THROWING A TOY WRENCH IN THE "GREATEST LEGAL ENGINE": CHILD WITNESSES AND THE CONFRONTATION CLAUSE

I. INTRODUCTION

Cross-examination of witnesses has often been called the "greatest legal engine ever invented for the discovery of truth."[1] Enshrined in the Confrontation Clause of the Sixth Amendment,[2] this most basic feature of an adversarial legal system guarantees criminal defendants the right to have the prosecution's witnesses testify in open court and the opportunity to question said witnesses in front of the jury.[3] Cross-examination is premised on the idea that face-to-face confrontation in open court between these witnesses and the defendant provides the strongest assurance of accurate testimony and, consequently, of protecting defendants from unjust convictions.[4] Through cross-examination, a defendant can introduce facts from the witness not raised on direct examination and challenge the credibility of that witness, both of which are relevant to a jury's determination of guilt.[5] In this way, cross-examination facilitates the fact-finding purpose of criminal trials. The importance of this right to the United States criminal justice system cannot be questioned.[6]

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1. JOHN HENRY WIGMORE, 5 EVIDENCE IN TRIALS AT COMMON LAW, § 1367 (James H. Chabourn ed., Little, Brown & Co. 1974); Lilly v. Virginia, 527 U.S. 116, 124 (1999) (quoting California v. Green, 399 U.S. 149, 158 (1970)) (describing cross-examination of witnesses as "the 'greatest legal engine ever invented for the discovery of truth.'").

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

3. Dowdell v. United States, 221 U.S. 325, 330 (1911) ("[The Confrontation Clause] intends to secure the accused in the right to be tried, so far as facts provable by witnesses are concerned, by only such witnesses as meet him face to face at the trial, who give their testimony in his presence, and give to the accused an opportunity of cross-examination.").

4. Mattox v. United States, 156 U.S. 237, 243 (1895) ("There is doubtless reason for saying that the accused should never lose the benefit of [personal examination and cross-examination of the witness] . . . and that, if notes of [the witness's] testimony are permitted to be read, [the accused] is deprived of the advantage of that personal presence of the witness before the jury which the law has designed for his protection.").

5. *Id.* at 242–43 ("The primary object of the constitutional provision . . . in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.").

6. *See* Pointer v. Texas, 380 U.S. 400, 405 (1965) ("There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.").

The premise underlying this "greatest legal engine" is challenged, however, when children are the "witnesses against"[7] the defendant. Social science and psychological research in recent decades suggest that cross-examination of child witnesses could actually interfere with the discovery of truth. A lesser capacity for recalling past events, a lack of understanding of the criminal justice system, and the trauma of testifying in court all raise concerns about the accuracy of child testimony compared to that of adults.[8] Of perhaps the greatest concern, research continually shows that children can be highly suggestible,[9] making leading questions—a common tactic during cross-examination—particularly dangerous in the case of child witnesses. While cross-examination can be used to elicit the truth from adversary witnesses, the same suggestive techniques could manipulate vulnerable children to testify to just the opposite.[10]

This Note explores this contradiction: the Confrontation Clause, constitutionalizing the right of cross-examination to ensure that convictions are based solely on accurate and reliable testimony, requires, if read literally, that child witnesses submit to a procedure which could undermine that very purpose.[11] The history and purpose of the Confrontation Clause suggest that cross-examination is not required in those circumstances. In the case of child witnesses, modern Confrontation Clause jurisprudence should take into account public policy concerns regarding the development of children and permit the admission of hearsay—testimony regarding a child's statements from someone other than the child—where cross-examination would not advance the fact-

7. U.S. CONST. amend. VI.

8. *See infra* Part III.B–E.

9. This Note refers to the term "suggestibility" as the quality of being more easily influenced and more inclined to accept what another says as true. For a more in-depth discussion of suggestibility in children, see *infra* Part III.C.

10. Professor Frank Vandervort has astutely pointed out that John Henry Wigmore, originator of the "greatest legal engine" phrase, himself recognized the inherent dangers of cross-examination. Frank E. Vandervort, *A Search for the Truth or Trial by Ordeal: When Prosecutors Cross-Examine Adolescents How Should Courts Respond?*, 16 WIDENER L. REV. 335, 335 (2010). Following his famous quote, Wigmore wrote, "A lawyer can do anything with cross-examination . . . . He may, it is true, do more than he ought to do; he . . . may make the truth appear like falsehood." WIGMORE, *supra* note 1, § 1367, at 32 (quoted in Vandervort, *supra*, at 335).

11. Many scholars have explored how child witnesses may not produce reliable answers when subjected to cross-examination or suggestive questioning techniques. *See infra* Part III.B–E. In particular, Professor Vandervort's article discussing the use of suggestive or aggressive cross-examination techniques by prosecutors on adolescent defense witnesses provides a particularly helpful background for this topic. *See generally* Vandervort, *supra* note 10. This Note attempts to situate this and similar research within the context of the Confrontation Clause and argues that the Constitution does not absolutely require confrontation in instances where the testimony elicited would not be reliable.

finding goals of a criminal trial. In short, children should not be treated as adults for purposes of confrontation. At the same time, this Note does not propose doing away with cross-examination of child witnesses altogether and should not be read as minimizing the importance of cross-examination to American criminal justice. However, it is important to recognize the oft-documented risks associated with children undergoing cross-examination. Amidst this backdrop, this Note makes the modest claim that the Constitution does not necessarily impose a categorical requirement that child witnesses, just as adults, testify and be subject to cross-examination.

This Note starts, in Part II, by discussing the history, purpose, and scope of the constitutional right of confrontation. Particular attention is given to the longstanding purpose of the Confrontation Clause: ensuring the reliability of evidence put before the trier of fact. In 2004, the Supreme Court decided *Crawford v. Washington*,[12] which represented a momentous change in Confrontation Clause analysis. But while the Clause's jurisprudence has shifted, its underlying purpose has remained the same. Part III begins with a brief history of its own—that of the use of child witnesses during and since the adoption of the Sixth Amendment. This survey shows that, throughout United States history, courts have almost always treated children as exceptional. This Part ends with child witnesses today and what psychological research tells us about the validity of child testimony under the rigors of cross-examination. Part IV explores the treatment of children in state courts before and after *Crawford* and shows that, despite much scholarship devoted to the contrary, children's out-of-court statements, just as those by adults, are generally barred under the Supreme Court's new rule. Part V makes the argument that the Confrontation Clause, and the Constitution in general, does not require strict enforcement where its purpose would be undermined. The difficult balance to be struck between the value of cross-examination and risks of confronting child witnesses is raised, and other practical solutions to this problem are also explored. Part VI concludes.

II. THE CONSTITUTIONAL RIGHT OF CONFRONTATION

An initial discussion of the historical purpose and scope of the Confrontation Clause serves two purposes. First, this history demonstrates that the longstanding, recognized purpose of the Confrontation Clause is to ensure the reliability of evidence before the trier of fact in criminal

12. 541 U.S. 36 (2004).

proceedings. Despite the Supreme Court's jurisprudential shift—from treating the Confrontation Clause as a substantive guarantee to merely a procedural one—in *Crawford v. Washington*, this underlying purpose remains the same. Second, rooted in this traditional purpose is the idea that the constitutional right of confrontation may give way to overriding concerns of public policy. The lessons of this history are that the Confrontation Clause has never been read to categorically require confrontation in all cases and the Clause's requirements should be determined in light of its underlying purpose.

A. The History and Purpose of the Confrontation Clause

Justice Harlan famously wrote that the Confrontation Clause "comes to us on faded parchment."[13] What Justice Harlan meant, and what subsequent justices and scholars have echoed, is that the history of the Confrontation Clause provides little insight into its meaning.[14] Neither the recorded debates at the Constitutional Convention,[15] nor other historical documents from the Framing period,[16] provide much guidance. Despite this dearth of historical evidence, the Supreme Court—most recently in *Crawford* itself—has generally traced the roots of the Confrontation Clause to English common law. In particular, the American right of confrontation emerged in response to the civil-law method of deposing witnesses ex parte before trial and admitting affidavits of their statements in lieu of live testimony.[17] Under this school of thought, the Sixth

13. California v. Green, 399 U.S. 149, 174 (1970) (Harlan, J., concurring).

14. *See* Dutton v. Evans, 400 U.S. 74, 95 (1970) (Harlan, J., concurring in result); *Green*, 399 U.S. at 179 (Harlan, J., concurring); White v. Illinois, 502 U.S. 346, 361–62 (1992) (Thomas, J., concurring).

15. Carol A. Chase, *The Five Faces of the Confrontation Clause*, 40 HOUS. L. REV. 1003, 1004–05 (2003) (concluding that the Confrontation Clause was only "briefly discussed" prior to its adoption based on records of the Convention).

16. Randolph N. Jonakait, *The Origins of the Confrontation Clause: An Alternative History*, 27 RUTGERS L.J. 77, 77 (1995); Roger W. Kirst, *Does* Crawford *Provide a Stable Foundation for Confrontation Doctrine?*, 71 BROOK. L. REV. 35, 35–40 (2005).

17. *Crawford*, 541 U.S. at 50 ("[T]he principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused."); *Green*, 399 U.S. at 156 ("[T]he particular vice that gave impetus to the confrontation claim was the practice of trying defendants on 'evidence' which consisted solely of *ex parte* affidavits or depositions secured by the examining magistrates, thus denying the defendant the opportunity to challenge his accuser in a face-to-face encounter in front of the trier of fact."); Mattox v. United States, 156 U.S. 237, 242 (1895) ("The primary object of the constitutional provision in question was to prevent depositions or *ex parte* affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness . . . .").

Amendment incorporated English common law as it existed at the writing of the Bill of Rights and was intended to ensure defendants had a right of confrontation for certain prosecution witnesses.[18] Still, this historical account as a basis for Confrontation Clause jurisprudence is not without critics and detractors.[19]

Historical ambiguity aside, the Supreme Court has recognized that the underlying purpose of the Confrontation Clause is to ensure the reliability of evidence before the trier of fact in criminal trials. The right of confrontation does so in two ways.[20] First, confrontation serves a functional purpose: ensuring the accuracy of the fact-finding process and protecting criminal defendants from unjust convictions.[21] The Supreme Court has long documented the practical benefits of confrontation:

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18. Justice Scalia's majority opinion in *Crawford* provides the most succinct account of this history. *See Crawford*, 541 U.S. at 43–50. Of note, the majority in that case asserted that the right of confrontation "is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding." *Id.* at 54; *see also Mattox*, 156 U.S. at 243 ("We are bound to interpret the constitution in light of the law as it existed at the time it was adopted . . . ."). While the premise that the Sixth Amendment be read in reference to Framing-era law is fairly noncontroversial, the implications of this premise are much less so. *See infra* note 27.

19. Numerous historians and constitutional scholars have criticized the history outlined in *Crawford*. *See, e.g.*, Thomas Y. Davies, *Revisiting the Fictional Originalism in* Crawford*'s "Cross-Examination Rule": A Reply to Mr. Kry*, 72 BROOK. L. REV. 557 (2007) (arguing that framing-era evidence law focused on oath, not hearsay, for admissibility); 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, 117–18 (2005) (criticizing some cases relied upon by the majority in *Crawford*); Jonakait, *supra* note 16, at 81 (arguing that the Confrontation Clause constitutionalized the adversarial procedure developing in the states following the American Revolution, not English common law); Randolph N. Jonakait, *The Too-Easy Historical Assumptions of* Crawford v. Washington, 71 BROOK. L. REV. 219 (2005) (rejecting idea that English common law had the right of confrontation at time Sixth Amendment adopted); Kirst, *supra* note 16, at 38–39 (same). Even other Justices on the Supreme Court have taken issue with Justice Scalia's historical analysis. *See Crawford*, 541 U.S. at 69–73 (Rehnquist, C.J., concurring); *White*, 502 U.S. at 359–66 (Thomas, J., concurring); *Green*, 399 U.S. at 175–79 (Harlan, J., concurring). Whether these criticisms are meritorious is outside the scope of this note. For purposes of this discussion, this debate is important simply to show that the current Confrontation Clause standard set forth in *Crawford* is far from a foregone conclusion. Moreover, disagreement on a proper historical account of the right of confrontation adds weight to the conclusion that courts should look to the overall purpose of the Confrontation Clause as a primary source of interpretation.

20. The Supreme Court has recognized two purposes of confrontation: one functional and other symbolic. Barbara Brook Snyder, *Defining the Contours of Unavailability and Reliability for the Confrontation Clause*, 22 CAP. U. L. REV. 189, 190 (1993).

21. *See, e.g.*, Kentucky v. Stincer, 482 U.S. 730, 737 (1987) ("The right to cross-examination, protected by the Confrontation Clause, thus is essentially a "functional" right designed to promote the reliability in the truth-finding functions of a criminal trial."); Ohio v. Roberts, 448 U.S. 56, 65 (1980) (referring to the Confrontation Clause's "underlying purpose to augment accuracy in the factfinding process by ensuring the defendant an effective means to test adverse evidence"); Dutton v. Evans, 400 U.S. 74, 89 (1970) ("The decisions of this Court make it clear that the mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials . . . ."); Dowdell v. United States, 221 U.S. 325, 330 (1911) ("[The Confrontation Clause] was

> Confrontation: (1) insures that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the 'greatest legal engine ever invented for the discovery of truth'; (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.[22]

In theory, witnesses are more likely to testify truthfully—and jurors better able to judge the truthfulness of witnesses—if they are required to testify in court, under oath, and in front of the jury and defendant. Cross-examination allows defendants to sift the conscience of witnesses, expose weaknesses in their testimony, and pose questions unasked on direct examination.[23] In short, confrontation advances the goals of the criminal process itself: discovering the truth and accurately determining the innocence or guilt of criminal defendants. Second, the Confrontation Clause serves the symbolic purpose of ensuring seemingly fair and even-handed criminal prosecutions.[24] Permitting confrontation of prosecution witnesses allows defendants an opportunity to fully defend against their charges and avoids the impression that defendants are convicted through the secrecy and conniving of the government. These twin goals demonstrate that the primary concern of the Confrontation Clause is the reliability of evidence.[25] *Crawford* and its progeny have not altered that focus.[26]

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intended to . . . preserve the right of the accused to test the recollection of the witness in the exercise of the right of cross-examination.").

22. *Green*, 399 U.S. at 158.

23. *See, e.g.*, *Stincer*, 482 U.S. at 736 ("The opportunity for cross-examination, protected by the Confrontation Clause, is critical for ensuring the integrity of the fact-finding process."); Davis v. Alaska, 415 U.S. 308, 316 (1974) ("Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested.").

24. *See, e.g.*, Coy v. Iowa, 487 U.S. 1012, 1017 (1988) (quoting Pointer v. Texas, 380 U.S. 400, 404 (1965)) ("[T]here is something deep in human nature that regards face-to-face confrontation between accused and accuser as 'essential to a fair trial in a criminal prosecution.'"); Lee v. Illinois, 476 U.S. 530, 540 (1986) ("[T]he right to confront and cross-examine adverse witnesses contributes to the establishment of a system of criminal justice in which the perception as well as the reality of fairness prevails. . . . The Confrontation Clause advances these goals by ensuring that convictions will not be based on charges of unseen and unknown—and hence unchallengeable—individuals.").

25. This is not to say there is unanimous agreement about the purpose of the Confrontation Clause. *See, e.g.*, Jonakait, *supra* note 16, at 82 (proposing that the purpose of the Confrontation Clause was to ensure effective defense advocacy in a developing American adversarial system); Roger C. Park, *Purpose as a Guide to the Interpretation of the Confrontation Clause*, 71 BROOK. L. REV. 297, 298 (2005) (arguing that the Clause's purpose is to prevent state abuse of power via undue influencing of witnesses); *but see* Paul L. Schechtman, *From Reliability to Uncertainty: Difficulties*

B. The Right of Confrontation

Exactly what the right of confrontation guarantees is another source of debate. The muddled history of the Confrontation Clause raises the same problems here.[27] The language of the Clause does little else to clarify its meaning. Tucked amidst other so-called trial rights of the Sixth Amendment, the Clause reads: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[28] Read literally, the Clause says nothing about hearsay. It requires nothing more than for prosecution witnesses who do actually testify to do so in a particular way—in court and subject to cross-examination by the defendant. The Supreme Court, however, has consistently held that the Constitution provides greater protection than this narrow view.[29] On the other hand, the Court has likewise rejected a broad interpretation, which would require all witnesses against the defendant to be present and testify at trial, as too extreme.[30]

The Supreme Court has characterized the Confrontation Clause as creating two substantive rights.[31] First, the Confrontation Clause grants

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Inherent in Interpreting and Applying the New Crawford *Standard*, 71 BROOK. L. REV. 305, 305 (2005) (advocating for reliability to remain the touchstone of Confrontation Clause analysis). Two responses come to mind. First, these additional or alternative purposes of the Confrontation Clause are not necessarily inconsistent with the purpose of reliability. Reliable evidence certainly goes hand-in-hand with ensuring effective criminal defense and creating a check on government prosecution. Second, a century of Supreme Court jurisprudence suggests that, though these goals are relevant, the primary concern of the Confrontation Clause is the reliability of evidence in criminal proceedings. *See supra* notes 21–23.

26. Crawford v. Washington, 541 U.S. 36, 61 (2004) ("To be sure, the Clause's ultimate goal is to ensure reliability of evidence . . . .").

27. *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 J.L. & POL'Y 349, 351–52 (2007) (suggesting that the admissibility of out-of-court statements in Framing-Era courts depended on whether a declarant was sworn and under oath, not whether the statement was hearsay); Randolph N. Jonakait, *The (Futile) Search for a Common Law Right of Confrontation: Beyond* Brasier*'s Irrelevance to (Perhaps) Relevant American Cases*, 15 J.L. & POL'Y 471 (2007) (arguing that the cases relied upon in *Crawford* do not show that there was any general prohibition on hearsay at common law when the Sixth Amendment was adopted).

28. U.S. CONST. amend. VI.

29. *See Crawford*, 541 U.S. at 51; White v. Illinois, 502 U.S. 346, 360 (1992) (Thomas, J., concurring).

30. *See* Ohio v. Roberts, 448 U.S. 56, 63 (1980) ("If one were to read this language literally, it would require, on objection, the exclusion of any statement made by a declarant not present at trial. But, if thus applied, the Clause would abrogate virtually every hearsay exception, a result long rejected as unintended and too extreme.").

31. *See* Pennsylvania v. Ritchie, 480 U.S. 39, 51 (1987) ("The Confrontation Clause provides two types of protections for a criminal defendant: the right physically to face those who testify against him, and the right to conduct cross-examination."); Mattox v. United States, 156 U.S. 237, 242 (1895)

defendants the literal right to confront adverse witnesses—for the witness to be present in court and to testify in front of the defendant and jury.[32] It is this right which is most consistent with the text of the Clause itself.[33] Literal confrontation advances the fact-finding purpose of the criminal process in ways described above—testimony under oath, in the presence of the defendant, and under observation by the fact-finder.[34] But beyond a literal interpretation of the Confrontation Clause, the Supreme Court has long recognized that the Sixth Amendment also guarantees defendants a right to cross-examine said witnesses.[35] This right further fulfills the goals of face-to-face confrontation by allowing defendants the opportunity to test the evidence against them.

Controversy surrounding the Confrontation Clause, however, is less about what confrontation requires but rather when it is required. Of most concern to this Note is whether the Confrontation Clause permits hearsay—testimony from a third party as to the out-of-court statements of a nontestifying witness. As the admission of hearsay necessarily does away with some or all of the elements of confrontation, this issue has been a fundamental question of Confrontation Clause jurisprudence.

C. Roberts *Reliability Doctrine*

For decades before *Crawford*, the Supreme Court conceptualized the Confrontation Clause as a substantive guarantee of the reliability of evidence—more than simply a procedural requirement.[36] The Court

(referring to both "personal examination" and "cross-examination" as rights associated with confrontation).

32. *See* Coy v. Iowa, 487 U.S. 1012, 1016 (1988) ("We have never doubted, therefore, that the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact."); California v. Green, 399 U.S. 149, 157 (1970) ("Our own decisions seem to have recognized at an early date that it is this literal right to "confront" the witness at the time of trial that forms the core of the values furthered by the Confrontation Clause.").

33. *See supra* text accompanying notes 28–29.

34. *See supra* text accompanying note 22.

35. *See* Crawford v. Washington, 541 U.S. 36, 55 (2004); Douglas v. Alabama, 380 U.S. 415, 418 (1965) ("Our cases construing the clause hold that a primary interest secured by it is the right of cross-examination . . . ."); Pointer v. Texas, 380 U.S. 400, 404 (1965) ("It cannot seriously be doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him.").

36. *See* Mancusi v. Stubbs, 408 U.S. 204, 213–14 (1972) (allowing admission of witness testimony from a prior trial because it was sufficiently reliable and the defendant's attorney had an opportunity to cross-examine at that trial); Dutton v. Evans, 400 U.S. 74, 88–89 (1970) (allowing a witness to testify regarding a coconspirator's statements while in prison because they bore indicia of reliability); *Green*, 399 U.S. at 155 (describing the Confrontation Clause and hearsay rules as concerned with the reliability of out-of-court statements).

articulated this view in *Ohio v. Roberts*.[37] Confrontation and cross-examination, according to *Roberts*, were necessary insofar as they ensured that only the most reliable, accurate evidence be used against criminal defendants at trial. If a statement was sufficiently reliable such that cross-examination of a witness was unnecessary, then the Confrontation Clause did not require it.[38] Confrontation was not constitutionally required if two conditions were met.[39] First, the prosecution must "either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant.'"[40] Second, if the declarant was found to be unavailable, an out-of-court statement was admissible "only if it bears adequate 'indicia of reliability.'"[41] *Roberts*'s two-prong test, then, generally tracked modern evidence law;[42] hearsay was inadmissible if the statement was too unreliable. Only then would witnesses be required to testify and submit to cross-examination at trial. In this way, the Confrontation Clause provided a substantive guarantee that only reliable hearsay would be admitted against criminal defendants.

Consistent with this view, the Supreme Court has never held the right of confrontation to be absolute. As far back as *Mattox v. United States*,[43]

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37. 448 U.S. 56 (1980).

38. *See id.* at 64–65 (citations omitted) (internal quotation marks omitted) ("The Court, however, has recognized that competing interests, if closely examined, may warrant dispensing with confrontation at trial. Significantly, every jurisdiction has a strong interest in effective law enforcement, and in the development and precise formulation of the rules of evidence applicable in criminal proceedings.").

39. *Id.* at 65–66.

40. *Id.* at 65. The Court in *United States v. Inadi*, 475 U.S. 387 (1986), and subsequently in *White v. Illinois*, 502 U.S. 346 (1992), limited *Roberts* to its facts and held that unavailability was not an absolute requirement under *Roberts*. Statements falling within a firmly rooted hearsay exception did not require such a finding to be admitted through another witness. *White*, 502 U.S. at 355–57; *Inadi*, 475 U.S. at 396.

41. *Roberts*, 448 U.S. at 66. The Court described two kinds of statements which bore adequate indicia of reliability: statements falling into a "firmly rooted hearsay exception" or those demonstrating "particularized guarantees of trustworthiness." *Id.*

42. The Supreme Court has gone to great lengths to debunk a one-to-one relationship between the Confrontation Clause and hearsay rules. *See, e.g.*, Idaho v. Wright, 497 U.S. 805 (1990) ("Although we have recognized that hearsay rules and the Confrontation Clause are generally designed to protect similar values, we have also been careful not to equate the Confrontation Clause's prohibitions with the general rule prohibiting the admission of hearsay statements."); *Green*, 399 U.S. at 155–56 ("While it may readily be conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions. . . . The converse is equally true: merely because evidence is admitted in violation of a long-established hearsay rule does not lead to the automatic conclusion that confrontation rights have been denied."). Legal historians generally support this distinction as well. *See, e.g.*, Davies, *supra* note 27, at 351–52 (explaining that hearsay rules and exceptions in evidence law developed only after the Sixth Amendment was adopted).

43. 156 U.S. 237 (1895).

one of the first seminal Confrontation Clause decisions, the Court recognized that public policy could trump confrontation rights,[44] and the Court has cited public policy to justify some common law hearsay exceptions as incorporated into the Sixth Amendment.[45] Decisions since have echoed that idea.[46] *Roberts*, itself, was premised on a constitutional "preference for face-to-face confrontation at trial," not a requirement.[47] In sum, Supreme Court decisions on the constitutionality of admitting hearsay without confrontation have supported the premise that the Confrontation Clause countenances policy considerations, particularly where that hearsay is deemed reliable.

A noteworthy example is *Maryland v. Craig*,[48] in which the Court upheld as constitutional the use of closed-circuit television to present the testimony of an alleged child sex abuse victim.[49] The Court in *Craig* ruled that face-to-face confrontation at trial, though a constitutional right under the Sixth Amendment, could be denied where necessary to further an important public policy interest—in this case the protection of child sexual abuse victims from the trauma of testifying.[50] In particular, the Court

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44. *See id.* at 243 ("But general rules of law of this kind, however beneficient in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case.")

45. *See* Dowdell v. United States, 221 U.S. 325, 330 (1911) ("As examples [of exceptions] are cases where the notes of testimony of deceased witness, of which the accused has had the right of cross-examination in a former trial . . . . Documentary evidence to establish collateral facts admissible under the common law, may be admitted."); *Mattox*, 156 U.S. at 243–44 ("We are bound to interpret the Constitution in the light of the law as it existed at the time it was adopted . . . . For instance, there could be nothing more directly contrary to the letter of the provision in question than the admission of dying declarations. . . . [Y]et from time immemorial they have been treated as competent testimony, and no one would have the hardihood at this day to question their admissibility.").

46. *See* Chambers v. Mississippi, 410 U.S. 284, 295 (1973) ("[T]he right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process."); Dutton v. Evans, 400 U.S. 74, 79 (1970).

47. *Roberts*, 448 U.S. at 63.

48. 497 U.S. 836 (1990).

49. *Id.* at 857. In *Craig*, the defendant Sandra Ann Craig was charged with abusing a six-year-old girl who attended a kindergarten center operated by Craig. *Id.* at 840. The prosecution invoked a Maryland statute which allowed a procedure by which a child witness alleged to be the victim of child abuse could testify from a room outside the courtroom via a one-way closed circuit television. *Id.* The child witness, prosecutor, and defense counsel would withdraw to a separate room to conduct the interview while the judge, jury, and defendant viewed the testimony from a video monitor in the courtroom. *Id.* at 841.

50. *Id.* at 850. The Maryland statute required the judge, before allowing the alternative procedure, to make a finding that "testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate." *Id.* at 841. The Supreme Court distinguished the situation in *Craig* from that in *Coy v. Iowa*, 487 U.S. 1012 (1988). In *Coy*, the Court found unconstitutional the placement of a screen between the defendant and child sexual assault victims during testimony. *Id.* at 1022. The children could be interviewed and cross-examined at trial but could not see the defendant nor be seen by the jury. *Id.* The Iowa statute in

found that the child's testimony was sufficiently reliable because only one element of confrontation—testifying in the presence of the defendant—was absent. The child witness was otherwise subject to cross-examination, under oath, and viewable by the jury.[51] *Craig* is important for two reasons. First, the majority in *Craig* recognized that concerns particular to child witnesses were relevant and important to Confrontation Clause analysis. Indeed, the Court, in other areas of constitutional law, has long acknowledged the developmental differences distinguishing children and adults.[52] Second, *Craig* stands for the proposition that the Confrontation Clause must be interpreted "in a manner sensitive to its purposes and sensitive to the necessities of trial and the adversary process."[53] Though *Craig* concerned only the face-to-face element of confrontation,[54] the Court's concerns with the reliability of evidence and problems of child witnesses apply equally to the admission of child hearsay.

D. Crawford *Testimonial Hearsay*

The Supreme Court did not stray from the Confrontation Clause's focus on reliability in *Crawford v. Washington*.[55] However, the Court began to treat the Clause as a procedural, rather than substantive, guarantee:

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question did not require any individualized finding that the witnesses testifying required special protection. *Id.* at 1021. Recognizing that the right to face-to-face confrontation at trial could give way to other important interests, the Court found that the prosecution did not demonstrate any public policy interests at stake and implied that the Iowa statute should require such a showing. *Id.*

51. *Craig*, 497 U.S. at 857.

52. *See, e.g.*, Miller v. Alabama, 132 S. Ct. 2455, 2468–69 (2012) (prohibiting, under the Eighth Amendment, a juvenile sentence of life without the possibility of parole without consideration of mitigating factors such as the juvenile's youth and immaturity); J.D.B. v. North Carolina, 131 S. Ct. 2394, 2403–06 (2011) (finding a child's age relevant to *Miranda* determinations); Graham v. Florida, 560 U.S. 48, 68–69 (2010) (holding that Eighth Amendment precludes a sentence of life without parole for minors who commit nonhomicide offenses); Roper v. Simmons, 543 U.S. 551, 569–70 (2005) (describing the developmental differences between juveniles and adults and, consequently, holding that imposition of the death penalty on all minors is cruel and unusual under the Eighth Amendment); Thompson v. Oklahoma, 487 U.S. 815, 834–35 (1988) (recognizing that "adolescents as a class are less mature and responsible than adults" in deciding that the death penalty was cruel and unusual where the defendant committed the underlying crime at 15 years of age); Eddings v. Oklahoma, 455 U.S. 104, 115–17 (1982) (holding that a state court must consider mitigating evidence regarding a child's age and upbringing before sentencing a 16 year old to death).

53. *Craig*, 497 U.S. at 849.

54. *See* White v. Illinois, 502 U.S. 346, 358 (1992) (drawing a distinction between cases like *Coy* and *Craig*, which concerned the constitutionality of in-court procedures once a witness is testifying, and what the Constitution requires before the introduction of out-of-court statements).

55. 541 U.S. 36 (2004).

> To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined.[56]

Purporting to properly align Confrontation Clause analysis with its history,[57] the *Crawford* decision essentially limited the breadth of the Clause's application but strengthened the depth of its requirements. While *Roberts* applied to all out-of-court statements, *Crawford* confined application of the Confrontation Clause to a new category of statements called testimonial hearsay.[58] At the same time, the Court criticized *Roberts* for leaving the right of confrontation to a judicial determination of reliability.[59] Finding reliability to be overly indeterminate,[60] *Crawford* held that the admission of testimonial hearsay, without the presence and testimony of the witness at trial, is absolutely barred by the Confrontation Clause unless the declarant is unavailable and the defendant had a prior opportunity for cross-examination.[61] In effect, for an out-of-court statement to be used as evidence, the defendant must be afforded some opportunity to cross-examine the witness who made the statement.

Crawford essentially changed the question asked for admitting hearsay in a manner consistent with the Constitution. Rather than weigh the substantive reliability of hearsay in each case, courts determine whether hearsay is testimonial and, if so, categorically require a particular procedure—in-court testimony and confrontation. Grounding this category of hearsay in history, the *Crawford* majority found that the Confrontation Clause was concerned primarily with statements resembling testimony.[62]

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56. *Id.* at 61 (citations omitted).

57. *Id.* at 60. This Section has already explained, however, that the *Crawford* standard is not above historical reproach. *See supra* notes 17–19 and accompanying text.

58. *Crawford*, 541 U.S. at 51–52. *Crawford* itself did not answer whether the Confrontation Clause was concerned solely with testimonial hearsay. *Id.* at 53. Subsequent decisions confirmed that the Clause does not implicate nontestimonial hearsay. *See, e.g.*, Davis v. Washington, 547 U.S. 813, 840 (2006).

59. *Crawford*, 541 U.S. at 53–54.

60. The Court found troubling that the *Roberts* definition of reliability depended so much on the subjectivity of judges and cited a string of similar cases resulting in disparate outcomes. *Id.* at 52–53.

61. *Id.* at 54.

62. The majority focused on the phrase "witnesses against" to determine that the Confrontation Clause referred to any out-of-court statement that was the functional equivalent of in-court testimony. *Id.* at 42–43, 50–53; *see also supra* notes 17–19 and accompanying text.

Though the Court suggested that the purpose and circumstances of statements were decisive, *Crawford* declined to absolutely define testimonial hearsay.[63] Subsequent decisions have struggled with that very task.[64] Nonetheless, the impact of *Crawford* has been significant—particularly for child witnesses—as will be explored in the following sections.[65] Regardless of the standard, what must be emphasized is that the underlying purpose of the Confrontation Clause has historically been, and continues to be, ensuring the reliability of evidence.

III. CONFRONTING CHILD WITNESSES

Where the previous Part established that the purpose of the Confrontation Clause is to ensure the reliability of evidence at criminal trials, this Part draws from social and psychological research to argue this purpose is undercut when it comes to children. More specifically, the suggestibility of young children means subjecting child witnesses to cross-examination can actually produce less accurate testimony. This Part begins as the previous did: with a brief historical account. The history of child witnesses demonstrates that children were not necessarily contemplated when the Confrontation Clause was adopted. At the very least, cultural views of children have been evolving for two hundred years—a fact which Confrontation Clause analysis should consider. The rest of this Part is dedicated to contemporary research on children and why subjecting children to cross-examination has the potential to reduce the reliability and accuracy of their testimony.

A. History of Children as Witnesses

Rules surrounding the admissibility of child testimony in criminal prosecutions were changing when the Sixth Amendment was adopted in 1791. There are numerous examples from English common-law decisions in the late seventeenth century and early eighteenth century of young children testifying without question, or even of parents testifying on their

63. *Crawford*, 541 U.S. at 51–52. The Court laid out three potential definitions: (1) ex parte in-court testimony, (2) extrajudicial statements contained in formalized affidavits, depositions, prior testimony, or confessions, and (3) pretrial statements made "under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Id.* (citations omitted) (internal quotation marks omitted).

64. *See infra* Part IV.A.

65. *See infra* Part IV.

child's behalf—what now would be known as hearsay.[66] In fact, the age of a witness was rarely mentioned during this period.[67] American courts followed the example of their English brethren and generally accepted child testimony, even without confrontation. By the late eighteenth century, however, standard practice was more in flux. Contemporary evidence law focused primarily on the swearing of an oath—something scholars and judges began doubting was possible for young children.[68] Judges started to conduct pretrial screenings of children for competence and excluded witnesses they deemed unable to be sworn.[69] Nonetheless, adults were often allowed to testify as to what incompetent children said, on the theory that their statements represented the best evidence available.[70] Even then, legal treatises and court decisions treated child testimony as lesser than that of adults; they believed that testimony from children, without corroboration, should not support convictions for more serious felonies.[71] A presumption of incompetence for child witnesses was developing and, by the early nineteenth century, there existed a categorical rule that children must reach a certain age before testifying.[72]

The historical use of child witnesses in the United States—as demonstrated by changing practices at the turn of the nineteenth century—has developed and adapted alongside changing norms regarding children in general. After the Constitution was adopted, a belief that children should be protected was growing, and evidentiary rules shielding children from testifying became increasingly common.[73] This is not to say that

66. HOLLY BREWER, BY BIRTH OR CONSENT: CHILDREN, LAW, AND THE ANGLO-AMERICAN 155–56 (2005).

67. *Id.* at 156 ("While ages are infrequently specified in the court records, their scarcity is itself a clue to their relative unimportance."). It should be noted that child abuse prosecutions, in which it was common for children to testify, were themselves a rarity in the Eighteenth Century. *See* Myrna S. Raeder, *Comments on Child Abuse Litigation in a "Testimonial" World: The Intersection of Competency, Hearsay, and Confrontation*, 82 IND. L.J. 1009, 1010 (2007).

68. BREWER, *supra* note 66, at 157–58; Thomas D. Lyon & Raymond LaMagna, *The History of Children's Hearsay: From Old Bailey to Post*-Davis, 82 IND. L.J. 1029, 1030–31 (2007).

69. BREWER, *supra* note 66, at 157–58.

70. Lyon & LaMagna, *supra* note 68, at 1030–31; *see also* Robert P. Mosteller, *Testing the Testimonial Concept and Exceptions to Confrontation: "A Little Child Shall Lead Them"*, 82 IND. L.J. 917, 932 (2007); Deborah Paruch, *Silencing the Victims in Child Sexual Abuse Prosecutions: The Confrontation Clause and Children's Hearsay Statements Before and After* Michigan v. Bryant, 28 TOURO L. REV. 85, 94 (2012).

71. BREWER, *supra* note 66, at 153–54, 163; Lyon & LaMagna, *supra* note 68, at 1030–31; Mosteller, *supra* note 70, at 930.

72. BREWER, *supra* note 66, at 159–60 (some courts required children to be as old as fourteen before they could be sworn as witnesses).

73. *See generally* David S. Tanenhaus & William Bush, *Toward a History of Children as Witnesses*, 82 IND. L.J. 1059 (2007).

children in eighteenth-century common law never testified or that their unsworn statements were never admitted. Indeed, they did, and they were. Ultimately, though, the law has treated children's hearsay statements as different than those of adults for centuries. To the extent *Crawford* attempts to ground the Confrontation Clause in history, the distinction between adult and child witnesses should be relevant to the right of confrontation.

Jumping ahead to the late twentieth century, two modern trends in child testimony are important to mention. First, a slew of protective statutes were put in place during the 1980s in response to a series of widely publicized sexual abuse scandals at daycare centers around the country.[74] These measures were aimed at shielding child abuse victims from the trauma of criminal investigations[75] and trials,[76] while ensuring their statements could be used to convict child abusers. For a number of reasons, child testimony in criminal trials is most common in cases where children themselves are the victims.[77] Today, it is estimated that

74. For an account of these scandals, see LUCY S. MCGOUGH, CHILD WITNESSES: FRAGILE VOICES IN THE AMERICAN LEGAL SYSTEM 8–13 (1994).

75. A common concern emerged following these infamous child sexual abuse cases that the very investigation into those crimes was further traumatizing children. To ease the investigative process for children, many states consolidated criminal investigation and treatment of child abuse victims into single child abuse prevention centers, commonly known as Child Advocacy Centers (CACs). These centers house medical personnel, child protective services, and law enforcement all in one location. Trained specialists interview children about their abuse once in a child-friendly environment, rather than subject victims to multiple interviews. *See* Nancy Chandler, *Children's Advocacy Centers: Making a Difference One Child at a Time*, 28 HAMLINE J. PUB. L. & POL'Y 315, 328–36 (2006). In this way, states intended CACs to reduce the trauma of multiple retellings of abuse and minimize the risk of fabrication or coaching through successive interviews. *See* Jean Montoya, *Something Not So Funny Happened on the Way to Conviction: The Pretrial Interrogation of Child Witnesses*, 35 ARIZ. L. REV. 927 (1993). For a more detailed history of CACs, see Chandler, *supra*, at 316–21.

76. State legislatures enacted child hearsay statutes, which permitted the admission of child statements made to forensic interviewers through the testimony of the interviewer. *See* MCGOUGH, *supra* note 74, at 14. Prosecutors would also rely on *Ohio v. Roberts* to admit child hearsay through traditional hearsay exceptions without confrontation. *See* Matthew W. Staab, Note, *Child's Play: Avoiding the Pitfalls of* Crawford v. Washington *in Child Abuse Prosecutions*, 108 W. VA. L. REV. 501, 522–23 (2005). Finally, courts employed specialized, informal procedures for child witnesses who actually did testify. *See* MCGOUGH, *supra* note 74, at 10–11.

77. For instance, take child sexual abuse cases. In these cases, children are often the only witnesses to the crime. *See* Jonathan Scher, Note, *Out-of-Court Statements by Victims of Child Sexual Abuse to Multidisciplinary Teams: A Confrontation Clause Analysis*, 47 FAM. CT. REV. 167, 170 (2009). Child abuse is a crime that tends to occur in secret; abusers target children when they are alone and the abuse happens in private settings. *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, 375 (2005). Alternative evidence of the crime, either eyewitnesses or physical evidence, is rare. *See* Kimberly Y. Chin, Note, *"Minute and Separate": Considering the Admissibility of Videotaped Forensic Interviews in Child Sex Abuse Cases after* Crawford *and* Davis, 30 B.C. THIRD WORLD L.J. 67, 84 (2010). For this reason, convictions for child sexual abuse are often based primarily on the

approximately 100,000 children testify each year in the United States[78]—a fact that further highlights the importance of child testimony.[79] Second, as these new child-friendly courtroom procedures developed, researchers took a heightened interest in the psychology of children as witnesses, and a still-growing body of literature attempted to define the strengths and weaknesses of child testimony. The next few sections take up this research.

B. Child Memory

Memory is not perfect. This is true of children, and it is true of adults. It is easiest to conceptualize memory as occurring in three stages: experiencing the actual event, storing or encoding the event into memory, and retrieving that memory of the event at a later time—i.e., remembering.[80] A problem at any one of these stages can affect what is remembered, how it is remembered, and how accurately it can be recalled.[81] For instance, individual characteristics, including age, can affect how an event is remembered.[82] The types of questions asked of witnesses and the behavior of interviewers can affect recall of the event as well.[83] These variables reinforce an important fact: memories are not

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testimony of the victim. These features are not true for most other types of crime, making child witnesses particularly common in abuse cases.

78. Angela D. Evans, Kang Lee & Thomas D. Lyon, *Complex Questions Asked by Defense Lawyers but Not Prosecutors Predicts Convictions in Child Abuse Trials*, 33 LAW & HUM. BEHAV. 258, 258 (2009).

79. Child sexual abuse is already an underreported crime. *See* Catherine Dixon, *Best Practices in the Response to Child Abuse*, 25 MISS. C. L. REV. 73, 74 (2005) (quoting survey data of adults who were abused as children but never reported it). When abuse is reported, child victims may be unable or unwilling to testify because they have a preexisting relationship with their abuser, *see* Thomas D. Lyon & Julia A. Dente, *Child Witnesses and the Confrontation Clause*, 102 J. CRIM. L. & CRIMINOLOGY 1181, 1203 (2012), because they are afraid of testifying, *see infra* note 127, or because they are afraid of their abusers, *see infra* note 128. For these reasons, the testimony of children is particularly important for the prosecution of child abuse.

80. *See* Lynne Baker-Ward & Peter A. Ornstein, *Cognitive Underpinnings of Children's Testimony*, *in* CHILDREN'S TESTIMONY: A HANDBOOK OF PSYCHOLOGICAL RESEARCH AND FORENSIC PRACTICE 21, 23–27 (Helen L. Westcott et al. eds., 2002); Elizabeth F. Loftus et al., *General Review of the Psychology of Witness Testimony*, *in* WITNESS TESTIMONY: PSYCHOLOGICAL, INVESTIGATIVE, AND EVIDENTIAL PERSPECTIVES 7, 7–8 (Anthony Heaton-Armstrong et al. eds., 2006).

81. *See* Loftus et al., *supra* note 80, at 8–17 (describing various factors which can affect each of the three stages of memory).

82. Gary L. Wells & Elizabeth A. Olson, *Eyewitness Testimony*, 54 ANN. REV. PYSCHOL. 277, 280–84 (2003).

83. *See* Gary L. Wells et al., *From the Lab to the Police Station: A Successful Application of Eyewitness Research*, 55 AM. PYSCHOL. 581, 582 (2000) (citing research which demonstrates that misleading questions can cause memories of an event to change or be replaced with new memories);

permanent. Memories can change or fade away over time and can be shaped by perceptions or expectations about the event rather than an actual recollection of the event.[84]

While scholars disagree as to what degree a child can be a competent witness,[85] the weight of psychological research suggests that, at a minimum, children are less suited to testifying in court than adults.[86] Unsurprisingly, cognitive ability, including the ability to remember and relate events, develops over time. This is not to say that all child testimony is unreliable;[87] there is variability among and within age groups.[88] In general, though, adversarial criminal trials are developmentally inappropriate for children—particularly young children.[89]

Kids sometimes remember things differently or not at all. Salient events—that is, what is stored into memory—often differ for children from what adults find relevant and memorable.[90] And naturally so; children, quite simply, are less experienced and understand less about the world than adults. Only over time do children learn what details are

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cf. Wells & Olson, *supra* note 82, at 286–89 (describing the effects of suggestive police conduct on the accuracy of eyewitness identification of suspects in police lineups).

84. Baker-Ward & Ornstein, *supra* note 80, at 25–26.

85. *See* Stephen J. Ceci & Richard D. Friedman, *The Suggestibility of Children: Scientific Research and Legal Implications*, 86 CORNELL L. REV. 33, 34–39 (2000) (describing the disagreement in the field of psychology between the mainstream view of child witnesses as highly suggestible and the modern revisionist challenge to this traditional view); John E.B. Myers, *Adjudication of Child Sexual Abuse Cases*, FUTURE CHILD., Summer/Fall 1994, at 84, 86 (identifying the differences between studies conducted by adherents to the mainstream view and those performed by modern critics).

86. *See generally id.* at 39–71 (providing a historical overview of psychological research on child witnesses arguing that modern studies do not disprove the fact that children are more suggestible than adults).

87. *See* Mosteller, *supra* note 70, at 921 (acknowledging that some children can testify to the same degree that adults can); *see also* Rachel Zajac, Sarah O'Neill, & Harlene Hayne, *Disorder in the Courtroom? Child Witnesses Under Cross-Examination*, 32 DEV. REV. 181, 189–92 (2012) (citing reasons why studies of children's responses to cross-examination-style questioning could have limited application to real-world situations).

88. Baker-Ward & Ornstein, *supra* note 80, at 23–27; Loftus et al., *supra* note 80, at 7–8.

89. Psychological research on child witnesses often distinguishes young children, typically from five to six years old and younger, from children in general, ranging from about six-years-old into adolescence. Numerous measures of cognitive functioning relevant to testifying at a criminal trial are of particular difficulty for young children. *See generally* John E.B. Myers et al., *Psychological Research on Children as Witnesses: Practical Implications for Forensic Interviews and Courtroom Testimony*, 28 PAC. L.J. 3 (1996) (noting that, on a number of variables, young children are more suggestible and their memory less developed than older children).

90. *See* NANCY WALKER PERRY & LAWRENCE S. WRIGHTSMAN, THE CHILD WITNESS: LEGAL ISSUES AND DILEMMAS 108 (1991) ("[C]hildren sometimes fail to note some peripheral elements because such elements may lack significance in their experience. At the same time, other extraneous elements may be given exaggerated importance because of their transitory relevance to the child."); Myers et al., *supra* note 89, at 9.

important to remember.[91] Significantly, what children do remember tends to be less forensically relevant than adult memories.[92] Questioning, particularly during cross-examination, often requires memory of highly specific and detailed information, which children are simply less likely to notice or remember.[93] Finally, research shows that it is much harder for children to retrieve salient memories compared to adults.[94] Children generally require much more prompting and clues about the relevant event to recall a memory, making the type of question asked much more important for accurate child testimony.[95]

This last fact presents a sort of conundrum for questioning child witnesses. Young children experience difficulty responding to open-ended, free-recall questions.[96] Such questions require a witness to rely only on his or her own memory to answer, often a difficult task for young children. Answers given by young children, even if accurate, are often incomplete.[97] On the other hand, leading questions—common on cross-examination—can assist children's memories substantially but risk confusing or influencing answers.[98] Attorneys, then, may face a choice between accurate or complete testimony.

C. Suggestibility of Children

Perhaps the greatest concern regarding child witnesses is their suggestibility. In general, children are more susceptible to being

91. *See* Baker-Ward & Ornstein, *supra* note 80, at 29 (noting that knowledge increases with age and a greater knowledge base increases storage and recall of memories); Lynn McLain, *"Sweet Childish Days": Using Developmental Psychology Research in Evaluating the Admissibility of Out-of-Court Statements by Young Children*, 64 ME. L. REV. 77, 113 (2011) ("Adult and children's perceptions of an event may differ in one sense, because of their different understandings of the context of the event.").

92. *See* Karen J. Saywitz, *Development Underpinnings of Children's Testimony*, *in* CHILDREN'S TESTIMONY, *supra* note 80, at 8 (explaining that children are less likely to remember identifying information, such as height or hair color, than adults).

93. *See* Zajac, O'Neill & Hayne, *supra* note 87, at 185 (suggesting that questions concerning "time, frequency, duration, directions, and measurement" are difficult for children given their cognitive development).

94. PERRY & WRIGHTSMAN, *supra* note 90, at 111–12 (noting that free recall, requiring a person to remember a previously observed event without any prompts, is a more complex form of retrieval and one whose use greatly varies with age); Saywitz, *supra* note 92, at 8 (citing research findings that young children demonstrate simplistic and ineffective retrieval strategies compared to older children and adults).

95. Loftus et al., *supra* note 80, at 19; Saywitz, *supra* note 92, at 8.

96. Myers et al., *supra* note 89, at 11.

97. *Id.* at 12.

98. *Id.* at 13; *see also infra* Part III.C.

influenced by leading questioning,[99] a weakness stemming from various facets of children's developmental immaturity. First, children are generally deferential to adults. As stated, children are naturally less experienced and learn about the world by looking to adults for answers.[100] Second, since children require more prompting to fully recall memories, they often rely on cues from adults to properly remember events.[101] Finally, children often struggle to identify the source of their beliefs,[102] which causes difficulty distinguishing between real, perceived memories of an event and memories generated from false information.[103] Leading questions thus risk confusing children or inducing them to give a suggested answer.

Studies have shown that the types of questions asked on cross-examination often prompt children to give incorrect and inconsistent answers.[104] For example, in one study, five- to six-year-old children participated in a common event (a trip to the local police station).[105] Six weeks later, each child was interviewed about the event using open-ended questions, similar to direct examination.[106] Eight months after that, each child took part in a cross-examination-style interview about the same event.[107] Eighty-five percent of children, in response to leading questions during this second interview, deviated from their previous answers.[108] Perhaps more striking, even children who were not exposed to any false information in between the two interviews still later changed some of their answers when prompted.[109] The implication is that leading questions can

99. *See generally* Michael R. Keenan, Note, *Child Witnesses: Implications of Contemporary Suggestibility Research in a Changing Legal Landscape*, 26 DEV. MENTAL HEALTH L. 99, 102–09 (2007). However, the suggestibility of children should not be exaggerated. Adults can certainly be subject to influence and leading as well. McLain, *supra* note 91, at 114. In fact, research suggests that by age ten or eleven, children are no more suggestible than adults. Myers et al., *supra* note 89, at 27–28. Even young children vary in their ability to resist suggestion. Keenan, *supra*, at 102–03.

100. *See* Saywitz, *supra* note 92, at 9.

101. *See id.* at 10.

102. *See* D. Stephen Lindsay, *Children's Source Monitoring*, *in* CHILDREN'S TESTIMONY, *supra* note 80, at 86–94.

103. *See* Saywitz, *supra* note 92, at 11.

104. *See* Zajac, O'Neill & Hayne, *supra* note 87, at 185–88 (providing an overview of studies on child suggestibility); Rachel Zajac, Emma Jury & Sarah O'Neill, *The Role of Psychosocial Factors in Young Children's Responses to Cross-Examination Style Questioning*, 23 APPLIED COGNITIVE PYSCHOL. 918 (2009) (finding that children with low self-esteem or self-confidence are more likely to change their answers during cross-examination).

105. Rachel Zajac & Harlene Hayne, *I Don't Think That's What* Really *Happened: The Effect of Cross-Examination on the Accuracy of Children's Reports*, 9 J. EXPERIMENTAL PSYCHOL. 187, 188 (2003).

106. *Id.*

107. *Id.* at 189.

108. *Id.* at 190.

109. *Id.* at 190–91.

confuse and manipulate children, even those originally confident in their memories.[110]

D. Legal Terminology and Miscommunication

The criminal justice system was designed "by adults, for adults."[111] The legal process presents a novel and confusing setting for children. Legal terms common in courtrooms are typically unfamiliar to young children.[112] One study demonstrated this fact by testing kindergarteners, third graders, and sixth graders on legal terminology.[113] Children were instructed to simply say everything they knew about a legal term, and answers were scored on level of correctness.[114] While the older age group scored better than the younger ones, all age groups generally misunderstood some terms.[115] Children often mistook or associated legal terms with similar-sounding words.[116] Besides using legal jargon, attorneys are notorious for asking difficult and confusing questions. Young children tend to respond more accurately to simple, short sentence structures.[117] Questions on cross-examination, in contrast, tend to involve complex language and complex sentence structure.[118] As a result, children are often ill-equipped to undergo cross-examination; simply by asking questions beyond a child's understanding, defense attorneys can discredit and lead child witnesses.

To complicate matters, children struggle to communicate their confusion while testifying. Not only do children, particularly young children, often fail to comprehend a question, children typically fail to communicate this misunderstanding and rarely ask for clarification.[119] In everyday life, children learn to structure their language and responses by

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110. The same authors conducted a follow-up study with nine- and ten-year-old children. Rachel Zajac & Harlene Hayne, *The Negative Effect of Cross-Examination Style Questioning on Children's Accuracy: Older Children Are Not Immune*, 20 APPLIED COGNITIVE PYSCHOL. 3 (2006). Though older children were better at correcting their mistakes and resisting leading questions, a number of children were still induced to change their originally correct answers on cross-examination. *Id.* at 12.

111. Zajac, O'Neill & Hayne, *supra* note 87, at 182.

112. Saywitz, *supra* note 92, at 4.

113. Karen Saywitz, Carole Jaenicke & Lorinda Camparo, *Children's Knowledge of Legal Terminology*, 14 LAW & HUM. BEHAV. 523, 525 (1990).

114. *Id.* at 525–26.

115. *Id.* at 527.

116. *Id.* at 532–33. For instance, words like "hearing" and "parties" have common nonlegal meanings as well. *Id.* at 532. Terms unfamiliar to children could be associated with similar words—e.g., "testify" is similar to "test," a concept more familiar to children. *Id.* at 533.

117. Saywitz, *supra* note 92, at 4–5.

118. *See* Zajac, O'Neill & Hayne, *supra* note 87, at 184.

119. Saywitz, *supra* note 92, at 5 (noting that "children rarely ask for clarification or indicate misunderstanding" in response to a question that confuses them).

the correction of supportive adults; this safety net is absent during trial testimony.[120] On their own, many children are unable to monitor how well they understand a question.[121] A child may not know an answer, but, in the context of an interview, that child still feels the social pressure to respond.[122] Moreover, children may not understand the significance of incorrect answers or answers to questions they do not understand.[123] Studies show that children will attempt to answer nonsensical or incomprehensible questions, even when children recognize the question does not make sense.[124]

E. Trauma of Testifying

An ancillary yet important issue concerning the reliability of child testimony is the potential for trauma. Child witnesses commonly report being afraid of testifying and experiencing distress while being questioned on cross-examination.[125] Indeed, law reporters are replete with cases where a child was unavailable for fear of testifying in open court and in the presence of the accused.[126] A number of factors contribute to this trauma: repeating one's story of abuse and reliving the crime, unfamiliarity with the legal process, and being subject to direct and cross-examination in general.[127] Particularly frightening for child witnesses is confronting the defendant while testifying.[128] Research shows that trauma and stress

120. *See* Amanda Waterman et al., *How and Why Do Children Respond to Nonsensical Questions?*, *in* CHILDREN'S TESTIMONY, *supra* note 80, at 147.

121. Myers et al., *supra* note 89, at 55.

122. *See id.* at 55–56.

123. *See id.*

124. *See* Zajac, O'Neill & Hayne, *supra* note 87, at 184–85 (suggesting that children are particularly likely to give answers to questions they do not understand during cross-examination, where questions often require only a simply yes-or-no response).

125. *See* Peter Dunn & Eric Shepard, *Oral Testimony from the Witness's Perspective: Psychological and Forensic Considerations*, *in* WITNESS TESTIMONY, *supra* note 80, at 369 (citing research which finds that a majority of young witnesses reported feeling stressed, frightened, and less confident during testimony); *see also* Zajac, O'Neill & Hayne, *supra* note 87, at 182.

126. *See, e.g.*, Styron v. State, 34 So. 3d 724 (Ala. Crim. App. 2009); People v. Burns, 832 N.W.2d 738 (Mich. 2013); *In re* N.C., 74 A.3d 271 (Pa. Super. Ct. 2013); State v. Ladner, 644 S.E.2d 684 (S.C. 2007).

127. *See* Tanya Asim Cooper, *Sacrificing the Child to Convict the Defendant: Secondary Traumatization of Child Witnesses by Prosecutors, Their Inherent Conflict of Interest, and the Need for Child Witness Counsel*, 9 CARDOZO PUB. L. POL'Y & ETHICS J. 239, 251 (2011); Saywitz, *supra* note 92, at 12–13 (describing the sources of fear and embarrassment associated with children who testify in court and the lack of useful strategies most children have to cope with that stress).

128. Dorothy F. Marsil et al., *Child Witness Policy: Law Interfacing with Social Science*, LAW & CONTEMP. PROBS., Winter 2002, at 209, 214.

generally decrease one's ability to recall a memory accurately.[129] Studies of child witnesses in particular have demonstrated that the stress of facing the defendant reduces the likelihood of testifying truthfully and accurately.[130]

IV. CHILD WITNESSES POST-*CRAWFORD*

Given the documented risks of children testifying, whether *Crawford* requires cross-examination of child witnesses in open court is of great importance. By most accounts, *Crawford*'s redefinition of the Confrontation Clause decreased the use of child witnesses in U.S. criminal trials.[131] Under *Roberts*, hearsay statements of child witnesses were regularly found admissible upon a judicial determination that the statement was reliable,[132] when statements fell within a traditional hearsay exception,[133] or under statutory hearsay exceptions for children.[134] Of additional note, many state courts also afforded special procedures for children to testify without facing the defendant or jury.[135] In *Crawford*, the Court criticized these judicial determinations of reliability and prohibited the admission of testimonial hearsay without a prior opportunity for confrontation. Despite efforts by scholars to situate child witness statements into the nontestimonial category, this section shows that the vast majority of child hearsay is testimonial. At the very least, children receive no special treatment due to their age or immaturity under *Crawford*'s categorical rule. As a result, out-of-court child statements

129. *See* Loftus et al., *supra* note 80, at 18.

130. *See* Marsil et al., *supra* note 128, at 214–15; Holly K. Orcutt et al., *Detecting Deception in Children's Testimony: Factfinders' Abilities to Reach the Truth in Open Court and Closed-Circuit Trials*, 25 LAW & HUM. BEHAV. 339, 339–42 (2001).

131. *See* Lyon & Dente, *supra* note 79, at 1189 (arguing that *Crawford* has likely deterred prosecution of child abuse cases).

132. *See, e.g.*, State v. Merriam, 835 A.2d 895 (Conn. 2003) (finding the circumstances surrounding the child's allegations of abuse were sufficiently reliable under *Roberts*); State v. Dever, 596 N.E.2d 436 (Ohio 1992) (holding that a child's statements to doctor were sufficiently reliable to be admitted without testimony from the child).

133. *See, e.g.*, State v. Larson, 472 N.W.2d 120 (Minn. 1991) (medical diagnosis or treatment exception); State v. Plant, 461 N.W.2d 253 (Neb. 1990) (excited utterance exception).

134. *See, e.g.*, Thomas v. People, 803 P.2d 144 (Colo. 1990) (child victim hearsay statute); Perez v. State, 536 So.2d 206 (Fla. 1988) (child hearsay statute); State v. Kuone, 757 P.2d 289 (Kan. 1988) (child victim hearsay statute); State v. Twist, 528 A.2d 1250 (Me. 1987) (state hearsay exception for children describing sexual abuse).

135. *See, e.g.*, People v. Lofton, 740 N.E.2d 782 (Ill. 2000) (use of podiums that prevented witness and defendant from seeing each other during the child's testimony). *But see* Price v. Commonwealth, 31 S.W.3d 885 (Ky. 2000) (finding the exclusion of the defendant from the courtroom during the child accuser's testimony violated the right of confrontation).

found reliable under the *Roberts* standard have now become barred as testimonial under *Crawford*.[136]

A. Child Witness Statements to Law Enforcement Are Testimonial

The Supreme Court clarified the scope of testimonial hearsay in two jointly decided opinions: *Davis v. Washington* and *Hammon v. Indiana*.[137] Both cases concerned the admission of out-of-court statements made by alleged victims of domestic abuse.[138] According to *Davis*, whether statements are testimonial or nontestimonial depends on the objective primary purpose of the interview.[139] When the primary purpose of law enforcement interrogation is "to enable police assistance to meet an ongoing emergency," then statements in response to this questioning are nontestimonial.[140] In contrast, when the primary purpose of police questioning is "to establish or prove past events potentially relevant to later prosecution," statements in response would be testimonial.[141] Where

136. *See* Lyon & Dente, *supra* note 79, at 1188–89 (listing cases where child abuse convictions based on the testimony of the victim were reversed after the Supreme Court decided *Crawford*); Staab, *supra* note 76, at 502–03 (arguing that *Crawford* will limit the use of child witnesses because children, due to fear of testifying in court or parental pressures, are often unavailable to testify); Erin Thompson, Comment, *Child Sex Abuse Victims: How Will Their Stories Be Told After* Crawford v. Washington*?*, 27 CAMPBELL L. REV. 279, 286–89 (2005) (listing cases which were overturned after *Crawford* due to the admission of hearsay statements of a an unavailable child witness).

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

138. In *Davis*, the prosecution sought admission of a 911-call recording in which the victim described that she had just been assaulted by the defendant, her former boyfriend. *Id*. at 817–18. The defendant was still in the house at the beginning of this call and, by the end, was driving away as the victim was on the phone. *Id.* at 818. In *Hammon*, police responded to a reported domestic disturbance at the defendant's house. *Id.* at 819. Upon arrival, the police learned from the defendant's wife that there had been an altercation between the two. *Id*. The police separated the wife from the defendant, asked her some questions, and eventually asked her to fill out a battery affidavit. *Id.* at 819–20. The prosecutors tried to use this affidavit at trial against the defendant. *Id.* at 820.

139. *Id.* at 822.

140. *Id.* In *Davis*, the Court found that the following circumstances would lead an objectively reasonable person to believe that the 911 operator's interview was in response to an emergency rather than for the purpose of gathering evidence to use at a later trial: the victim was speaking about events as they were actually happening; the victim's purpose in calling 911 seemed to be to seek help; the questions asked and answered during the 911 call were for the purpose of resolving the ongoing emergency; and the victim's answers were frantic and the interview informal. *Id.* at 827. The Court concluded that these circumstances objectively indicated that the primary purpose of the 911 call was to respond to an ongoing emergency. *Id*. at 828. The Court was quick to point out, however, that interviews which began as emergency response questions could evolve into an investigatory interview which would then become testimonial. *Id.* at 828–29.

141. *Id.* at 822. The Court compared the affidavit in *Hammon* to the testimonial statements in *Crawford*. Cite. The victim in *Hammon* did not indicate an emergency was ongoing, the officers asked the victim about past events rather than what was happening currently, and the officers asked the victim to fill out an affidavit—which was comparable to a formal interrogation. *Id*. at 830. Such statements were testimonial and could not act as a substitute for live testimony. *Id.*

a declarant is answering questions in response to an ongoing emergency, he or she is not acting as a witness or testifying; therefore, those statements would not serve as a weaker substitute for live testimony.[142]

The Supreme Court left unclear in *Davis* whether the declarant's or the interviewer's perspective was relevant to this primary purpose test. In *Michigan v. Bryant*,[143] the most recent case of concern to child witnesses, the Court held that both the purpose of the witness and the purpose of interrogator are relevant.[144] The Court also reaffirmed the principle that the subjective purpose of either party is irrelevant; it is only what an objectively reasonable participant would view as the purpose of the statement or questioning.[145]

Under *Davis* and *Bryant*, the statements of children are treated as identical to those of adults. These cases dictate that the primary purpose of a statement should be determined from the perspective of an objectively reasonable person.[146] While some scholars have used these terms as justification for treating child witnesses differently,[147] lower courts have generally been reluctant to do so.[148] Even if a child would not anticipate his or her statements being used for litigation purposes, an objectively reasonable person in the child's circumstances very well might.

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142. *Id.* at 828.

143. 131 S. Ct. 1143 (2011).

144. *Id.* at 1161. *But see id.* at 1168 (Scalia, J., dissenting) (arguing that the relevant perspective, under *Crawford* and *Davis*, is only that of the declarant). Though *Bryant* declared both perspectives relevant, the decision itself focused primarily on that of the police officer asking the shooting victim questions. *Id.* at 1162.

145. *Id.* at 1156 ("The circumstances in which an encounter occurs—*e.g.*, at or near the scene of the crime versus at a police station, during an ongoing emergency or afterwards—are clearly matters of objective fact. The statements and actions of the parties must also be objectively evaluated. That is, the relevant inquiry is not the subjective or actual purpose of the individuals involved in a particular encounter, but rather the purpose that reasonable participants would have had, as ascertained from the individuals' statements and actions and the circumstances in which the encounter occurred.").

146. *See supra* note 145 and accompanying text.

147. *See, e.g.*, Christopher Cannon Funk, Note, *The Reasonable Child Declarant After* Davis v. Washington, 61 STAN. L. REV. 923, 947–59 (2009) (arguing that courts should consider a reasonable person in light of the child victim's age, intelligence, and experience).

148. *See, e.g.*, State v. Henderson, 160 P.3d 776 (Kan. 2007). In *Henderson*, the State sought to admit a videotaped interview between an alleged victim of child abuse and police officers. *Id.* at 781. In holding that the interview was testimonial, the Kansas Supreme Court acknowledged that the victim did not fully understand the implications of her statements, but ruled that "a young victim's awareness, or lack thereof, that her statement would be used to prosecute" was relevant, but not dispositive, under the totality of the circumstances. *Id.* at 785. While the victim was immature, the police officers questioning her were not. The court found dispositive that police had a suspect in mind when questioning the victim, that they only asked questions implicating the defendant, the formal investigative style of the interview, and the involvement of police throughout the process. *Id.* at 787–90.

In addition, since *Bryant* held that the perspective of the questioner was relevant to the primary purpose test as well,[149] child statements prompted by police questioning are likely testimonial in nature. Barring some ongoing emergency,[150] the Supreme Court has made clear that police-initiated statements were a prime concern of the Confrontation Clause.[151] Despite states' efforts to shield child witnesses from testifying,[152] cases in which children themselves are victimized nonetheless prove problematic when law enforcement is in any way involved in questioning.[153] As a result, whether a child witness statement is testimonial often hinges on to whom and under what circumstances the statement was made.[154]

B. Davis *and* Bryant *Emergency Doctrine*

The emergency doctrine articulated in *Davis* likewise does not support treating child witness statements as nontestimonial. As already explained, the Supreme Court in *Davis* held that statements made in response to police questioning were nonetheless nontestimonial where police were

149. *See supra* note 144.

150. *See infra* Part IV.B.

151. *See* Crawford v. Washington, 541 U.S. 36, 52–53 (2004) ("Statements taken by police officers in the course of interrogations are also testimonial under even a narrow standard. . . . [I]nterrogations by law enforcement officers fall squarely within that class [of testimonial hearsay].").

152. *See supra* notes 75–76 and accompanying text.

153. *See, e.g.*, State v. Bentley, 739 N.W.2d 296 (Iowa 2007) (holding that a child victim's statements to a counselor at a child protection center were testimonial given the involvement of law enforcement); State v. Contreras, 979 So. 2d 896 (Fla. 2008) (finding that a forensic interviewer's cooperation with law enforcement turned an interview of the alleged child victim into testimonial hearsay) State v. Arnold, 933 N.E.2d 775 (Ohio 2010) (finding that statements of a child victim to an interviewer at a CAC were for investigative purposes and therefore testimonial). The irony that CACs, designed in part to alleviate concerns about the reliability of child abuse allegations, now cause the inadmissibility of those very statements has not been lost on scholars. *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 (2009) (discussing the problems of applying the primary purpose test to CACs due to the multiple purposes of forensic interviews).

154. *See* Seely v. State, 282 S.W.3d 778 (Ark. 2008) (holding that the hearsay statements concerning abuse that a daughter made to her mother and then to a social worker were not testimonial); State v. Krasky, 736 N.W.2d 636 (Minn. 2007) (holding that a child victim's statements to a nurse were nontestimonial); State v. Beadle, 265 P.3d 863 (Wash. 2011) (holding that a child victim's out-of-court statements to family members were not testimonial); *cf.* State v. Snowden, 867 A.2d 314 (Md. 2005) (holding that statements made to a social worker employed by Child Protective Services were testimonial because the interview was conducted for the purpose of developing testimony against the defendant); State v. Justus, 205 S.W.3d 872 (Mo. 2006) (finding that statements made to sex abuse counselors, who were government agents, were testimonial). *See also* Robert P. Mosteller, *Confrontation in Children's Cases: The Dimensions of Limited Coverage*, 20 J.L. & POL'Y 393, 402–16 (2012) (discussing how, after *Crawford*, whether the statement of a child victim is testimonial depends on if the statement was made to parents, doctors, social workers, or police).

merely responding to an ongoing emergency.[155] The *Bryant* decision expanded upon this doctrine.[156] In that case, the Court described emergencies as context-dependent.[157] For purposes of the Confrontation Clause, an emergency could extend beyond the limited scenario in *Davis* in which a victim was presently in danger at the time of the police questioning. What constitutes an emergency requires an assessment of the potential ongoing threat to the police and public in general.[158] The formality of the interview and the nature of the questions asked of the witness are still relevant to determining testimonial statements.[159]

The concept of an ongoing emergency does not transfer cleanly to crimes typically perpetrated against children. Take child abuse, for example.[160] *Bryant* itself seems to reject the extension of this doctrine to police interviews with alleged child abuse victims.[161] Regardless, the continuing threat to police and general public, dispositive in *Bryant*, are not generally present in child abuse cases. Certainly the public danger of child abuse does not compare to that of an active gunman. Moreover, when interviewed by police, the victim is not in any apparent danger or

155. *See supra* notes 140, 142.

156. Michigan v. Bryant, 131 S. Ct. 1143, 1167 (2011). In *Bryant*, police responded to a reported shooting at a gas station to find a gunshot victim lying on the ground next to his car and appearing to be in great pain. *Id.* at 1150. Before ambulances took the victim to the hospital, police asked what had happened, and the victim told police that Bryant had shot him. *Id.* At trial, the police officers testified as to what the victim told them. *Id.* The Michigan Supreme Court reversed the conviction in light of *Davis* since the victim's statements were made in response to police interrogation, the victim was unavailable, and the defendant had no prior opportunity to cross-examine the victim. *Id.* at 1151. The Supreme Court, however, reversed the Michigan court and found the victim's statements to be nontestimonial. *Id.* at 1167.

157. *Id.* at 1159.

158. *Id.* at 1158. In particular, the Court in *Bryant* considered relevant that the victim had been injured, the crime involved the use of a gun, and that the shooter was still at-large. *Id.* at 1163–64. The Court compared the case with *Hammon*, where the perpetrator was only armed with his fists, and therefore removing the victim to another room ended any potential emergency. *Id.* at 1158. Also relevant was the victim's medical condition. *Id.* at 1159 ("The medical condition of the victim is important to the primary purpose inquiry to the extent that it sheds light on the ability of the victim to have any purpose at all in responding to police questions and on the likelihood that any purpose formed would necessarily be a testimonial one. The victim's medical state also provides important context for first responders to judge the existence and magnitude of a continuing threat to the victim, themselves, and the public.").

159. *Id.* at 1160. The questions asked in *Bryant*, though trying to establish past events, were the kind of questions designed to allow the police "to assess the situation, the threat to their own safety, and possible danger to the victim." *Id.* at 1165 (citing Davis v. Washington, 547 U.S. 813, 832 (2006)). The Court also considered the informality of the questioning more similar to the 911 call in *Davis* than the police station interview in *Crawford*. *Id.* at 1166.

160. *See supra* note 77.

161. *See id.* at 1158 ("Domestic violence cases like *Davis* and *Hammon* often have a narrower zone of potential victims involving threats to public safety."). *See also* Paruch, *supra* note 70, at 138–39.

emergency. As such, state courts have generally refused to apply *Davis* to the statements of child abuse victims,[162] and otherwise treat child witnesses like any other for the purposes of the emergency doctrine.

C. Giles *Forfeiture Doctrine*

The common-law doctrine of forfeiture by wrongdoing disallows defendants profiting from the unavailability of the prosecution's witness if the defendant caused the witness to be unavailable and intended to cause the witness's absence.[163] Early Supreme Court cases recognized this doctrine as applicable in the context of the Confrontation Clause.[164] In *Giles v. California*,[165] the Court reaffirmed forfeiture as applicable under the Confrontation Clause after *Crawford*.[166] However, the Court stressed the intent element of forfeiture and limited its application to where the defendant "engaged in conduct designed to prevent the witness from testifying."[167] If a defendant merely caused the absence of the witness but did not do so for the purpose of preventing the witness from testifying, the forfeiture doctrine does not apply and the defendant is still entitled to an opportunity to confront and cross-examine the witness.[168]

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162. *See, e.g.*, State v. Justus, 205 S.W.3d 872 (Mo. 2006). In *Justus*, the Missouri Supreme Court found it was error for the trial court to admit a videotaped interview between a social worker and a young sex abuse victim. *Id.* at 881. The court rejected the notion that the child's statements were made during an ongoing emergency and distinguished the case from *Davis* in that the child was not in any immediate danger, the statements were made in a hospital interview room, and the child appeared calm throughout the conversation. *Id.* These circumstances stood in contrast to the facts of *Davis* in which a domestic abuse victim, apparently speaking frantically, conversed with a 911 operator about how the defendant abused her and how he was still in the house. *Davis*, 547 U.S. at 817–18.

163. Reynolds v. United States, 98 U.S. 145, 159 (1878).

164. *See id.* at 158–59. *See also* Motes v. United States, 178 U.S. 458, 472 (1900) ("The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts. It grants him the privilege of being confronted with the witnesses against him; but if he voluntarily keeps the witnesses away, he cannot insist on his privilege. If, therefore, when absent by his procurement, evidence is supplied in some lawful way, he is in no condition to assert that his constitutional rights have been violated.").

165. 554 U.S. 353 (2008).

166. *Id.* at 359.

167. *Id.* at 361.

168. *Id.* In *Giles*, the Court provided an example of a murder case, in which the victim makes an accusatory statement prior to the crime. *Id.* at 361–62. There, forfeiture would not apply. Though the murderer caused the unavailability of the witness, the murder is not considered as intended to cause the absence of the witness at the defendant's future murder trial for the very same victim, absent some evidence to the contrary. *Id.*

The facts of *Giles* fell under this category as well, and the Supreme Court overruled the application of forfeiture by wrongdoing there. *Id.* at 377. The defendant was on trial for the murder of his girlfriend, who weeks earlier had reported to the police death threats made by the defendant. *Id.* at 356–57. The lower courts allowed police to testify as to those threats because the defendant had procured the absence of the witness. *Id.* at 357. The Supreme Court reversed based on the defendant's

Using child abuse cases as an example, *Giles* would require evidence that the defendant committed abuse for the very purpose of preventing the victim from testifying in the defendant's later prosecution for child abuse. Though there are arguments to be made that abuse is often calculated to cause the unavailability of the child witness at trial,[169] courts have generally rejected these claims.[170] Evidence of the defendant's intent to specifically discourage the child victim's later testimony is often lacking. Again, child witnesses get no special treatment here. As a result, evidence of forfeiture has generally been rare in the context of child abuse prosecutions.

V. RECONCILING THE LETTER OF THE CONFRONTATION CLAUSE WITH ITS PURPOSE

Herein lies the central concern of this Note. The *Crawford* testimonial hearsay standard treats child witnesses as adults.[171] Defendants receive the same right of confrontation regardless of the witness's age. Modern psychological research, however, teaches that children should be treated like children.[172] State and lower courts have seemingly resolved this conflict—between constitutional rule and psychological research—in favor of strict application of the *Crawford* rule to child witnesses. The following Part examines whether, particularly in light of the Confrontation Clause's purpose, that resolution is required under the Constitution.

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lack of specific intent to prevent his girlfriend from testifying at a later trial. *Id.* at 377.

169. *See* Lyon & Dente, *supra* note 79, at 1205–16 (arguing that forfeiture should apply in many child abuse cases because abusers tend to consciously select and "groom" victims who are unlikely to report). *See also* Laurie E. Martin, Note, *Child Abuse Witness Protections Confront* Crawford v. Washington, 39 IND. L. REV. 113, 140–42 (2005) (arguing that forfeiture should be applied broadly in child abuse cases due to the fear and embarrassment that abuse instills in its victims).

170. *See, e.g.*, *In re* Rolandis G., 902 N.E.2d 600, 616 (Ill. 2008) (finding a forfeiture claim lacking on the ground that "there is no indication that when respondent sexually assaulted [the victim], his assault was motivated in any way by a desire to prevent [the victim] from bearing witness against him at trial" and there was no indication that the "pinky swear" or threats to keep the abuse a secret were done in contemplation of a future trial); State v. Henderson, 160 P.3d 776, 793 (Kan. 2007) (rejecting the State's argument that an act independent of the crime charged is not required where the defendant assaults a young child who is unlikely to be legally competent or capable of testifying at trial); People v. Burns, 832 N.W.2d 738, 747 (Mich. 2013) (finding that forfeiture did not apply where the prosecution presented no evidence that the defendant's threats to his child abuse victim actually caused the child's unavailability rather than the child's general fear of testifying due to her young age).

171. *See supra* Part IV.

172. *See supra* Part III.B–E.

A. The Case for Distinguishing Children from Adults Under the Confrontation Clause

The policy argument for relaxing confrontation requirements as applied to child witnesses is clear. Cross-examination is developmentally inappropriate for many children.[173] As research shows, children are generally more suggestible, less knowledgeable of the legal system, and less adept at testifying truthfully under pressure than adults.[174] Subjecting child witnesses to the rigors of the adversarial system creates the opportunity for defense attorneys to confuse, intimidate, and influence said witnesses. While these concerns are present with adult witnesses,[175] the still-developing minds of children— particularly of young children—make this risk even more acute. Common defense tactics, therefore, have the potential to not only expose the falsity in a child's testimony but also to manipulate and induce false testimony from an otherwise truthful witness.

A constitutional analysis of whether to permit child hearsay should consider these same policy concerns. The purpose of the Confrontation Clause is to ensure the reliability of evidence.[176] By generally prohibiting child hearsay and requiring children to submit to cross-examination, the *Crawford* decision undercuts this very purpose. The difficulty with *Crawford* is not so much the testimonial standard itself; rather, *Crawford* is problematic because the Supreme Court there concerned itself with the wrong issues when it comes to child witnesses. *Crawford* requires confrontation categorically, while the Confrontation Clause's purpose—and its history as well—allow room for other considerations, such as the cognitive development of the witness.[177] A purpose-driven approach to constitutional analysis should be appropriate where the strict application of a constitutional right would subvert the underlying purpose of that right. Indeed, the Court has recognized as much in other areas of constitutional criminal rights.

B. A Purpose-Driven Constitutional Analysis

For other constitutional rights of defendants, the Supreme Court has limited the scope of such protections by relying on the purpose of the right

173. *See supra* Part III.B–E.
174. *See supra* Part III.C–E.
175. *See supra* notes 80–84 and accompanying text.
176. *See supra* Part II.A.
177. *See supra* Part II.

itself. Consider the Sixth Amendment right to a speedy trial.[178] In *Barker v. Wingo*,[179] the Supreme Court held that the right to a speedy trial is not absolute.[180] Though the Court acknowledged a "general concern that all accused persons be treated according to decent and fair procedures," certain "societal interests" often outweigh the interests of the defendant.[181] The Court identified these interests:

> The inability of courts to provide a prompt trial has contributed to a large backlog of cases in urban courts which, among other things, enables defendants to negotiate more effectively for pleas of guilty to lesser offenses and otherwise manipulate the system. In addition, persons released on bond for lengthy periods awaiting trial have an opportunity to commit other crimes. . . . Finally, delay between arrest and punishment may have a detrimental effect on rehabilitation.
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> . . . .
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> A second difference between the right to speedy trial and the accused's other constitutional rights is that deprivation of the right may work to the accused's advantage. Delay is not an uncommon defense tactic. As the time between the commission of the crime and trial lengthens, witnesses may become unavailable or their memories fade.[182]

While the Sixth Amendment, on its face, guarantees a speedy trial in all instances, the Court held that the Constitution countenances restricting this right where it no longer advances its purpose of protecting a defendant from unfair convictions.[183] The Court was particularly concerned with defendants abusing this right to ensure an acquittal.[184] The *Barker* decision, then, set forth a balancing test to determine when a speedy trial is required.[185]

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178. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . .").

179. 407 U.S. 514 (1972).

180. *Id.* at 521–22.

181. *Id.* at 519.

182. *Id.* at 519–21 (citations omitted).

183. *Id.* at 519–22.

184. *See id.* at 534–35 ("More important than the absence of serious prejudice, is the fact that Barker did not want a speedy trial. . . . Instead the record strongly suggests that while he hoped to take advantage of the delay in which he had acquiesced, and thereby obtain a dismissal of the charges, he definitely did not want to be tried.")

185. *Id.* at 530 ("[W]e identify four such factors: Length of delay, the reason for the delay, the

The Sixth Amendment right to compulsory process[186] provides another example. The Compulsory Process Clause includes the right of defendants to present a defense and to have witnesses be heard by the trier of fact.[187] Again, this right is subject to limitations. In *Taylor v. Illinois*,[188] the Supreme Court upheld a state court's sanction imposed on a defendant for committing a discovery violation, even though the sanction precluded the accused from calling a defense witness.[189] The purpose of compulsory process, according to the Court in *Taylor*, is "to vindicate the principle that the 'ends of criminal justice would be defeated if judgments were founded on a partial or speculative presentation of the facts.'"[190] However, the Court found that "[d]iscovery, like cross-examination, minimizes the risk that a judgment will be predicated on incomplete, misleading, or even deliberately fabricated testimony."[191] The trial court, then, could sanction the defendant for willful discovery violations—thereby restricting the defendant's right to present a defense—because the purpose of compulsory process would otherwise be undermined.[192] The risk that the defendant would present false evidence at trial made the exclusion of the defense witness constitutionally permissible.

It is not merely the Sixth Amendment for which the Supreme Court has employed a purpose-driven analysis. In cases concerning the Fourth Amendment exclusionary rule—the idea that evidence obtained through violations of the Fourth Amendment should be inadmissible at the defendant's trial—the Court has similarly refused to apply the rule where its purpose was not advanced.[193] Evidence obtained in violation of the

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defendant's assertion of his right, and prejudice to the defendant.").

186. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . . .").

187. Washington v. Texas, 388 U.S. 14, 19 (1967).

188. 484 U.S. 400 (1988).

189. *Id.* at 416. The defendant violated the prosecution's pretrial discovery motion by not disclosing two key witnesses until the second day of trial. *Id.* at 403. When questioned about this violation, the defendant's attorney represented to the court that the witnesses had only recently been found. *Id.* at 403–04. An examination of these witnesses outside the presence of the jury revealed that defense counsel had fabricated this story. *Id.* at 404–05.

190. *Id.* at 411 (quoting United States v. Nixon, 418 U.S. 683, 709 (1974)).

191. *Id.* at 411–12. *See also id.* at 416 ("More is at stake than possible prejudice to the prosecution. We are also concerned with the impact of this kind of conduct on the integrity of the judicial process itself.").

192. *Id.* at 409–10 ("The accused does not have the unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under the standard rules of evidence. The Compulsory Process Clause provides him with an effective weapon, but it is a weapon that cannot be used irresponsibly.").

193. *See generally* Herring v. United States, 555 U.S. 135, 139–42 (2009) (describing the Supreme Court's jurisprudence on when the Fourth Amendment exclusionary rule applies).

Fourth Amendment is excluded only when the benefits of deterring police misconduct in the future outweigh the social costs of excluding valid evidence against a criminal defendant.[194] For instance, in *United States v. Leon*,[195] the Supreme Court refused to apply the exclusionary rule where police found evidence during an illegal search because the officers reasonably and in good faith relied on a faulty search warrant.[196] Likewise, in *Davis v. United States*,[197] the Court found that good-faith reliance by police on an outdated law did not warrant excluding illegally obtained evidence.[198] In essence, since the purpose of the exclusionary rule is to deter intentional misconduct by police, whether evidence is excluded depends on the culpability of the police involved.

These examples show that a purpose-driven constitutional analysis is not foreign to the Supreme Court. At times, enforcing a constitutional provision would be contrary to its underlying purpose, and the Court has not hesitated to restrict constitutional rights in those instances. Certainly, comparison between different types of rights is imperfect, and the Court's approach in the above cases may be unique to those circumstances.[199] Nonetheless, the concern of hindering the fact-finding purpose of the Confrontation Clause through the cross-examination of child witnesses is analogous.

C. A Caveat: How Far Is Too Far?

That an argument *can* be made for constitutionally allowing the admission of child hearsay without confrontation does not answer whether confrontation requirements *should* be relaxed as to child witnesses. Simply put, the Confrontation Clause's goal of ensuring reliable evidence is not an end unto itself. Reliable evidence certainly advances the fact-finding function of criminal trials, but, perhaps more importantly, it allows defendants to fully put the government to its burden and protects the

194. *See* United States v. Calandra, 414 U.S. 338, 347–48 (1974).
195. 468 U.S. 897 (1984).
196. *Id.* at 922.
197. 131 S. Ct. 2419 (2011).
198. *Id.* at 2429.
199. *See, e.g.*, Barker v. Wingo, 407 U.S. 514, 519 (1972) ("The right to a speedy trial is generically different from any of the other rights enshrined in the Constitution for the protection of the accused."); Taylor v. Illinois, 484 U.S. 400, 410 (1988) ("There is a significant different between the Compulsory Process Clause weapon and the other rights that are protected by the Sixth Amendment—its availability is dependent entirely on the defendant's initiative."); United States v. Calandra, 414 U.S. 338, 348 (1974) (describing the exclusionary rule as a prophylactic, remedial measure which should only be applied when its objectives are advanced).

accused from wrongful convictions.[200] For child witnesses, the same developmental immaturity that makes children suggestible on the stand also presents a great risk for fabrication or coaching before trial.[201] Cross-examination of the child witness may be the defendant's one opportunity to expose this falsity to the jury. Doing away with confrontation of child witnesses is particularly impactful when there is no other corroborating evidence.[202]

The previously mentioned child abuse scandals at day care centers across the United States during the 1980s are perhaps the best illustration of the potential virtues of confronting child witnesses.[203] During the summer of 1983, a mother in Manhattan Beach, California reported to the police that staff at the McMartin Preschool had sexually assaulted her son, then two-and-a-half years old.[204] A panic ensued, and hundreds of other parents brought their children to a child abuse treatment center for interviewing.[205] Before long, 350 other children had alleged being abused at the McMartin Preschool,[206] with claims ranging from the disturbing to the absolutely bizarre.[207] Though no corroborating evidence of abuse was ever found, charges were brought against the owners and staff of McMartin Preschool,[208] and a well publicized, six-year prosecution followed.[209] Scandals elsewhere in the country followed a similar pattern.[210]

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200. *See supra* Part II.A.

201. *See generally* Montoya, *supra* note 75 (recounting examples of cases in which pretrial interviewing of child witnesses appeared to influence their testimony); John S. Shaw, III & Kimberley A. McClure, *Repeated Postevent Questioning Can Lead to Elevated Levels of Eyewitness Confidence*, 20 LAW & HUM. BEHAV. 629 (1996) (conducting a study in which participants who were repeatedly questioned about an event over the course of five weeks reported higher confidence in their testimony; in fact, their testimony was no more accurate than those who were not repeatedly questioned).

202. Indeed, that is the case with most child sexual abuse prosecutions. *See supra* note 77.

203. *See supra* note 74.

204. Robert Reinhold, *Collapse of Child Abuse Case: So Much Agony for So Little*, N.Y. TIMES, Jan. 24, 1990, at A1.

205. *Id.*

206. MCGOUGH, *supra* note 74, at 8.

207. Allegations included that the teachers forced children to play "The Hollywood Game" or "Naked Movie Star" where children were photographed and videotaped while the staff sexually molested them, Robert Lindsey, *Boy's Responses at Sex Abuse Trial Underscore Legal Conflict*, N.Y. TIMES, Jan. 27, 1985, at 14; that teachers slaughtered class pets in front of the children in order to ensure their silence, Marcia Chambers, *7 Ordered to Stand Trial in Child Sex Abuse Case*, N.Y. TIMES, Jan. 10, 1986, at A8; and that teachers performed and forced children to participate in satanic rituals in which the class drank the blood of the slaughtered animals and teachers magically flew around the room like witches. Reinhold, *supra* note 204.

208. MCGOUGH, *supra* note 74, at 8.

209. Reinhold, *supra* note 204.

210. MCGOUGH, *supra* note 74, at 8–13.

At trial, the defense exposed the incredibility of these allegations by aggressively cross-examining the child accusers. Defense counsel did so by employing some of the same tactics found ill-suited for child witnesses: lengthy cross-examination,[211] repeated questioning,[212] complex questions,[213] and leading questions.[214] Nonetheless, the defense successfully convinced a jury, particularly since other evidence was lacking, that the wild claims of hundreds of children were likely grounded in suggestive interviewing by parents and therapists rather than fact.[215] Without cross-examination, the McMartin defendants may not have been able to expose this coaching, and innocent persons would have been wrongly convicted. Though most cases are likely less fantastical, the opportunity for confrontation can be just as important.

D. Alternative Solutions

There are, perhaps, more functional answers to the suggestibility problem posed by child witnesses—ones that need not be addressed by the Confrontation Clause. From a practical standpoint, the aggressive cross-examination of children seen in the McMartin Preschool case may be impractical in most cases. Defense attorneys may strategically refrain from acting hostile towards child witnesses as to avoid a negative reaction from the jury.[216] Judges and prosecutors can also play a role to ensure both confrontation and reliable testimony. Rules of evidence generally give judges the power to control the scope and manner of cross-examination.[217]

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211. One witness was subjected to cross-examination for seventeen days by the defense. Reinhold, *supra* note 204.

212. *Child's Testimony Disputed in the McMartin Abuse Case*, N.Y. TIMES, Aug. 5, 1987, at D23.

213. Reinhold, *supra* note 204.

214. Lindsey, *supra* note 207.

215. Reinhold, *supra* note 204. Following the defendants' acquittal, the verdict was widely seen as the correct one. *Id.* A full-length, made-for-television movie based on the McMartin case was released in 1995 and similarly portrayed the allegations as hysterical and unfounded. *See* INDICTMENT: THE MCMARTIN TRIAL (HBO Pictures 1995).

216. *See* Evans, Lee & Lyon, *supra* note 78, at 259–62 (finding that the more complex questions defense counsel asks of a child witness, the more likely a jury is to convict the defendant); Zajac, O'Neill & Hayne, *supra* note 87, at 192 (suggesting that mock jurors tend to be sympathetic to children undergoing cross-examination). Courts have recognized this as a legitimate defense strategy as well; for example, the failure of defense counsel to aggressively cross-examine child witnesses does not constitute ineffective assistance of counsel, but rather represents a conscious, calculated decision to not risk angering the jury. *See, e.g.*, Rodgers v. State, 113 So.3d 761 (Fla. 2013); Geralds v. State, 111 So. 3d 778 (Fla. 2010); McCullough v. State, 973 N.E.2d 62 (Ind. App. 2012); McKenna v. State, 671 A.2d 804 (R.I. 1996); Peterson v. State, 270 P.3d 648 (Wyo. 2012).

217. *See* FED. R. EVID. 611(a) ("The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to: (1) make those procedures effective for determining the truth; (2) avoid wasting time; and (3) protect witnesses from harassment or undue

Prosecutors can adapt their questioning styles, both before and during trial, to the needs of children and can better prepare their young witnesses for testifying in court.[218] A number of studies have shown that jurors tend to sympathize with young witnesses, but jurors are also sensitive to the perceived suggestibility and immaturity of children as well.[219] Judges and prosecutors should take note of these findings and use them to properly facilitate cross-examination of children where necessary.

For decades, courts have employed special courtroom procedures for child witnesses. While the continuing validity of *Maryland v. Craig*[220] has been questioned after *Crawford*,[221] a number of post-*Crawford* state court cases have continued to uphold practices similar to one at issue in *Craig*.[222] Many scholars have continued to advocate for child-friendly procedures that nonetheless preserve the opportunity to cross-examine the

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embarrassment."). *See also* McLain, *supra* note 91, at 112 (advocating for judges to exercise their supervisory powers to preclude attorneys from using complex questions with child witnesses); Vandervort, *supra* note 10, at 360 (same).

218. *See* Michael E. Lamb et al., *The Effects of Forensic Interview Practices on the Quality of Information Provided by Alleged Victims of Child Abuse*, *in* CHILDREN'S TESTIMONY *supra* note 80, at 137–140 (offering questioning techniques and suggestions for forensic interviewers on how to obtain more accurate responses from children and describing the research supporting those suggestions); Janet Leach Richards, *Protecting the Child Witness in Abuse Cases*, 34 FAM. L.Q. 393, 413–17 (2000) (describing the role of prosecutors in protecting child witnesses); Saskia Righarts, Sarah O'Neill & Rachel Zajac, *Addressing the Negative Effect of Cross-Examination Questioning on Children's Accuracy: Can We Intervene?*, 37 LAW & HUM. BEHAV. 354, 360–61 (2013) (finding that warning children about the nature of cross examination can reduce the number of changes a child witness makes between direct examination and cross examination).

219. *See* Jodi A. Quas, William C. Thompson & K. Alison Clarke-Stewart, *Do Jurors "Know" What Isn't So About Child Witnesses?*, 29 LAW & HUM. BEHAV. 425, 435–36 (2005) (surveying laypersons' beliefs about the reliability of child testimony and comparing those beliefs to actual research findings); David F. Ross et al., *The Child in the Eyes of the Jury: Assessing Mock Jurors' Perceptions of the Child Witness*, 14 LAW & HUM. BEHAV. 5, 6–8 (1990) (citing research finding that jurors hold negative stereotypes of child witnesses, and are more sensitive to changes in their testimony, but nonetheless find them more credible); Casey W. Schmidt & John C. Brigham, *Jurors' Perceptions of Child Victim-Witnesses in a Simulated Sexual Abuse Trial*, 20 LAW & HUM. BEHAV. 581, 601 (1996) (finding that young witnesses who testify confidently can actually appear more credible due to the contrary stereotype of child witnesses).

220. 497 U.S. 836 (1990). *See also supra* notes 48–54 and accompanying text.

221. *See* Thompson, *supra* note 136, at 290 (arguing that public policy and Supreme Court precedent allow for statutory exceptions to child testimony); Jennifer E. Rutherford, Comment, *Unspeakable!:* Crawford v. Washington *and Its Effects on Child Victims of Sexual Assault*, 35 SW. U. L. REV. 137, 154–55 (2005) (arguing that *Craig* was not overruled by *Crawford* because the Court did not address whether face-to-face confrontation was required).

222. *See, e.g.*, State v. Arroyo, 935 A.2d 975 (Conn. 2007) (holding child's testimony in a modified courtroom with one-way mirror, without the presence of the defendant, to be constitutional); State v. Stock, 256 P.3d 899 (Mont. 2011) (upholding use of two-way electronic audio–video communication for young child's testimony).

witness.[223] Despite concerns that these measures skew juror opinion or unduly prejudice defendants, the research has not borne out these fears.[224] Some scholars, still, have ignored concerns about the vulnerability and suggestibility of children and have argued that testifying is beneficial for child witnesses, particularly those who were victims of crime.[225] In any event, psychological research will likely continue to develop and assess new child-friendly procedures for undergoing cross-examination to balance the rights of the defendant and the vulnerabilities of the witness.

VI. CONCLUSION

The Confrontation Clause should be applied with its underlying purpose—to ensure the reliability of evidence and to facilitate the fact-finding function of criminal trials—at the forefront of the analysis. It is only logical that the purpose of the Confrontation Clause should not be subverted by its own strict adherence. The decades of research surveyed by this Note show that subjecting children to cross-examination risks doing just that. The suggestibility and immaturity of young children can lead to inaccurate testimony and manipulation by defense counsel. Though some scholars question whether the Supreme Court is retreating from its position in *Crawford*,[226] the testimonial hearsay standard appears to be here to stay. But while the *Crawford* standard generally treats children as adults for purposes of confrontation, the history and purpose of the Confrontation Clause does not require this result. Based on this history and the psychological research available, it is arguably constitutionally permissible for courts to admit child hearsay without confrontation. Still, the challenges that child witnesses pose to the "greatest legal engine" do

223. *See, e.g.*, MCGOUGH, *supra* note 74, at 189–232 (recording pre-trial interviews with children); Julie A. Buck, Kamala London & Daniel B. Wright, *Expert Testimony Regarding Child Witnesses: Does It Sensitize Jurors to Forensic Interview Quality?*, 35 LAW & HUM. BEHAV. 152, 160–61 (2011) (expert testimony regarding the suggestibility of children); Righarts, O'Neill & Zajac, *supra* note 218, at 361–62 (pre-trial intervention); Rutherford, *supra* note 221, at 153–55 (two-way video technology).

224. *See* Gail Goodman et al., *Face-to-Face Confrontation: Effects of Closed-Circuit Technology on Children's Eyewitness Testimony and Jurors' Decisions*, 22 LAW & HUM. BEHAV. 165, 197–200 (1998) (finding that use of closed circuit television to broadcast child testimony to courtroom did not affect jurors' abilities to judge credibility of witness, nor did it prejudice jurors against defendant); Marsil et al., *supra* note 128, at 216–24 (summarizing research showing that shielding procedures for child witnesses do not prejudice defendants).

225. *See* Cooper, *supra* note 127, at 250 (citing research suggesting that children who testify at the trials of their abusers feel empowered and a greater sense of healing than those who do not testify).

226. *See generally* Shari H. Silver, Note, Michigan v. Bryant*: Returning to an Open-Ended Confrontation Clause Analysis*, 71 MD. L. REV. 545 (2012); Jason Widdison, Note, Michigan v. Bryant*: The Ghost of* Roberts *and the Return of Reliability*, 47 GONZ. L. REV. 219, 230–35 (2012).

not lend themselves to a simple answer. Though cross-examination of children can jeopardize the accuracy of evidence at criminal trials, and constitutional doctrine should account for that risk, whether confrontation of child witnesses may nonetheless be desirable is another question entirely.

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