., Thomas D. Lyon, Karen J. Saywitz, Debra L. Kaplan & Joyce S. Dorado, *Reducing Maltreated Children's Reluctance to Answer Hypothetical Oath-Taking Competency Questions*, 25 LAW & HUM. BEHAV. 81 (2001); see also Paul Wagland & Kay Bussey, *Factors that Facilitate and Undermine Children's Beliefs About Truth Telling*, 29 LAW & HUM. BEHAV. 639 (2005) (suggesting ways to facilitate truth telling by children who are afraid to speak after adults have sworn them to secrecy).

46. See, e.g., ANN M. HARALAMBIE, CHILD SEXUAL ABUSE IN CIVIL CASES: A GUIDE TO CUSTODY AND TORT ACTIONS 312–15 (1999); Lyon, *Child Witnesses*, *supra* note 34, at 1071.

47. 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).

48. See *infra* text accompanying notes 78–103.

49. 497 U.S. 836 (1990).

50. *Id.* at 855.

51. *Crawford v. Washington*, 541 U.S. 36, 67–68 (2004).

52. 749 N.W.2d 649 (Wis. App. 2006).

53. *Id.* at 654; cf. *United States v. Yates* 438 F.3d 1307, 1313 (11th Cir. 2006) (applying *Craig*, rather than *Crawford*, to confrontation via two-way television).

confrontation can be traced to the 1895 decision in *Mattox v. United States*,<sup>54</sup> which makes it less subject to being overruled as a product of the *Roberts* rejected reliability test. In addition, *Craig* has not produced the parade of horrors that *Crawford* so dramatically portrayed as justification for jettisoning *Roberts*. Indeed, *Craig* has provided a sensible solution for an intractable problem: providing cross-examination of abused children who are traumatized.

A century earlier than *Craig*, *Mattox* recognized that “the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused”<sup>55</sup> and that exceptions may arise from the “necessities of the case, and to prevent a manifest failure of justice.”<sup>56</sup> I have argued elsewhere that *Mattox*’s time-honored balancing test would also better serve societal interests than complete exclusion of most critical testimonial statements that cannot be duplicated at trial, when the police have not created the statement and the government is not negligent or at fault in failing to provide prior cross-examination.<sup>57</sup> Even without such an approach, the flexibility offered by *Craig* should allow most children who are now disqualified because of communication problems to testify.

Freezing on the witness stand is something that can be cured. The judicial branch should take responsibility for ensuring that children are treated appropriately in court. Federal and state rules not only give judges the ability to control the nature of questions posed to children to avoid harassment, but also to take measures to make children comfortable in the courtroom.<sup>58</sup> Education should be required for judges and lawyers who interact with children in the courtroom, and the use of experts 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 testifying; this should be a standard practice. Specialized child abuse courts should be created in urban locations, similar to domestic violence courts that have helped to increase successful prosecutions and assist victims. Just as victim advocates are now commonplace in domestic violence cases, they should be available to help children and their families cope with the trial process in child abuse cases. Prosecutors now have greater incentive to have children testify because testimonial statements can no longer be introduced without the child present, making it likely that even without doctrinal changes, resort to *Craig* will become more popular.

Undoubtedly, *Craig* is not a complete panacea since the child must be “traumatized, not by the courtroom generally, but by the presence of the defendant.”<sup>59</sup> Thus several cases have reversed where dual reasons for the fear existed.<sup>60</sup> Similarly, courts vary significantly about the nature and extent of the showing that justifies in-court

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54. 156 U.S. 237 (1895).

55. *Id.* at 243.

56. *Id.* at 244 (discussing dying declarations).

57. Myrna S. Raeder, *Confrontation Clause Analysis After Davis*, 22 CRIM. JUSTICE 10, 15 (Spring 2007).

58. *See, e.g.*, 18 U.S.C. § 3509 (2000).

59. *Maryland v. Craig*, 497 U.S. 836, 856 (1990).

60. *See, e.g.*, *United States v. Bordeaux*, 400 F.3d 548, 553–54 (8th Cir. 2005) (post-*Crawford*) (also noting confrontation via a two-way closed circuit television is not constitutionally equivalent to face-to-face confrontation); *United States v. Turning Bear*, 357 F.3d 730, 736 (8th Cir. 2004) (pre-*Crawford*).

regulation of testimony, as well as who can establish it.<sup>61</sup> Some judges have permitted prosecutors to make the representation concerning trauma, although one well-respected commentator has recommended that the judge talk to the child.<sup>62</sup> Pre-*Crawford*, Justices Scalia and Thomas have dissented from the denial of certiorari in two cases involving interpretation of *Craig* that they characterized as "confrontation-via-TV."<sup>63</sup> In one, a fifteen-year-old teenager indicated she was not afraid of the defendant, but "can't be near him."<sup>64</sup> The other protected a child whose mother and doctor indicated that the six-year-old wanted to testify, and because the testimony would be limited to another girl's abuse, not her own, neither expected the child to suffer additional emotional distress.<sup>65</sup>

Since *Davis* has approved an approach to confrontation based on "primary purpose,"<sup>66</sup> this standard should also satisfy *Craig* when the child's fear is "primarily" based on testifying in front of the defendant. Ultimately, I do not expect *Craig*'s balancing approach to be vanquished; not only because it can be distinguished as regulating in-court testimony, rather than out-of-court statements, but also because it appears to embody a forfeiture approach appropriate to children. In other words, the standard basically acts as a presumption that the child's fear is caused by the defendant, based on the reality that a large proportion of molested children are told not to reveal their abuse and that these children are effectively powerless in the presence of an adult, particularly, as Professor Lyon suggests, an adult who resides at home or is a trusted family member or friend.<sup>67</sup> Thus, *Craig*'s elimination of any evidentiary requirement that the defendant actually threatened the child not to testify is rationally based.

Ironically, proof of forfeiture in a testimonial context, which requires a showing of acts directed towards witness tampering, would permit the hearsay to be admitted without the child's testimony, completely defeating cross-examination that is essential to the application of *Craig* as well as to the defendant's right to a fair trial. *Craig* is critical because it allows both cross-examination of testimonial statements and the jury's evaluation of children without unduly exposing them to potential trauma.<sup>68</sup> 1

61. See, e.g., *State v. Marlyn J.J.*, 2007 WL 610938, at ¶¶ 46–53 (Wis. Ct. App. Mar. 1, 2007) (testimony of therapist in combination with evidence that child was so frightened at preliminary hearing that she had to be removed from courtroom was sufficient); *State v. Paulson*, 2007 WL 461323, at \*6 (Iowa Ct. App. Feb. 14, 2007) (trained child abuse investigator's conclusion that child would be traumatized by testifying in the presence of the defendant was sufficient).

62. See Jean Montoya, *Lessons from Akiki and Michaels on Shielding Child Witnesses*, 1 PSYCHOL. PUB. POL'Y & L. 340, 342–43, 356–66 (1995).

63. *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).

64. *Danner v. Kentucky*, 525 U.S. 1010, 1010 (1998) (Scalia, J., dissenting), *denying cert. to* 963 S.W.2d 632 (Ky. 1998).

65. *Marx*, 528 U.S. at 1034–38.

66. *Davis v. Washington*, 126 S. Ct. 2266, 2268 (2006).

67. See Lyon & LaMagna, *History of Children's Hearsay*, *supra* note 2.

68. The extent to which children are traumatized by testifying is not settled. See, e.g., 1 JOHN E.B. MYERS, MYERS ON EVIDENCE IN CHILD, DOMESTIC AND ELDER ABUSE CASES § 3.01, at 134–41 (3d ed. 2005) (discussing psychological research); John E.B. Myers, *The Child Sexual Abuse Literature: A Call for Greater Objectivity*, 88 MICH. L. REV. 1709, 1724 (1990)

agree with Professor Lyon that jurors want to see the children on whose hearsay they must rely to convict the defendant. Moreover, prosecutors have difficulty winning cases without them, and some suggest that prosecutors are loath to indict a defendant when the child cannot testify.<sup>69</sup>

The apparent downside to *Craig* is that empirical data appear to suggest that when children are shielded, the jury may find the child less credible, even though their reliability increases.<sup>70</sup> Therefore, in cases applying *Craig*, the prosecution should be permitted to admit expert testimony that shielding does not lower child witness reliability, to counteract this non-intuitive finding. It may be more difficult to argue in favor of expert testimony that shielding enhances credibility, as not sufficiently vetted by *Daubert*,<sup>71</sup> or as improper vouching. However, insinuations by the defense that the child's shielding lowers her credibility should be considered as opening the door for such expertise.

Finally, I think it is doctrinally appropriate to require a two-step process before introducing hearsay of a nontestifying child. In other words, a child should be required to testify via the protections offered by *Craig* before permitting the child's hearsay in absence of his or her testimony. If the prosecution demonstrates that *Craig* would not alleviate the trauma, then the child's statements would be introduced subject to *Crawford* and *Davis*. While *White* might seem at odds with this approach, *Crawford* made clear that *White* is suspect.<sup>72</sup> Certainly, as to testimonial statements, a child who could testify protected by *Craig* should not be considered unavailable, which renders her statements inadmissible, even if forfeiture could be argued. In other words, *Craig* should trump forfeiture if the child can testify when shielded. If the Court expands the definition of testimonial to include many medical and forensic statements as I argue below, shielding under *Craig* would no doubt become more widely demanded by prosecutors to ensure the admissibility of testimonial hearsay.

While I recognize that some prosecutors believe that court proceedings re-traumatize children, the experts in the field do not necessarily agree. Given the protections of shielding and programs to familiarize children with courtroom procedures, if the choice is between letting a dangerous abuser escape without trial or having the child testify, it is the psychologist and/or judge who has talked to the child who should be relied upon to make the final decision in an individual case. Conversely, although I urge the expanded use of *Craig*, care must be taken that statutory schemes enacted by some states do not become a trap for defendants who may lose their right to

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(challenging the stereotype that claims "[f]or most victims, confrontation with the legal system is a second and separate trauma, a process of revictimization"); Gail D. Cecchetti-Whaley, *Note, Children as Witnesses after Maryland v. Craig*, 65 S. CAL. L. REV. 1993 (1992) (surveying psychological literature).

69. John E.B. Myers, Allison D. Redlich, Gail S. Goodman & Lori P. Prizmich, *Jurors' Perceptions of Hearsay in Child Sexual Abuse Cases*, 5 PSYCHOL. PUB. POL'Y & L. 388, 411 (1999) (finding that children testified live in court in each trial studied, which suggested that "prosecutors are reluctant to take child sexual abuse cases to trial unless the victim is available to testify").

70. See Jean Montoya, David Ross & Louise Graham, *Child Witness Policy: Law Interfacing with Social Science*, 65 LAW & CONTEMP. PROBS. 209, 238-39 (2002).

71. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993); see also FED. R. EVID. 702.

72. See *Crawford v. Washington*, 541 U.S. 36, 58 n.8 (2004).

cross-examination through invited error or waiver, such as when they do not specifically ask for the child to be interviewed or testify at trial.<sup>73</sup>

As to nontestimonial statements, while I believe that *Craig* should also be required before admitting the hearsay of a child who does not testify, it is unlikely that this would be mandated under the current confrontation clause approach. However, under a robust view of due process, resort to *Craig* would appear a sensible compromise in keeping with historic concerns about child testimony. Certainly the compulsory process right of the defendant would compel the same result. However, because the child would be called as a defense witness, adverse strategic consequences might occur. For example, the direct would actually be in the form of cross-examination, appearing to the jury as if the child is being intimidated, as well as potentially eliciting evidence that is damaging to the defense. For a number of years, Minnesota has, when requested by the defense, required prosecutors to call available child witnesses in their case-in-chief when child hearsay is being admitted against the defendant.<sup>74</sup> While adoption of this procedure was not constitutionally based, it provides a model that should be more widely enacted.

#### IV. FORFEITURE IN CHILD ABUSE CASES

Forfeiture can also play a direct role in child abuse cases when the evidence establishes the defendant's misconduct. However, tracing the misconduct to the defendant is not always simple when the defendant is a family member, because the child is often pressured not to testify by the non-offending parent, typically the mother. This occurs because the abuse may result in the mother having to make a choice of living with her male intimate and having her child removed from the home, or giving up the male to retain custody of her child. Because the penalties for child abuse are so great, on occasion the family refuses to believe the child. Similarly, children who are old enough to understand the ramifications of making the complaint may recognize at some point that they would rather live at home than be placed in foster care. Another significant forfeiture problem is that the intimidation is not necessarily directed toward not testifying, but rather to keeping the relationship a secret, or preventing original disclosure.<sup>75</sup>

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73. See *Morales v. State*, No. 13-05-188-CR, 2006 WL 3234073 (Tex. App. Nov. 9, 2006) (defendant could have submitted written interrogatories to the unavailable child whose videotape was permitted, or asked for an interview via closed circuit television at time of trial; admission of other videotapes was invited error); accord *Rangel v. State*, 199 S.W.3d 523, 537 (Tex. App. 2006) (defendant had opportunity to effectively cross-examine child through submission of written interrogatories to neutral interrogator after viewing videotaped statements).

74. See *State v. Larson*, 472 N.W.2d 120, 125 (Minn. 1991), cert. denied, 502 U.S. 1071 (1992).

75. See Tom Harbinson, *Using the Crawford v. Washington "Forfeiture by Wrongdoing" Confrontation Clause Exception in Child Abuse Cases*, REASONABLE EFFORTS (Am. Prosecutor's Research Inst., Arlington, Va.), Volume 1, Number 3, 2004, available at [http://www.ndaa-apri.org/publications/newsletters/reasonable\\_efforts\\_volume\\_1\\_number\\_3\\_2004.html](http://www.ndaa-apri.org/publications/newsletters/reasonable_efforts_volume_1_number_3_2004.html).

Most thoughtful commentators are concerned that forfeiture doctrine should not be interpreted so broadly in a child context that it routinely allows testimonial hearsay when the child does not take the stand. However, this concern must be balanced against the possibility that most of the child's statements will be excluded, rendering it virtually impossible to obtain a conviction in many cases. *Craig* may also play a part in resolving this tension. If the child can testify shielded pursuant to *Craig*, then forfeiture should not trump the giving of testimony. If, however, the child would still be traumatized and unable to testify, then the original threats to the child should be presumed to affect the child's inability to testify at trial under a forfeiture rationale even though the demonstrated tampering occurred prior to disclosure. In other words, forfeiture is not simply based on the defendant's choosing a highly vulnerable young child who may be incompetent to testify,<sup>76</sup> but rather on the defendant's actions that were aimed at defeating the judicial system. Indeed, some refusals and recantations occur because the defendant, or those acting with his acquiescence, continue to intimidate the child, who is unwilling to admit that the defendant is responsible.

I have also reconsidered my initial view that if children are too young to meet their truth-telling obligation, the defendant's coercion does not supply a direct link to witness tampering at trial. On further reflection, forfeiture should also apply in this situation because this rationale is not dependent on reliability or waiver, rather on misconduct. Thus, the defendant's instructions not to disclose the abuse supplies the intent necessary to demonstrate eventual witness tampering,<sup>77</sup> and the defendant should not benefit by the fortuity of the child being incompetent.

#### V. OPPORTUNITY FOR CROSS-EXAMINING CHILD WITNESSES

Permitting the child abuse victim to testify, whether shielded or without regard to traditional measures of competency, does not necessarily eliminate the testimonial bar. Courts disagree about the extent to which cross-examination of an incompetent child poses a confrontation problem.<sup>78</sup> Moreover, despite *Owens*<sup>79</sup> and *Green*,<sup>80</sup> which reject confrontation challenges for declarants who testify, defendants have rushed to attack the testimony of children by claiming their opportunity for cross-examination was not adequate. They rely heavily on *United States v. Spotted War Bonnet*,<sup>81</sup> a pre-*Crawford* opinion, finding that if "a child is so young that she cannot be cross-examined at all, or if she is 'simply too young and too frightened to be subjected to a thorough direct or

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76. See *State v. Henderson*, 129 P.3d 646, 655 (Kan. Ct. App. 2006) (rejecting forfeiture where no misconduct was cited, but simply the age of the three-year-old child).

77. See generally James F. Flanagan, *Confrontation, Equity, and the Misnamed Exception for "Forfeiture" by Wrongdoing*, 14 WM. & MARY BILL RTS. J. 1193 (2006).

78. Compare *Walters v. McCormick*, 122 F.3d 1172, 1175 (9th Cir. 1997) (pre-*Crawford*; the "[i]ncapacity to understand the duty to testify truthfully does not automatically offend the Confrontation Clause when the witness in question is a young child") with *Purvis v. State*, 829 N.E.2d 572, 581 (2005) (developmentally disabled child who was unable to appreciate the obligation to testify truthfully could not be effectively cross-examined for *Crawford* purposes concerning testimonial statements; upholding the admission of nontestimonial statements).

79. *United States v. Owens*, 484 U.S. 554 (1988).

80. *California v. Green*, 399 U.S. 149 (1970).

81. 933 F.2d 1471 (8th Cir. 1991).

cross-examination[.]' the fact that she is physically present in the courtroom should not, in and of itself, satisfy the demands of the Clause."<sup>82</sup> Most courts reject claims that imperfect memory<sup>83</sup> or failure to respond to a handful of questions<sup>84</sup> renders a child unavailable. A few decisions go further, finding a child available who did not remember what she told adults or even what the defendant did to her, but where she said she told the adults the truth, which permitted the admission of her videotaped statements to a social worker and deputy that included graphic descriptions of the abuse.<sup>85</sup> Moreover, forgoing cross-examination about specifics of the alleged abuse after a child fails to respond on direct to the details of the abuse can result in a waiver of the cross-examination issue,<sup>86</sup> as can failing to recall a child after her videotaped statement is introduced.<sup>87</sup>

Yet, several post-*Crawford* cases have found Confrontation Clause violations despite the child's presence at trial for reasons including improper limitation of cross-examination.<sup>88</sup> For example, *In re T.T.*<sup>89</sup> found a child was unavailable to testify after she froze on the stand when asked to recount the alleged incidents of abuse.<sup>90</sup> Although the child responded to general questions from the prosecutor about her family and school, and explained how she came to be at the alleged perpetrator's house on the dates of the alleged assaults, when questions became more specific regarding the assaults, she stopped answering questions, even after a recess was taken so that her mother could console her.<sup>91</sup> Similarly, in *People v. Osio*,<sup>92</sup> the child's preliminary hearing testimony to only one of seven counts provided insufficient opportunity for

82. *Id.* at 1474 (quoting *United States v. Dorian*, 803 F.2d 1439, 1446 (8th Cir. 1986)).

83. *People v. Harless*, 22 Cal. Rptr. 3d 625, 637 (Cal. Ct. App. 2004) (partial failure did not prevent witness from explaining prior statements or preclude assessment of her demeanor by jury); *State v. McClanahan*, No. 50866-1-I, 2004 WL 723283, at \*4 (Wash. Ct. App. Apr. 5, 2004) (second grader subjected to substantial cross-examination).

84. *State v. McKinney*, 699 N.W.2d 471, 480 (S.D. 2005).

85. *State v. Yanez*, No. A04-276, 2005 WL 894649, at \*3 (Minn. Ct. App. Apr. 19, 2005); see also *State v. Price*, 110 P.3d 1171, 1175 (Wash. Ct. App. 2005) (admitting child's statements made to her mother and a detective despite child's testimony that she remembered neither the abuse nor making the statements).

86. See *People v. Sharp*, 825 N.E.2d 706, 713 (Ill. App. Ct. 2005).

87. See *Brown v. State*, No. CACR 05-1409, 2006 WL 2501416 (Ark. Ct. App. Aug. 30, 2006); *Penny v. State*, No. 2005-KA-01543-COA, 2006 WL 3593220 (Miss. Ct. App. Dec. 12, 2006) (both finding waiver).

88. *E.g.*, *People v. Couturier*, No. 252175, 2005 WL 323680 at \*3 (Mich. Ct. App. Feb. 10, 2005) (limiting the cross-examination of a child witness at trial concerning questions about notes she wrote to the defendant after the alleged abuse saying she loved and missed him violated the defendant's right of confrontation where there was no corroborating physical evidence or witness testimony), *vacated*, 704 N.W.2d 463 (Mich. 2005), *rev'd*, 2005 WL 3439824 (Mich. Ct. App. Dec. 15, 2005) (court stated it believed error had been preserved and was reversible, but under plain error standard mandated by the Michigan Supreme Court, it affirmed the judgment).

89. 815 N.E.2d 789 (Ill. App. Ct. 2004).

90. *Id.* at 797-98.

91. *Id.*

92. No. H026953, 2005 WL 1231402 (Cal. Ct. App. May 25, 2005).

cross-examination.<sup>93</sup> Indeed, care must be taken that preliminary hearings or other pretrial depositions or procedures provide an adequate opportunity for cross-examination when the child does not testify at trial.<sup>94</sup>

Given the intensive fact-driven nature of such appeals, it is difficult to predict how broadly the opportunity for cross-examination will be interpreted concerning children. I agree with Professor Mosteller that we must accommodate these less-than-perfect witnesses.<sup>95</sup> Both a total lack of recall, and a feigned lack of recall, were sufficient for confrontation purposes in *Owens* and *Green* respectively. The rationale that the jury could assess credibility and that the witness was impeached by lack of recollection is the same whether the witness is an adult or a child. Therefore, unlike *State v. Brigman*,<sup>96</sup> where young children were found unavailable where they remembered telling their foster parents what the defendant had done, but not what happened, their lack of memory should not render them unavailable in the absence of some other bar to competency.<sup>97</sup> In other words, children should not be disadvantaged by a higher standard than an adult would be required to meet. Thus, the appropriate judicial response is found in *State v. Carothers*,<sup>98</sup> where the court noted that although the child may not have been able to repeat exactly what she told the social worker, police officers, or doctors, "she did remember speaking to them and responded that she remembered telling . . . 'the truth.'"<sup>99</sup>

Likewise, it is wrong to declare a child unavailable simply because of her lack of memory, resulting in the appellate court reversing because of the admission of her forensic interview, when there is no clear indication of her incompetency.<sup>100</sup> *Bockting v. Bayer*<sup>101</sup> raised the interesting question of whether a child must take the stand to testify to lack of memory. *Bockting* held that admission of a child's hearsay statement to a detective warranted habeas relief where the statement was critical in view of the victim's testimony at the preliminary hearing claiming not to remember what

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93. *Id.* at \*7.

94. *See Remember the Ladies*, *supra* note 8, at 355–58. *Compare* *Howard v. State*, 853 N.E.2d 461, 468–69 (Ind. 2006) (extensive discovery deposition of child provided sufficient prior opportunity to cross-examine child) *with* *State v. Noah*, No. 91353, 2006 WL 1976505 at \*1 (Kan. Ct. App. July 14, 2006) (brief preliminary hearing did not provide sufficient prior opportunity to cross-examine child), *review granted*, Dec. 19, 2006.

95. *See* Mosteller, *A Little Child Shall Lead Them*, *supra* note 1, at 990 & n.283.

96. 632 S.E.2d 498 (N.C. Ct. App. 2006).

97. *Id.* at 506. In *Brigman*, given that the victims were two years old, their ability to discern the truth may have been an issue, but it was not discussed and the children clearly communicated with the judge at the hearing. The court admitted their statements under the dubious rationale that a reasonable child under three years of age would not know that his statements might later be used at trial. *Id.*

98. 724 N.W.2d 610 (S.D. 2006).

99. *Id.* at 618.

100. *See* *State v. Blue*, 717 N.W.2d 558, 560, 565 (N.D. 2006) (finding a child's mere presence at preliminary hearing not sufficient opportunity for cross-examination, where child shook her head to answer questions, and no questions were asked by defendant; trial judge declared her unavailable due to lack of memory).

101. 399 F.3d 1010, *amended by* 408 F.3d 1127 (9th Cir. 2005), *rev'd on other grounds sub nom.* *Whorton v. Bockting*, 127 S. Ct. 1173, 1177 (2007).

happened.<sup>102</sup> However, the Supreme Court recently reversed on the ground that *Crawford* is not retroactive,<sup>103</sup> not resolving the underlying issue in cases reviewed on direct appeal. Obviously, the multiple variations of how this issue is raised will impact the ability to provide uniform guidance, but generally courts should be generous in finding competency, and applying *Owens*.

## VI. MEDICAL EXCEPTIONS AND MULTIDISCIPLINARY FORENSIC TEAMS

*Crawford* appears to doom the use of multidisciplinary teams in child abuse as a way of introducing statements of children who do not testify. This approach has been encouraged by the Department of Justice for the last ten years as a way to include "[s]ocial workers, physicians, therapists, prosecutors, judges, and police officers"<sup>104</sup> to limit the amount of questioning of children and encourage their appropriate questioning. More than forty states have legislation concerning joint investigation and cooperation between law enforcement and social services and authorizing multidisciplinary teams.<sup>105</sup>

Such teams have been instrumental in improving the skills of interviewers and reducing the number of interviews.<sup>106</sup> Now *Crawford* has turned these best practices into a textbook for creating testimonial statements when the child does not testify. As Professor Mosteller suggested in his oral presentation at the Association of American Law Schools (AALS), merely using the word forensic ensures finding a statement or videotaped interview is testimonial.<sup>107</sup> While a few outlying cases treat some videotaped statements as given primarily for nonprosecutorial purposes,<sup>108</sup> most agree with *United States v. Bordeaux*<sup>109</sup> that because the statements may also have "a medical purpose does not change the fact that they were testimonial, because *Crawford* does not indicate, and logic does not dictate, that multipurpose statements cannot be

102. 399 F.3d at 1022.

103. *Bockting*, 127 S. Ct. at 1177.

104. OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, LAW ENFORCEMENT RESPONSE TO CHILD ABUSE 3 (2d prtg. 2001), available at <http://www.ncjrs.gov/pdffiles/162425.pdf>.

105. Nat'l Dist. Attorneys Ass'n, Legislation Mandating or Authorizing the Creation of Multidisciplinary/Multi-Agency Child Protection Teams (Nov. 5, 2004), [http://www.ndaa-apri.org/pdf/statutes\\_legislation\\_mandating\\_multidisciplinary\\_teams\\_2004.pdf](http://www.ndaa-apri.org/pdf/statutes_legislation_mandating_multidisciplinary_teams_2004.pdf).

106. See, e.g., John E.B. Myers, Karen J. Saywitz & Gail S. Goodman, *Psychological Research on Children as Witnesses: Practical Implications for Forensic Interviews and Courtroom Testimony*, 28 PAC. L.J. 3, 17 (1996).

107. See Robert P. Mosteller, Address at the Association of American Law Schools Annual Meeting Symposium: Children as Witnesses: Competence, Hearsay, and Confrontation (Jan. 4, 2007), available at <http://www3.cali.org/aals07/mp3/AALS%202007%20Children%20and%20Evidence%20Law%2020070104.mp3>.

108. See *State v. Scacchetti*, 711 N.W.2d 508, 515 (Minn. 2006) (pre-*Davis*; holding pediatric nurse's purpose in evaluating victim was to assess her medical condition, and mere fact that nurse might be called to testify did not transform medical purpose of assessments into a prosecutorial purpose); see also *State v. Bobadilla*, 709 N.W.2d 243, 254–55 (Minn. 2006) (avoiding multiple interviews is a critical concern; statutory scheme requiring taping protects health and welfare of children).

109. 400 F.3d 548 (8th Cir. 2005).

testimonial.”<sup>110</sup> In other words, the focus is on whether law enforcement is its primary motivation.<sup>111</sup>

Post-*Davis*, more courts rely on the “primary purpose” of the interview. For example, in *State v. Justus*,<sup>112</sup> the Supreme Court of Missouri held a child’s statements were testimonial when made to a child investigator for the division of family services, and a social worker for a children’s advocacy center who videotaped the interview.<sup>113</sup> The court found the statements were made in a formal setting, that the four-year-old child was aware the statements could be used against her father, and that the primary purpose was to establish or prove past events, even though another purpose of the interrogations was to assist the child.<sup>114</sup> Although the mother and grandmother also testified to the statements, the court did not find the error harmless, and reversed the conviction.<sup>115</sup> Similarly, *State v. Pitt*<sup>116</sup> found plain error where the trial judge admitted a videotaped interview taken at a county child advocacy center for the purpose of furthering a police investigation, or in the words they quoted from *Davis*, “their primary purpose was to ‘establish or prove past events potentially relevant to later criminal prosecution.’”<sup>117</sup>

Professor Mosteller has thoroughly reviewed all of the existing post-*Crawford* cases concerning statements to medical personnel, finding remarkable consistency in holdings by lower courts, once the categories are sufficiently parsed to take account of the role of law enforcement in obtaining the statements.<sup>118</sup> In other words, while some courts find statements to social workers or medical personnel in child advocacy centers to be testimonial, most statements to medical personnel are admitted as nontestimonial, even on occasion, statements to nurse practitioners in units whose mission is to assist law enforcement.<sup>119</sup> Some courts stress that “[t]he key to the inquiry is whether the examination and questioning were for a ‘diagnostic purpose’ and whether the ‘statement was the by-product of substantive medical activity.’”<sup>120</sup> Under this

110. *Id.* at 556.

111. *See id.* (forensic interviews are connected with courtroom use; questioning is formal for law enforcement purposes, despite its multipurpose use for medical assistance).

112. 205 S.W.3d 872 (Mo. 2006) (en banc).

113. *Id.* at 874.

114. *Id.* at 880–81.

115. *Id.* at 881.

116. 147 P.3d 940 (Or. Ct. App. 2006).

117. *Id.* at 945 (quoting *Davis v. Washington*, 126 S. Ct. 2266, 2273 (2006)).

118. *See* Mosteller, *A Little Child Shall Lead Them*, *supra* note 1, at 944–65; *see also* *Remember the Ladies*, *supra* note 8, at 377–83.

119. *Compare* *State v. Stahl*, 855 N.E.2d 834, 844 (Ohio 2006) (statements made by adult rape victim to nurse practitioner during an emergency-room examination at unit of hospital specializing in treating sexual assault victims, in which victim identified defendant as her assailant, were not testimonial despite fact that unit’s mission statement listed one of its primary purposes as assisting law enforcement, since this was secondary to care of its patients) *with* *State v. Krasky*, 721 N.W.2d 916, 922 (Minn. Ct. App. 2006) (rejecting statement to nurse practitioner when child’s health and welfare are no longer at risk and the interview investigates past events).

120. *State v. Kirby*, 908 A.2d 506, 527 (Conn. 2006) (quoting *In re T.T.*, 351 N.E.2d 789, 803 (Ill. App. Ct. 2004)); *see also* Allie Phillips, *Health Care Providers’ Roles After Crawford, Davis & Hammon*, 40 PROSECUTOR 18, 21 (2006) (suggesting doctors emphasize their medical

formulation most statements are deemed nontestimonial,<sup>121</sup> despite the reality that each of the fifty states has enacted mandatory reporting of child abuse laws that affect the medical personnel and social workers that a child would be likely to approach, including a number of states that require any person who suspects abuse to report it to the proper authorities.<sup>122</sup> While many courts have ignored this issue, which I find completely disingenuous, a few judges have started to question why mandatory reporting is not a significant factor in analyzing the nature of the statement.<sup>123</sup>

When the testimonial approach is interpreted restrictively, the result basically duplicates the hearsay routinely admitted pursuant to *White*. Beyond the involvement of medical personnel with law enforcement, which explains much of the variation as to whether statements are testimonial, another distinction that has arisen relates to identifying the perpetrator or attributing fault.<sup>124</sup> I have always questioned why a statement by a child abuse victim, which attributes fault to a member of the victim's immediate household, should be admitted under the medical exception. However, many states view such statements as relevant to the prevention of recurrence of injury to the child.<sup>125</sup> Therefore, I am not troubled that such statements would likely be suppressed under a true testimonial approach that focuses on the accusatory nature of statements, although some courts are still admitting identity as nontestimonial.<sup>126</sup> Unlike Professor Mosteller, I would not permit identity under medical exceptions; yet I do agree with him that the answer cannot be based on differing state hearsay policies, but must be decided as a unitary Confrontation Clause issue.<sup>127</sup> To me, identity is essentially a child safety issue that is inextricably intertwined with a law-enforcement purpose dwarfing any nonprosecutorial function.

If mandatory reporting is taken seriously, more traditional symptoms and descriptions of medical problems would be transformed into testimonial statements unless courts view the accusation narrowly to include only the identification of the perpetrator, as opposed to explaining the nature of the injuries caused. The court adopted this distinction in *In re T.T.*,<sup>128</sup> which found statements to be nontestimonial where they did not accuse or identify the perpetrator of the assault, such as the child's explanation of how she was penetrated, descriptions of the pain, and the offender's use

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services to children when testifying).

121. See *State v. Slater*, 908 A.2d 1097, 1106–07 (Conn. 2006) (adult victim; surveys case-law); see also *Remember the Ladies*, *supra* note 8, at 377–79.

122. NAT'L CLEARINGHOUSE ON CHILD ABUSE & NEGLECT INFO., U.S. DEP'T OF HEALTH & HUMAN SERVS., CURRENT TRENDS IN CHILD MALTREATMENT REPORTING LAWS 1 (2002).

123. See, e.g., *State v. Hosty*, 944 So. 2d 255, 269–70 (Fla. 2006) (Quince, J., dissenting from holding that statements to teacher were not testimonial because Florida teachers are legally obligated to report any crimes that occur when students are under the district school board's jurisdiction).

124. See *Slater*, 908 A.2d at 1106–07 (discussing case-law).

125. *State v. Sims*, 890 P.2d 521, 523 (Wash. Ct. App. 1995); *Blake v. State*, 933 P.2d 474, 477 n.2 (Wyo. 1997) (“[A]n overwhelming majority of jurisdictions, including at least thirty-two states and four federal circuits, allow into evidence statements regarding the identity of the perpetrator in child physical or sexual assault cases.”).

126. See, e.g., *United States v. Peneaux*, 432 F.3d 882, 896 (8th Cir. 2005) (identification admitted; “Where statements are made to a physician seeking to give medical aid in form of diagnosis or treatment, they are presumptively nontestimonial.”).

127. See Mosteller, *A Little Child Shall Lead Them*, *supra* note 1.

128. 815 N.E.2d 789, 804 (Ill. App. Ct. 2004).

of a lubricant. While I would expect the defense bar to argue that statements to all mandatory reporters are testimonial, an absolute ban on all statements made to medical personnel concerning child abuse would be quite troubling. Looking to the nature of the statement appears more in keeping with *Davis* when the physician is not part of a prosecutorial forensic team or otherwise motivated to obtain an accusatory statement.

## VII. OTHER STATEMENTS TO PRIVATE INDIVIDUALS

So far, the Court has rejected an accusatorial approach, which would be more likely to make statements to private individuals testimonial. Lower courts agree. For example, *People v. R.F.*<sup>129</sup> issued a blanket holding that statements of a child to family members are not testimonial.<sup>130</sup> Similarly, in *People v. Griffin*, the California Supreme Court noted that a child victim's statements to a friend at school were not testimonial.<sup>131</sup> *Purvis v. State*<sup>132</sup> found that the fact that parents turn over information about crimes to the police "does not transform their interactions with their children into police investigations."<sup>133</sup> Moreover, foster parents have not been considered agents of the state for purposes of determining if a statement is testimonial.<sup>134</sup> Given the tendency of many courts to treat statements to private individuals as nontestimonial, a significant amount of child hearsay will still be admissible because family members are typically the ones to whom abuse is originally disclosed, making the question of harmless error for duplicative information a major issue. This tendency also raises the issue of whether *Wright* requires a reliability check for statements admitted under child hearsay or residual exceptions, which I have argued elsewhere that it should.<sup>135</sup>

## CONCLUSION

Advocates on behalf of abused children must adjust to the testimonial world, rather than fighting it by strained interpretations that generally lower their credibility when making claims that courts are more likely to accept. The focus should be on using *Craig* to allow more children to testify, coupled with a concerted effort both to educate

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129. 825 N.E.2d 287 (Ill. App. Ct. 2005).

130. *Id.* at 295; *see also* *State v. Aaron L.*, 865 A.2d 1135, 1146 n.21 (Conn. 2005) (finding a statement of a two-and-a-half-year-old victim to mother was not testimonial); *Herrera-Vega v. State*, 888 So. 2d 66, 69 (Fla. Dist. Ct. App. 2004) (finding a spontaneous statement of three-year-old child to mother was not testimonial, nor was repetition of that statement to father minutes later).

131. 93 P.3d 344, 372 n.19 (Cal. 2004).

132. 829 N.E.2d 572 (Ind. Ct. App. 2005), *cert. denied*, 126 S. Ct. 1580 (2006).

133. *Id.* at 579; *see also* *People v. Learn*, No. 2-04-1169, 2007 WL 724835 at \*14 (Ill. App. Ct. 2007) (special concurrence of Presiding Justice Grometer suggested reasonable parents face an ongoing emergency in learning the identity of the abuser so that they can deny access to the child and protect their wellbeing).

134. *United States v. Peneaux*, 432 F.3d 882, 896 (8th Cir. 2005), *cert. denied*, 127 S.Ct. 42 (2006).

135. *Remember the Ladies*, *supra* note 8, at 320–25; *Domestic Violence Cases*, *supra* note 26.

lawyers and judges about how to appropriately interact with children, and to make children comfortable to testify in a courtroom setting.

