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FOREWORD: WHY "THE CHILD WITNESS" NOW?

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Why "the child witness" in 2009? Although there had been an abundance of litigation addressing the spectrum of claims associated with child witness evidence and testimony over the past two decades,[1] in the past four years a critical mass has been generated that can transform the treatment of children in the courtroom. The elements and catalysts of this convergence include:

1) The relaxation of barriers to child witness testimony, either in the initial competence determination of a child witness, or in approving accommodations of various sorts to reduce the foreignness and inhospitable nature of the adult litigation setting;
2) The radical transformation of hearsay admissibility doctrine in criminal cases, an outgrowth of the "testimonial/nontestimonial" paradigm adopted by the United States Supreme Court for determining what hearsay statements are admissible notwithstanding the Sixth Amendment's guarantee of the right to be confronted by adverse witnesses;
3) A virtual explosion in psychological research into children's capacity and "best practices" for child witness interviewing, which has provided a knowledge base to increase witness accuracy and ensure effective examination on the witness stand.

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1. Litigation addressed such issues as: child witness hearsay, see *e.g.*, Idaho v. Wright, 497 U.S. 805, 816-17 (1990); the use of closed-circuit television and other modes for presenting the child witness' testimony from outside of the courtroom (and the presence of the accused), see *e.g.*, Maryland v. Craig, 497 U.S. 836, 853-54 (1990); the capacity of children as young as three or four to testify, see *e.g.*, *In re* E.A.J., 858 So. 2d 205 (Miss. Ct. App. 2003); the admissibility of expert witnesses to explain why a child might recant or testify with inconsistencies, see *e.g.*, Sanderson v. Commonwealth, 291 S.W.3d 610, 612-14 (Ky. 2009); State v. Schnabel, 952 A.2d 452, 462 (N.J. 2008); the problem of "taint," suggestive interviewing techniques that might alter a child's memory or create a false one, see *e.g.*, State v. Michaels, 642 A.2d 1372, 1375 (N.J. 1994); and special accommodations for the child witness, such as the presence of a "support" person in the courtroom, see *e.g.*, SUSAN R. HALL & BRUCE D. SALES, COURTROOM MODIFICATIONS FOR CHILD WITNESSES: LAW AND SCIENCE IN FORENSIC EVALUATIONS 52-55 (2008).

Perhaps ironically, these factors result in divergent trend lines: an effort to facilitate acceptance of the child as a witness, and simultaneously, a renewed push to be able to prove the claim of a child witness without the minor ever having to appear in court.

Undoubtedly, the most prominent occurrence was the Supreme Court's 2004 decision in *Crawford v. Washington.*[2] Repudiating roughly a quarter century of Confrontation Clause precedent governing the use of hearsay in criminal cases, *Crawford* divided all hearsay statements into two categories, "testimonial" and "nontestimonial," and applied the Confrontation Clause's protection only to the former.[3] In a series of subsequent holdings, the Court expressly excluded nontestimonial hearsay from the reach of the confrontation guarantee.[4]

Of particular significance is the decision the Court has not made. What the Court has declined to answer,[5] and what has been much debated by lower courts and commentators,[6] is how to categorize statements made by children

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

3. *Id.* at 68-69.

4. United States v. Gonzalez-Lopez, 548 U.S. 140, 146 (2006) (quoting *Crawford*, 541 U.S. at 61); *see also* Davis v. Washington, 547 U.S. 813, 825 & n.4 (2006) (holding that *Crawford* overruled Ohio v. Roberts, 448 U.S. 56 (1980)). The Court spoke on this point with unanimity in *Whorton v. Bockting*:

> [W]hatever improvement in reliability *Crawford* produced in this respect must be considered together with *Crawford's* elimination of Confrontation Clause protection against the admission of unreliable out-of-court nontestimonial statements. Under *Roberts*, an out-of-court nontestimonial statement not subject to prior cross-examination could not be admitted without a judicial determination regarding reliability. Under *Crawford*, on the other hand, the Confrontation Clause has no application to such statements and therefore permits their admission even if they lack indicia of reliability.

Whorton v. Bockting, 549 U.S. 406, 420 (2007). For a summary of *Crawford* and the subsequent fashioning of Confrontation Clause analysis, see Jules Epstein, *Avoid Trial by Rumor: Identifying the Due Process Threshold for Hearsay Evidence After the Demise of the* Ohio v. Roberts *"Reliability" Standard*, 77 UMKC L. REV. 119 (2008).

5. The issue was presented to the Court but it refused to grant certiorari. *See* State v. Krasky, 736 N.W.2d 636, 640 (Minn. 2007), *cert. denied*, 128 S. Ct. 1223 (2008).

6. *See, e.g.*, State v. Coder, 968 A.2d 1175, 1186 (N.J. 2009) (statement to mother that "Mommy, he touched me" is nontestimonial); *In re* S.R., 920 A.2d 1262, 1269 (Pa. Super. Ct. 2007) (holding that child's statement to mother was nontestimonial); Myrna S. Raeder, *Enhancing the Legal Profession's Response to Victims of Child Abuse*, CRIM. JUST., Spr. 2009, at 12; Eileen A. Scallen, *Coping with* Crawford*: Confrontation of Children and Other Challenging Witnesses*, 35 WM. MITCHELL L. REV. 1558 (2009); Andrew Etter, Comment, *Embracing* Crawford*: The Rights of Defendants and Children Under the Confrontation Clause*, 77 U. CIN. L. REV. 1167 (2009); Christopher Cannon Funk, Note, *The Reasonable Child Declarant After* Davis v. Washington, 61 STAN. L. REV. 923 (2009); 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); 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 (2009).

to private actors, be they parents, teachers, social workers or medical providers. These are often critical child witness declarations, particularly in investigations involving physical and sexual abuse.[7] Continued litigation involving this issue will determine to what extent a child's version of events will be heard in the courtroom, and what emphasis will be placed on the right to confront and cross-examine the child declarant.

The impact of *Crawford* is found not merely in the courtroom, where determinations concerning a child's out-of-court statement are made, but in the designing of child victim interviewing protocols. The clear trend is for children to be interviewed once by a member of a multidisciplinary team, rather than be subjected to multiple interviews, one medical, one involving protective services agencies and one or more with police.[8] The debate that is occurring, and which will persist, is whether such joint-purpose interviews generate "testimonial" statements[9] that must be excluded under *Crawford.*

Sadly, this tension may have a distorting effect on how prosecutors and law enforcement officials conduct interviews with children. Much research supports the videotaping of child interviews, because such a process not only ensures accuracy, thus enhancing investigations, but it prods interviewers to adhere to interview protocols in addition to providing compelling proof that the child was not subjected to suggestive interviewing techniques.[10] Yet,

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7. Jules Epstein, *The Prosecution and Defense of Child Sexual Assault, in* THE PROSECUTION AND DEFENSE OF SEX CRIMES (rev. 2004, 1997) at ch. 9, § 5.08 (1)(b)-(c).

8. Jerome R. Kolbo & Edith Strong, *Multidisciplinary Team Approaches to the Investigation and Resolution of Child Abuse and Neglect: A National Survey*, 2 CHILD MALTREATMENT 61, 61, 67 (1997). The American Prosecutors Research Institute recommends that a multidisciplinary team prepare the interview, which is then conducted by one team member while the others watch through a one-way mirror. AM. PROSECUTORS RESEARCH INST., INVESTIGATION AND PROSECUTION OF CHILD ABUSE 41 (3d ed. 2004). These same recommendations were made by the National Institute of Justice. OFFICE ON VIOLENCE AGAINST WOMEN, U.S. DEP'T OF JUSTICE, A NATIONAL PROTOCOL FOR SEXUAL ASSAULT MEDICAL FORENSIC EXAMINATIONS ADULTS/ADOLESCENTS (2004), *available at* http://www.ncjrs.gov/pdffiles1/ovw/206554.pdf.

9. *Compare* Mary E. Sawicki, *The* Crawford v. Washington *Decision—Five Years Later: Implications for Child Abuse Prosecutors*, UPDATE (Am. Prosecutors Research Inst./Nat'l Dist. Att'ys Ass'n, Alexandria, Va.), 2009, at 1, 6-7, *available at* http://www.ndaa.org/publications/newsletters/update_vol_21_no_9_10.pdf (describing arguments as to why such interviews generate "nontestimonial" hearsay), *with* Raeder, *supra* note 6 ("Because *Crawford* has turned these best practices into a blueprint for creating testimonial statements, most children who are interviewed at [child advocacy centers] will have to testify for those statements to be admitted.").

10. *See, e.g.*, Theodore P. Cross et al., *Evaluating Children's Advocacy Centers' Response to Child Sexual Abuse*, JUV. JUS. BULL. (Office of Juvenile Justice & Delinquency Prevention/ U.S. Dep't of Justice, Washington, D.C.), Aug. 2008, at 1, 3, *available at* http://www.ncjrs.gov/pdffiles1/ojjdp/218530.pdf.; Amy Russell, *Electronic Recordings of Investigative Child Abuse Interviews*, CENTER PIECE (Nat'l Ass'n to Prevent Sexual Abuse of Children/Nat'l Child Prot. Training Ctr., Winona, Minn.), June 2009, at 4.

> It is my belief that even after *Crawford*, prosecutors have an incentive to videotape children in [child advocacy centers] so that when they testify the videotape will bolster their credibility by showing the interview was non-suggestive. Where the interview takes

videotaping is seen by prosecutors as formalizing the statement, thus making it "testimonial," and therefore is often resisted.[11]

This concern over making a child's statement "testimonial" also may distort the selection of "best practices" interviewing protocols. For example, prosecutors currently urge interviewers to avoid "a truth/lie scenario in a forensic interview since this unnecessarily incorporates the test for taking an oath into the process. . . . [and] to never ask a child what should happen to the abuser or parent since this aspect is not relevant to the forensic interview phase."[12]

The irony is that science has greatly advanced the understanding of how to elicit accurate information from child witnesses. After having extensively documented the practices that contribute to child witness suggestivity,[13] research turned to interviewing protocols that would reduce such risks. Currently, there are at least one dozen suggested protocols, or "interviewing structures."[14] Perhaps the most prominent is the National Institute of Child Health and Human Development (NICHD) protocol for child witness interviewing, which begins the interview process with an introduction, an explanation of the importance to tell the truth *and* of the appropriateness of answering "I don't know" or "I don't remember" and then proceeds with open-ended questions, rather than "option-posing" inquiries.[15] Another protocol strongly supported by prosecutors is Rapport, Anatomy

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place at a Child Advocacy Center, the incidence of recording is much higher than elsewhere.

Raeder, *supra* note 6.

11. *See* Allie Phillips, *Weather the Storm After* Crawford v. Washington, UPDATE (Am. Prosecutors Research Inst./Nat'l Dist. Att'ys Ass'n, Alexandria, Va.), 2004, *available at* http://ndaa.org/publications/newsletters/update_volume_17_number_5_2005.html (explaining that the circumstances under which the interview was conducted, such as whether the testimony was videotaped, suggest it may have been made in preparation for trial and therefore testimonial). *See generally* TASK FORCE ON CHILD WITNESSES, AM. BAR ASS'N CRIM. JUSTICE SECTION, THE CHILD WITNESS IN CRIMINAL CASES 17 (2002) (summarizing stance of opponents).

12. Phillips, *supra* note 11.

13. *See, e.g.*, STEPHEN J. CECI & MAGGIE BRUCK, JEOPARDY IN THE COURTROOM: A SCIENTIFIC ANALYSIS OF CHILDREN'S TESTIMONY (1995); CHILDREN'S TESTIMONY: A HANDBOOK OF PSYCHOLOGICAL RESEARCH AND FORENSIC PRACTICE (Helen L. Westcott et al. eds., 2002) [hereinafter CHILDREN'S TESTIMONY]; THE SUGGESTIBILITY OF CHILDREN'S RECOLLECTIONS (John Doris ed., 1991).

14. KATHLEEN COULBORN FALLER, *Interview Structure, Protocol, and Guidelines, in* INTERVIEWING CHILDREN ABOUT SEXUAL ABUSE: CONTROVERSIES AND BEST PRACTICE 66, 66 (Kathleen Coulborn Faller ed., 2007).

15. Michael E. Lamb et al., *A Structured Forensic Interview Protocol Improves the Quality and Informativeness of Investigative Interviews with Children: A Review of Research Using the NICHD Investigative Interview Protocol*, 31 CHILD ABUSE & NEGLECT 1201, 1204–06 (2007).

Identification, Touch Inquiry, Abuse Scenario and Closure[16] (RATAC). While the NICHD protocol has had substantial validation research,[17] the concern over risking the creation of a "testimonial" statement, in a case where the child is subsequently unable to testify in court, due to fear or other concerns, pushes some prosecutors away from that format.[18]

It will take years of additional litigation to resolve the hearsay questions attendant to child witnesses. However, by ensuring child witnesses' continued access to the courtroom, concerns over hearsay admissibility will be reduced because there is no Confrontation Clause barrier in using a child witnesses' hearsay statements.[19] The "competence" barrier to a child witness testifying has been essentially eliminated, either by statute or decisional law.[20]

The Federal Rules of Evidence establish an across-the-board acceptance of all witnesses as competent,[21] although a judge retains authority to hold a competence inquiry for a minor witness.[22] This presumption, followed in many states, has been made mandatory in certain jurisdictions, at least for certain categories of cases (such as sexual assault prosecutions).[23] Albeit not mandatory in federal prosecutions, the presumption of competence is great, and a challenge to competence may be brought only upon a showing of "compelling reasons," with the specification that age alone cannot establish such cause.[24]

Accompanying the legislative and rule-based treatment of child witnesses has been an ever-lowering judicial threshold for upholding competence determinations. "Casual review of appellate cases suggests that the

16. *See* SUSAN WALTERS ET AL., AM. PROSECUTORS RESEARCH INST., FINDING WORDS: HALF A NATION BY 2010, INTERVIEWING CHILDREN AND PREPARING FOR COURT 2 (2003), *available at* http://www.ndaa.org/pdf/finding_words_2003.pdf.

17. *See* Lamb et al., *supra* note 15.

18. *See generally* Phillips, *supra* note 11.

19. Crawford v. Washington, 541 U.S. 36, 60 n.9 (2004) ("[W]hen the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements.").

20. ROSS EATMAN & JOSEPHINE BULKLEY, PROTECTING CHILD VICTIM/WITNESSES: SAMPLE LAWS AND MATERIALS 37-39 (1986).

21. "Every person is competent to be a witness except as otherwise provided in these rules." FED. R. EVID. 601.

22. *See, e.g.*, Tate v. Bd. of Educ., 346 F. Supp. 2d 536, 537 (S.D.N.Y. 2004) (noting that a competence inquiry was conducted after the judge found "reasonable cause to hold a hearing").

23. *See, e.g.*, Ala. Code § 15-25-3(e) (2009) ("Notwithstanding any other provision of law or rule of evidence, a child victim of a physical offense, sexual offense or sexual exploitation, shall be considered a competent witness and shall be allowed to testify without prior qualification in any judicial proceeding."). Similar statutes are found in Connecticut, Georgia, Utah and West Virginia. *See* Michelle L. Morris, Comment, *Li'l People, Little Justice: The Effect of the Witness Competency Standard in California on Children in Sexual Abuse Cases*, 22 J. JUV. L. 113, 123-24 (2002).

24. 18 U.S.C. § 3509(c)(4) (2006).

overwhelming majority of children are found competent."[25] Children as young as three and four years old have been found to be competent witnesses.[26] Accompanying and supporting this relaxation is the ever-growing awareness that formulaic competence inquiries do not necessarily determine a child's ability to be an accurate witness.[27]

Ensuring the right to testify is not the only step taken to permit children's voices to be heard. Courtroom accommodations, such as the presence of a support person or a child-friendly environment (such as a smaller chair), are now accepted practices to permit the child to testify comfortably and cogently.[28] Other reforms may include judicial control over the form of questions posed (ensuring child-comprehensible language) and the length of time the child testifies.[29]

Beyond and behind all of these changes is a remarkable body of scientific research available to inform judges, lawyers and policy makers in their efforts to permit a child's voice to be heard *and* ensure constitutional protections to the accused.[30] Publication of such texts has been accompanied by guides specifically designed for the legal community.[31]

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25. Thomas D. Lyon, *Child Witnesses and the Oath: Empirical Evidence*, 73 S. CAL. L. REV. 1017, 1024 (2000) (cautioning that the appellate record may not reflect trial level findings of *incompetence*, which prosecutors may not appeal).

26. People v. Daniel, No. C050613, 2006 Cal. App. Unpub. LEXIS 11236, at *20-1 (Ct. App. Dec. 13, 2006) (upholding trial court determination that a three and one half year old was competent); Kelluem v. State, 396 A.2d 166, 167 (Del. 1978) (holding that child who was four years and five months old at time of trial was competent to testify); B.E. v. State, 564 So. 2d 566, 567-68 (Fla. Dist. Ct. App. 1990) (collecting cases upholding competency determinations for three year old witnesses); Dunham v. State, 762 P.2d 969, 971-72 (Okla. Crim. App. 1988) (affirming finding of competency of four year old child).

27. This recognition is found in some court decisions. *See, e.g.*, State v. Ferguson, No. 07AP-999, 2008 Ohio App. LEXIS 5571, at *13 (Ct. App. Dec. 18, 2008) ("A child need not define a lie to establish competency to testify, however."). There is also an abundance of research literature on this point. *See* Thomas D. Lyon et al., *Coaching, Truth Induction, and Young Maltreated Children's False Allegations and False Denials*, 79 CHILD DEV. 914, 925 (2008); Thomas D. Lyon et al., *Young Children's Competency to Take the Oath: Effects of Task, Maltreatment and Age*, 34 LAW & HUM. BEHAV. 141, 142 (2010); Victoria Talwar et al., *Children's Lie-Telling to Conceal a Parent's Transgression: Legal Implications*, 28 LAW & HUMAN BEHAV. 411, 413-14 (2004); Paul Wagland & Kay Bussey, *Factors that Facilitate and Undermine Children's Beliefs About Truth Telling*, 29 LAW & HUMAN BEHAV. 639, 649-50 (2005).

28. NAT'L CTR. FOR PROSECUTION OF CHILD ABUSE, NAT'L DIST. ATTY'S ASS'N, COMFORT ITEMS FOR CHILD WITNESSES DURING CRIMINAL PROCEEDINGS (2009), *available at* http://www.ndaa.org/pdf/Regarding_use_of_Comfort_Items_for_Child_Witnesses.pdf.

29. *See, e.g.*, HALL & SALES, *supra* note 1.

30. *See* CECI & BRUCK, *supra* note 13, at 253-68; CHILDREN'S TESTIMONY, *supra* note 13; FALLER, *supra* note 14, at 66-89; HALL & SALES, *supra* note 1; THE SUGGESTIBILITY OF CHILDREN'S RECOLLECTIONS, *supra* note 13; Robyn Fivush & Jennifer R. Shukat, *Content, Consistency, and Coherence of Early Autobiographical Recall*, *in* MEMORY AND TESTIMONY IN THE CHILD WITNESS 5, 5-6 (Maria S. Zaragoza et al. eds., 1995); Margaret Bull Kovera & Eugene Borgida, *Expert Scientific Testimony on Child Witnesses in the Age of* Daubert, *in* EXPERT WITNESSES IN CHILD ABUSE CASES: WHAT CAN AND SHOULD BE SAID IN COURT 185, 200 (Stephen J. Ceci

The developments in hearsay law, the reduced barriers to a child's access to the courtroom and the accumulation of a great body of scientific knowledge are the reasons for holding "The Child Witness" symposium. Since children remain witnesses in a high number of cases,[32] policy and practice must be informed by science, by the constitutional and evidentiary mandates of reliability, and by due process of law.

"The Child Witness" symposium convened a remarkable assemblage of scholars in the fields of law and psychology to address these varying claims and concerns. It proved that an understanding of science, in particular the developmental stages a child progresses through and the dangers of suggestivity caused by certain interviewing practices, is essential for courts and practitioners when the words of a child are core to the resolution of a legal dispute.

& Helene Hembrooke eds., 1998); Kamala London et al., *Disclosure of Child Sexual Abuse: What Does the Research Tell Us About the Ways That Children Tell?*, 11 PSYCHOL. PUB. POL'Y & L. 194, 217-20 (2005).

31. *See* TASK FORCE ON CHILD WITNESSES, *supra* note 11; DEBRA WHITCOMB, NAT'L INST. OF JUSTICE, WHEN THE VICTIM IS A CHILD (2d ed. 1992). For every development there is some "pushback," an effort to challenge the new developments or use them to attack previously-accepted practices. For example, after *Crawford*, defense counsel could argue that the re-defining of the Confrontation right calls into question the continued validity of the Court's 1990 holding permitting children to testify via closed-circuit television. *See, e.g.*, United States v. Pauly, No. ACM 36764, 2008 CCA LEXIS 292, at *11 n.4 (A.F. Ct. Crim. App. Aug. 11, 2008) (indicating that the holding in Maryland v. Craig, 497 U.S. 836 (1990) permitting remote live testimony of a child, was not overruled by Crawford v. Washington, 541 U.S. 36 (2004)); Roadcap v. Commonwealth, 653 S.E.2d 620, 625 (Va. Ct. App. 2007) (summarizing cases that in support of the proposition that *Craig* was not overruled by *Crawford*).

32. Although there are no clear data on the number of children who testify, it has been estimated that "[i]n the United States alone, hundreds of thousands of children are deposed, interviewed and examined each year as part of civil and family court proceedings, abuse/neglect investigations, and other types of criminal investigations." Stephen J. Ceci et al., *Unwarranted Assumptions about Children's Testimonial Accuracy*, 3 ANN. REV. CLIN. PSYCHOL. 311, 312 (2007). In criminal cases, seventy-eight percent of prosecutors surveyed in 1994 reported presenting testimony from a witness age twelve or younger at least once. Carol, J. DeFrances et al., Bureau of Justice Statistics, *Prosecutors in State Courts, 1994*, BUREAU JUST. STAT. BULL., Oct. 1996, at 1, 4 tbl.4, *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/pisc94.pdf. The data on crimes against children under the age of twelve are incomplete but studies show a substantial victimization rate, making such children potential witnesses. HOWARD N. SNYDER, NAT'L CTR. FOR JUVENILE JUSTICE, SEXUAL ASSAULT OF YOUNG CHILDREN AS REPORTED TO LAW ENFORCEMENT: VICTIM, INCIDENT, AND OFFENDER CHARACTERISTICS 2 & n.1 (2000), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/saycrle.pdf.