CHILD ABUSE WITNESS PROTECTIONS CONFRONT *CRAWFORD V. WASHINGTON*

LAURIE E. MARTIN*

INTRODUCTION

The Sixth Amendment of the United States Constitution grants the accused in a criminal prosecution the right "to be confronted with the witnesses against him."[1] The right to confrontation of witnesses by a criminal defendant has long been at odds with the judicial system's desire to protect child witnesses in certain types of criminal prosecutions, such as sexual abuse proceedings. Because of the concern for child witnesses, courts have permitted special hearsay exceptions and various methods of shielding child witnesses from the trauma of testifying in the courtroom with the defendant present.[2] States have used courtroom closure, a special "child's courtroom," protective evidentiary rules and hearsay exceptions, delayed discovery statutes, elimination of the marital privilege in child sexual abuse cases, videotaping, closed-circuit television, and use of a screen in the courtroom to protect child witnesses.[3] However, many of these methods arguably violate the defendant's Sixth Amendment Confrontation Clause rights because the defendant is not in face-to-face contact with the witness or is unable to cross-examine a non-testifying declarant on a statement he made out of court.[4]

The Supreme Court has upheld certain protective procedures in the context of child sex abuse cases when these procedures were challenged under the Confrontation Clause.[5] However, the Supreme Court's decision in *Crawford v. Washington*[6] on March 8, 2004, creates new questions about the validity of many protective statutes and child hearsay exceptions under the Confrontation Clause.[7]

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* J.D. Candidate, 2006, Indiana University School of Law—Indianapolis; B.A., *magna cum laude*, 2000, Butler University, Indianapolis, Indiana. Thank you to my husband, Chad, and my family and friends for their encouragement, to Professor Frank O. Bowman for his assistance in developing this topic, and especially to my daughter for patiently waiting to come into this world until after my final draft was complete.

1. U.S. CONST. amend. VI.

2. *See* Katherine W. Grearson, Note, *Proposed Uniform Child Witness Testimony Act: An Impermissible Abridgement of Criminal Defendants' Rights*, 45 B.C. L. REV. 467, 468 (2004).

3. ROBERT H. MNOOKIN & D. KELLY WEISBERG, CHILD, FAMILY, AND STATE 479, 485-89 (4th ed. 2000).

4. *See* Coy v. Iowa, 487 U.S. 1012, 1016 (1988) ("[T]he Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact.").

5. *See* Maryland v. Craig, 497 U.S. 836, 857 (1990) (upholding statutory procedure allowing child witnesses in sexual abuse cases to testify by one-way closed circuit television); Idaho v. Wright, 497 U.S. 805, 826-27 (1990) (approving procedure under which the child declarant's statements could be admitted if witness was unavailable and statement bore indicia of reliability but finding statement at issue was not supported by particularized guarantees of trustworthiness).

6. 541 U.S. 36 (2004).

7. *Id.* at 68-69 (barring admission of testimonial, out-of-court statements unless the witness is unavailable and defendant had a prior opportunity to cross-examine).

Crawford established that testimonial, out-of-court statements by witnesses not appearing at trial are inadmissible unless the witness is unavailable to testify in court, and the defendant had a prior opportunity to cross-examine the witness.[8] The new standard changed precedent set nearly twenty-five years ago in *Ohio v. Roberts*.[9] This Note examines the constitutionality of state-created hearsay exceptions and in-court protective procedures in the face of the Supreme Court's recent decision in *Crawford*.

Crawford should not affect protection of child witnesses. First, in-court protective procedures, such as the use of closed-circuit television, remain untouched because *Crawford* only applies to out-of-court statements. Second, *Crawford* does not apply if the statement is nontestimonial. Many statements by children are likely to be considered nontestimonial, even when such statements might be testimonial in other contexts. Third, *Crawford* maintained that forfeiture by wrongdoing is a waiver of the defendant's confrontation clause rights. Particularly in the area of child abuse, the forfeiture exception is likely to be interpreted expansively. Fourth, policy and public pressure on the courts support the continued use of child hearsay exceptions and in-court protective procedures.

Part I of this Note discusses prior Supreme Court law regarding the conflict between the Confrontation Clause and hearsay exceptions generally, including an examination of the Court's decision in *Crawford*. Part II looks at Supreme Court decisions on Confrontation Clause challenges in the context of child sex abuse. Part III briefly examines the policy supporting both defendants' Confrontation Clause rights and protection of child witnesses in sexual abuse prosecutions, as well as the contradictory social science in this area. In Part IV, this Note concludes that *Crawford* should not be construed as a per se invalidation of child hearsay statutes and that, overall, *Crawford*'s impact on child abuse witness protections should be minimal, at most.

I. THE CONFRONTATION CLAUSE IN THE SUPREME COURT

A. Historical Analysis

The Supreme Court emphasized the importance of cross-examination in securing the defendant's constitutional right of confrontation very early in Confrontation Clause jurisprudence. The Supreme Court interpreted the Sixth Amendment Confrontation Clause in *Mattox v. United States*[10] in 1895. Even

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8. *Id.* at 53-54.

9. 448 U.S. 56, 74 (1980) (holding that evidence from a witness not giving live testimony at trial was admissible if it was necessary to use such evidence and the statements bore adequate indicia of reliability).

10. 156 U.S. 237 (1895). Clyde Mattox was convicted of murder, but the court granted him a new trial. By the time of the second trial, two witnesses from the first trial had died. The court admitted to the jury the court reporter's notes of the testimony of the two deceased witnesses from the prior trial. Mattox claimed that admitting the record of their testimony violated his right to

from this early date, the Court acknowledged the existence of exceptions to the right of confrontation based on public policy and necessity.[11]

The Court held that it did not violate Mattox's Confrontation Clause rights to submit to the jury a written record of prior testimony of two deceased witnesses.[12] Mattox's rights were preserved because he had previously been face-to-face with the witnesses and each witness had been subjected to "the ordeal of a cross-examination" during a prior trial.[13] The Court felt that the primary goal of the Confrontation Clause was to prevent depositions or ex parte affidavits from being used against a defendant in lieu of personal examination and cross-examination of the witness.[14] Cross-examination was significant to the Court because it allowed the accused to "test[] the recollection and sift[] the conscience" of a witness and to compel the witness to stand face-to-face with the jury so they can judge his demeanor and credibility.[15]

The *Mattox* Court stated that technical adherence to the letter of the Confrontation Clause would go further than necessary to protect the accused and further than public safety warranted.[16] It noted that the rule must occasionally give way to considerations of public policy and the necessities of the case.[17] The court cited dying declarations as an example of technical hearsay that has historically been considered competent testimony and admitted as evidence "simply from the necessities of the case, and to prevent a manifest failure of justice."[18]

The Supreme Court further developed the need for cross-examination under the Confrontation Clause in 1899 in *Kirby v. United States*.[19] The lower court allowed the prosecution to use records of an allegedly related trial as evidence that the property Kirby possessed was stolen property.[20] The Supreme Court held

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confrontation. *Id*. at 240.

11. *Id*. at 243.

12. *Id*. at 244.

13. *Id*.

14. *Id*. at 242.

15. *Id*. at 242-43. The *Mattox* Court stated that the witness should be face-to-face with the jury, rather than the accused. *Id.* The accused was entitled to use the tool of cross examination to probe the truth of a witness's testimony, but face-to-face confrontation was for the direct benefit of the ultimate fact-finder who would evaluate the credibility of the witness: the jury. *Id.*

16. *Id*.

17. *Id.* at 243.

18. *Id*. at 244. Dying declarations are allowed under the rationale that impending death removes any temptation of falsehood and enforces adherence to the truth as would an oath were the defendant present at trial.

19. 174 U.S. 47 (1899). Joseph Kirby was indicted for possession of stolen goods and money from a U.S. post office. Prior to his trial, three other men were tried and convicted for stealing the goods in question. The Court allowed the prosecution to admit records of part of the trial of the three convicted men to establish that the goods possessed by Kirby were indeed stolen. *Id*. at 48-50.

20. *Id*. at 54, 61.

that this act violated the Confrontation Clause and reversed Kirby's conviction.[21] The Court classified the Sixth Amendment right of confrontation as "one of the fundamental guaranties of life and liberty."[22] The Court stated that Kirby could not be convicted "except by witnesses who confront him at trial, upon whom he can look while being tried, whom he is entitled to cross-examine, and whose testimony he may impeach in every mode authorized . . . ."[23] The *Kirby* Court emphasized both confrontation in the form of visual contact between the accused and the witness and confrontation in the form of cross-examination as among the rights guaranteed by the Constitution.

The *Mattox* and *Kirby* opinions have been instrumental in shaping modern Confrontation Clause decisions.[24] These early opinions established the two primary elements of confrontation thought to protect the accused from false convictions in criminal prosecutions: face-to-face contact and cross-examination.[25] *Mattox* established, however, that from the inception of Confrontation Clause jurisprudence, exceptions to a literal reading of the clause were recognized as vital to securing justice.[26] This balancing of public interests with the rights of the accused continues to be a point of contention throughout modern Confrontation Clause cases, including *Crawford v. Washington*.[27]

B. Modern Analysis

In 1980, the Court established the modern test for admissibility of hearsay over a defendant's Confrontation Clause objections in *Ohio v. Roberts*.[28] The Court in *Roberts* stated that some hearsay was admissible under the Confrontation Clause, if "necessary," and if the statement bore sufficient indicia of reliability.[29] This test became the basis for many child witness protection statutes which emerged in the mid to late 1980s.[30] However, the *Roberts*

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21. *Id*. at 61.

22. *Id*. at 55.

23. *Id*.

24. *Mattox* is cited in *Crawford v. Washington*, 541 U.S. 36 (2004); *White v. Illinois*, 502 U.S. 346 (1992); *Maryland v. Craig*, 497 U.S. 836 (1990); *Idaho v. Wright*, 497 U.S. 805, (1990); *Coy v. Iowa*, 487 U.S. 1012 (1988); *Ohio v. Roberts*, 448 U.S. 56 (1980); and *California v. Green*, 399 U.S. 149 (1970). *Kirby* is cited in *Crawford*, *Craig*, *Coy*, and *Green*.

25. Grearson, *supra* note 2, at 473-74.

26. Mattox v. United States, 156 U.S. 237, 243 (1895).

27. *Crawford*, 541 U.S. at 67-68 ("By replacing categorical constitutional guarantees with open-ended balancing tests, we do violence to their design.").

28. *Roberts*, 448 U.S. at 56.

29. *Id*. at 65-66.

30. *See* Maryland v. Craig, 497 U.S. 836, 854-55 nn.2-4 (1990). When *Craig* was decided in 1990, thirty-seven states permitted videotaped testimony, twenty-four states permitted one-way closed circuit television testimony, and eight states permitted two-way closed circuit television procedures for child witnesses testifying in abuse cases. The states passed the statutes cited in *Craig* between 1984 and 1990, after the *Roberts* decision.

reliability test was recently overturned in favor of a new standard in *Crawford v. Washington*.[31] After *Crawford*, testimonial out-of-court statements by witnesses are barred under the Confrontation Clause unless the witness is unavailable and the defendant had prior opportunity to cross-examine the witness, regardless of any indicia of reliability that the statements may bear.[32]

1. Ohio v. Roberts.—Prior to *Crawford*, *Roberts* articulated the standard for introducing out-of-court statements from a witness who is not produced for live testimony at trial under the Confrontation Clause.[33] *Roberts* established that such evidence was constitutional if the circumstances showed that the witness was unavailable, in the constitutional sense,[34] to appear at trial, and if the hearsay testimony bore adequate indicia of reliability.[35] The Court stated that the primary interest secured by the Confrontation Clause was the right of cross-examination,[36] but continued to agree that competing interests "may warrant dispensing with confrontation at trial."[37]

Under *Roberts*, the Confrontation Clause restricted admissible hearsay in two ways. First, because of the Confrontation Clause's preference for face-to-face confrontation between the accused and the witness,[38] the prosecution had to show that it was necessary to use the declarant's statement because the declarant was

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31. *Crawford*, 541 U.S. at 53-54.

32. *Id*.

33. *Roberts*, 448 U.S. at 56.

34. The Court reiterated the "basic litmus of Sixth Amendment unavailability . . . : '[A] witness is not 'unavailable' for purposes of the . . . exception to the confrontation requirement unless the prosecutorial authorities have made a *good-faith effort* to obtain his presence at trial.'" *Id*. at 74 (quoting Barber v. Page, 390 U.S. 719, 724-25 (1968)). Whether the prosecution made a good-faith effort prior to trial to locate and present the witness is a question of reasonableness. *Id*. The *Roberts* Court held that the prosecution met their duty of good-faith effort in issuing five subpoenas at the last-known real address of the witness and holding a conversation with the witness's mother regarding her daughter's whereabouts. *Id*. at 76. However, Justice Brennan, joined by Justices Marshall and Stevens, dissented from the majority because he did not agree that the State met the "heavy burden . . . either to secure the presence of the witness or to demonstrate the impossibility of that endeavor." *Id*. at 78-79 (Brennan, J., dissenting).

35. *Id*. at 66 (majority opinion).

36. *Id*. at 63.

37. *Id*. at 64. One such interest pointed out by the Court is each jurisdiction's "strong interest in effective law enforcement, and in the development and precise formulation of the rules of evidence applicable in criminal proceedings." *Id*.

38. *Id*. at 65-66. The Court states that this preference for face-to-face confrontation and the right of cross-examination are both integral to the factfinding process. *Id*. at 63-64. However, the Court refers to a "preference" for face-to-face confrontation embodied in the Clause, in contrast to the clear "right" of cross-examination secured to the accused by the Clause, suggesting that cross-examination is more important than face-to-face contact between the accused and the witness. *Id.* This distinction is significant in the context of certain protective procedures such as allowing live testimony by a child witness via closed-circuit television, during which cross-examination may proceed unimpeded, but the defendant and the child are not actually in face-to-face contact.

unavailable to testify in person.[39] Second, once the witness was shown to be unavailable, the Confrontation Clause required that the statement bore sufficient indicia of reliability. This requirement was intended to further the Clause's purpose to "augment accuracy in the factfinding process."[40] Under the indicia of reliability test, reliability was inferred if the evidence fell within a firmly rooted hearsay exception.[41] If the evidence was not within a firmly rooted exception, it was excluded, absent a showing of "particularized guarantees of trustworthiness."[42]

2. Crawford v. Washington.—The Court's ruling in *Crawford* abrogated *Roberts*'s indicia of reliability test, at least as applied to testimonial statements.[43] *Crawford* also distinguished between "testimonial" and "nontestimonial"

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39. *Id.*; *see* Mancusi v. Stubbs, 408 U.S. 204 (1972); Barber v. Page, 390 U.S. 719 (1968); *see also* California v. Green, 399 U.S. 149, 161-62, 165, 167 n.16 (1970). However, the *Roberts* Court pointed out that a demonstration of unavailability was not required in *Dutton v. Evans*, 400 U.S. 74 (1970), when the Court determined that "the utility of trial confrontation [was] so remote that it did not require the prosecution to produce a seemingly available witness." *Roberts*, 448 U.S. at 65 n.7.

40. *Id*. at 65. The Court in *Roberts* said

> [t]he focus of the Court's concern has been to insure that there "are indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant," and to "afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement." It is clear from these statements, and from numerous prior decisions of this Court, that even though the witness be unavailable his prior testimony must bear some of the "indicia of reliability."

Id. at 65-66 (internal citations omitted) (quoting *Mancusi*, 408 U.S. at 213).

41. *Id*. at 66.

42. *Id*. The *Roberts* Court left it to the lower courts to determine what constituted a guarantee of trustworthiness. This situation led to unpredictability, and ultimately brought about *Roberts*'s demise in *Crawford*. *See* Crawford v. Washington, 541 U.S. 36, 62-65 (2004). Trial courts had great discretion in making determinations on the reliability and trustworthiness of statements, and rulings were unpredictable, contradictory, and often made without authority. *Id.*; *see* Sherrie Bourg Carter & Bruce M. Lyons, *The Potential Impact of* Crawford v. Washington *on Child Abuse, Elderly Abuse and Domestic Violence Litigation*, 28 CHAMPION 21, 22 (2004). *Crawford* cited examples where a statement was deemed reliable because it was "detailed," while another jurisdiction determined a statement was reliable because it was "fleeting." *Crawford*, 541 U.S. at 63. Statements were held to be reliable because they were obtained while a suspect was in custody and charged with a crime, and elsewhere held reliable because the witness was not in custody, and not a suspect in the crime. *Id*.

43. *Crawford*, 541 U.S. at 68. The Court states that "[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." *Id*. at 68-69. However, "[w]here nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law—as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether." *Id*. at 68.

statements, a new development in Confrontation Clause jurisprudence.[44] Before looking at whether these changes will affect child hearsay exceptions and protective measures for child witnesses, a closer examination of the Court's decision is required.

In *Crawford*, the petitioner raised a Confrontation Clause challenge to the lower court's admission of his wife's tape-recorded statement to police during his assault trail.[45] Justice Scalia, writing for the majority, used historical and textual analysis, similar to the argument in his dissent in *Maryland v. Craig*[46] and Justice Thomas's concurrence in *White v. Illinois*,[47] to support two conclusions about the Clause: 1) The principal evil at which the Clause was directed was the civil-law use of ex parte examinations as evidence against the accused; and 2) The Framers of the Constitution would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination.[48]

Unavailability of a witness and prior opportunity for cross-examination are not new Confrontation Clause requirements. The Court characterized these Confrontation Clause rights as procedural rather than substantive guarantees of reliability.[49] However, it was new to hold that these procedures are *the only means* sufficient to render a declarant's testimonial statement admissible if the declarant does not appear in court.

As mentioned above, the *Crawford* holding indicated that the Confrontation Clause may apply only to testimonial statements. The text of the Clause refers to "'witnesses against" a defendant. Because the term "witness" is defined as "those who bear testimony," the Court reasoned that the Clause applies only to testimonial statements.[50] After introducing this new distinction, the Court paradoxically left the task of devising a comprehensive definition of a

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44. *Id.*

45. *Id.* at 38. The wife did not testify at trial because the Washington state marital privilege bars one spouse from testifying without the other's consent, but the privilege does not extend to a spouse's out-of-court statements that fall under a hearsay exception. *Id*. at 40. The state argued that the statement fell under the hearsay exception for "statement[] against penal interest." *Id*. The Washington Supreme Court found that the statement did not fall under a firmly rooted hearsay exception, but did bear guarantees of trustworthiness because it "interlocked" with that of the defendant. *Id*. at 41.

46. 497 U.S. 836, 860-70 (1990) (Scalia, J., dissenting).

47. 502 U.S. 346, 365-66 (1992) (Thomas, J., concurring).

48. *Crawford*, 541 U.S. at 50-54.

49. *See id*. at 61. The Court stated that for testimonial statements, the Framers did not intend "to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of 'reliability.'" *Id.* While acknowledging that exceptions to the common-law rule requiring cross-examination existed, such as that allowing admission of dying declarations, the Court pointed out that there was no general reliability exception. *Id*. at 61, 73.

50. *Id*. at 51.

"testimonial" statement for later decisions.[51] The Court stated that the term testimonial "applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations."[52] Because even this loose definition included statements taken by police officers in the course of interrogations, Crawford's wife's statement to the police was testimonial. The Court concluded that admission of Crawford's wife's testimonial out-of-court statement violated the Confrontation Clause.

Although dissenting in overruling *Roberts*, Chief Justice Rehnquist, joined by Justice O'Connor, concurred in the *Crawford* judgment.[53] The Chief Justice stated that the distinction between testimonial and nontestimonial statements were no better rooted in history than the current precedent.[54] Statements given during police interrogations are not given under oath, and for this reason, such statements would likely have been disapproved of in the nineteenth century, but not because they resembled ex parte affidavits or depositions.[55] The concurrence criticized the Court for leaving the definition of testimonial unresolved, leaving thousands of federal and state prosecutors in the dark on how to apply the rules of criminal evidence.[56] Finally, the Chief Justice cited the rule from *Idaho v. Wright*,[57] that "an out-of-court statement was not admissible simply because the truthfulness of that statement was corroborated by other evidence at trial," as sufficient to exclude Crawford's wife's statement without overruling *Roberts*.[58]

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51. *See id*. at 68; *infra* note 173.

52. *Id*. The Court cited, without adopting, various definitions of testimonial statements including

> *ex parte* in-court testimony or its functional equivalent . . . material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially, extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions, [and] statements that were 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. at 51-52 (internal citations omitted). The Court states that although not sworn testimony, "[s]tatements taken by police officers in the course of interrogations are . . . testimonial under even a narrow standard." *Id*. at 52.

53. *Id*. at 69-76 (Rehnquist, C.J., concurring).

54. *Id*. at 69.

55. *Id*. at 70. The oath is significant in the context of child witnesses because a child's competence and understanding of an oath is often at issue in child abuse trials. So-called "firmly-rooted" hearsay exceptions such as co-conspirator statements, spontaneous declarations, and statements made during medical examinations are not given under oath, but have still been historically admitted as evidence because "some out-of-court statements are just as reliable as cross-examined in-court testimony due to the circumstances under which they were made." *Id*. at 74.

56. *Id*. at 75-76.

57. *See infra* Part II.B.

58. *Crawford*, 541 U.S. at 76 (Rehnquist, C.J., concurring).

II. PROTECTION OF CHILD WITNESSES IN THE SUPREME COURT

The Supreme Court has examined several Confrontation Clause challenges to protective measures for child witnesses in child sexual abuse cases. These cases show an important distinction between in-court protective procedures used when the victim is testifying, such as "live" testimony displayed on a closed-circuit television, and evidentiary rules establishing prerequisites for admission of a child witness's out-of-court statements when the alleged victim is not able to testify in court. When in-court protective procedures are used, the child witness testifies but is physically shielded from the defendant in some manner. If the child cannot testify, hearsay exceptions allow the State to try to admit out-of-court statements by the child as evidence against the accused.

A. In-Court Procedures for Testifying Child Witnesses

1. Coy v. Iowa *(1988).—Coy v. Iowa* emphasized the importance of face-to-face confrontation with the defendant, and ultimately overturned the screening procedure utilized by the lower court because it denied the defendant a right to face-to-face confrontation.[59] The *Coy* Court reversed the appellant's conviction for two counts of lascivious acts with a child after a jury trial utilized a screening procedure.[60] A screen was placed between the appellant and the witness stand during the victim's testimony. When the lights in the courtroom were adjusted, the defendant could dimly perceive the witnesses, but the witnesses were not able to see the defendant at all.[61]

In the majority opinion, Justice Scalia reasoned that the Confrontation Clause guaranteed a face-to-face meeting with witnesses appearing before the trier of fact.[62] This "face-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult."[63] Iowa's statutory procedure was a violation of the Confrontation Clause because it contained a legislative presumption of trauma in all cases in which a child testified against an alleged sexual abuser.[64] Something more than this legislative presumption was required to trump the defendant's Confrontation Clause rights when the hearsay exception was not one "firmly . . . rooted in our jurisprudence."[65]

Although the majority opinion did not state whether any exceptions to the requirements of the Confrontation Clause existed,[66] Justice O'Connor's

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59. *See* Coy v. Iowa, 487 U.S. 1012, 1015-16, 1021 (1988).

60. *Id.* at 1022. Iowa Code § 910A.14 (1987) allowed use of a closed circuit TV or for the child witness to testify behind a screen. *Id*. at 1014.

61. *Id*. at 1014-15.

62. *Id.* at 1015-16.

63. *Id*. at 1020.

64. *Id*. at 1021.

65. *Id*. (quoting Bourjaily v. United States, 483 U.S. 171, 183 (1987)) (internal quotations omitted).

66. *Id*.

concurring opinion emphasized that a defendant's Confrontation Clause rights "may give way . . . to other competing interests so as to permit the use of certain procedural devices designed to shield a child witness from the trauma of courtroom testimony."[67] O'Connor reiterated that while a literal interpretation of the Confrontation Clause could bar use of any out-of-court statement when the declarant was unavailable to testify in court, the Court has consistently concluded that this result would be "unintended and too extreme."[68] O'Connor stated that protective procedures were permitted only when "necessary to further an important public policy."[69] She stated that a showing of necessity required a case-specific finding of trauma to the witness caused by face-to-face testimony.[70]

Justice Blackmun dissented because he felt that despite the screening procedure, the testimony at issue was given under adequate procedural safeguards to preserve the "purposes of confrontation."[71] Blackmun expressed concern that focus on face-to-face confrontation could lead states to sacrifice a more central Confrontation Clause interest, the right to cross-examine the witness in front of the trier of fact.[72] Since the testimony at issue bore sufficient indicia of reliability, he felt that no more specific finding of necessity should be required and that there was no Confrontation Clause violation.[73]

2. Maryland v. Craig *(1990)*.—Justice O'Connor delivered the 5-4 majority of the Court in *Maryland v. Craig*.[74] The Court looked at a challenged protective procedure that allowed a judge to receive, by one-way closed circuit television, the testimony of a child witness alleged to be a victim of child abuse.[75] The

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67. *Id*. at 1022 (O'Connor, J., concurring).

68. *Id*. at 1024-25 (quoting Ohio v. Roberts, 448 U.S. 56, 63 (1980)).

69. *Id*. at 1025.

70. *Id*.

71. *Id*. at 1025-27 (Blackmun, J., dissenting). The testimony was given under oath, was subject to unrestricted cross-examination, the defendant could see and hear the witness, and the screening procedure still allowed the jury to evaluate the demeanor of the witness.

72. *See id*. at 1028.

73. *Id*. at 1033-34. Blackmun addressed another argument against use of shielding devices: that they are inherently prejudicial and may indicate to the jury that the defendant is likely guilty if the child requires such protection to testify. *Id*. at 1034. However, Blackmun stated that no prejudice should have arisen from this procedure because "unlike clothing the defendant in prison garb" the screen is not something generally associated with guilt; moreover, the court explicitly instructed the jury to "draw no inference of any kind from the presence of [the] screen." *Id*. at 1034-35.

74. Maryland v. Craig, 497 U.S. 836, 836-60 (1990). The victim, a six-year-old girl, attended a kindergarten and prekindergarten operated by the defendant Sandra Craig. Using a one-way closed-circuit television for the child's testimony, the trial court convicted the defendant on counts of child abuse, first and second degree sexual offenses, perverted sexual practice, assault, and battery. *Id*. at 840.

75. *Id.* at 841; *see also* MD. CODE ANN., CTS. & JUD. PROC. § 9-102 (1989). To invoke the procedure, the state had to show that the witness would suffer "serious emotional distress such that the child cannot reasonably communicate." *Craig*, 497 U.S. at 838. The child witness, prosecutor,

Court held that "so long as a trial court makes . . . a case-specific finding of necessity, the Confrontation Clause does not prohibit a State from using a one-way closed circuit television procedure for the receipt of testimony by a child witness in a child abuse case,"[76] but remanded to the Maryland Court of Appeals to determine whether the trial court made the requisite finding of necessity.[77]

Significantly, the Court agreed with the Maryland Court of Appeals that face-to-face confrontation was "not an absolute constitutional requirement."[78] The Court engaged in a balancing test between the state's interest in the physical and psychological well-being of the child abuse victim and the defendant's right to face his or her accusers in court and concluded that the state's interest could outweigh the defendant's rights.[79] *Craig* still required a showing of necessity before a defendant's rights were limited by a procedure that permitted a child witness to testify in the absence of face-to-face confrontation.[80] The finding of necessity had to be case-specific, and the trial court had to find that the trauma to the child witness arose not from the courtroom generally, but from the presence of the defendant during testimony.[81] Finally, the emotional distress suffered by the child had to be "more than *de minimis*, i.e., more than 'mere nervousness or excitement or some reluctance to testify.'"[82] The Court also required some indication of the reliability of the statement, although the Court did not cite specifically to *Roberts*'s "indicia of reliability" test.[83] The Court stated in conclusion that upon a case-specific finding of necessity, the Confrontation Clause did not prohibit procedures that ensured reliability of the evidence by subjecting it to "rigorous adversarial testing," which "preserve[d] the essence of effective confrontation."[84]

Justice Scalia, joined by Justices Brennan, Marshall, and Stevens,

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and defense counsel withdraw to a separate room where the child is examined and cross-examined. The proceedings are displayed to the judge, jury, and defendant in the courtroom on the closed-circuit TV. The defendant remains in electronic communication with defense counsel and objections are made and ruled on as if the witness were in the courtroom. *Id.* at 841-42.

76. *Craig*, 497 U.S. at 860.

77. *Id.*

78. *Id*. at 857.

79. *Id*. at 853.

80. *Id*. at 855.

81. *Id*. at 855-56.

82. *Id*. at 856 (quoting Wildermuth v. State, 530 A.2d 275, 289 (1987)). The Court did not decide what this minimum showing of emotional distress required because the Maryland statute required that the child suffer "serious emotional distress such that the child cannot reasonably communicate," which clearly met the constitutional standard. *Id.* (quoting MD. CODE ANN., CTS. & JUD. PROC. § 9-102(a)(1)(ii)).

83. *See id*. at 857. In *Craig*, reliability was established because the child testified under oath, was subject to full cross-examination, and was observed by the judge, jury, and defendant during the testimony.

84. *Id*.

dissented.[85] As well as expressing concern that the text of the Constitution was being subordinated "to currently favored public policy," the dissent disagreed with the Court's implication that the Confrontation Clause did not require face-to-face confrontation.[86]

The dissent struggled to reconcile the Court's necessity requirement with the "unavailability" requirements of previous Confrontation Clause cases.[87] Justice Scalia equated being "unavailable" only because the witness is *unable* to testify in the presence of the defendant with a refusal to testify and said that mere unwillingness to testify cannot be a valid excuse under the Confrontation Clause.[88] He stated that the very object of the Clause is "to place the witness under the sometimes hostile glare of the defendant."[89] Finally, the dissent stated that the Constitution does not allow the sort of interest-balancing that the Court used to overcome the defendant's confrontation rights.[90]

B. Prerequisites for Admitting Statements of Child Witnesses Not Testifying

1. Idaho v. Wright *(1990)*.—The Court decided *Idaho v. Wright*[91] on the same day as *Maryland v. Craig*. The Court held that admission of hearsay statements made by a child declarant to her examining pediatrician violated the defendant's Confrontation Clause rights.[92] A child's mother and boyfriend were accused of sexually abusing the child and her sister, who were ages five and two at the time the charges were filed. When the older daughter came forward with allegations of abuse, the father reported the events to the police and took both daughters to the hospital. The younger daughter's statements to the doctor she saw during this hospital examination, a pediatrician with extensive experience in child abuse cases, were at issue in the case.[93] The trial court admitted the child's statements under Idaho Rule of Evidence 803(24),[94] a residual hearsay

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85. *Id*. at 860-70 (Scalia, J., dissenting).

86. *Id.* at 861.

87. *Id*. at 865-67 (citing Idaho v. Wright, 497 U.S. 805, 815 (1990); United States v. Inadi, 475 U.S. 387, 395 (1986); Ohio v. Roberts, 448 U.S. 56, 65 (1980); Barber v. Page, 390 U.S. 719 (1968)).

88. *Id*. at 866.

89. *Id*.

90. *Id*. at 870.

91. 497 U.S. 805 (1990).

92. *Id.* at 813.

93. *Id*. at 809.

94. IDAHO R. EVID. 803(24). Idaho's residual hearsay exception states that the following is not excluded by the hearsay rule, even if the declarant is available as a witness:

> A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these

exception that allowed statements having sufficient circumstantial guarantees of trustworthiness to be used as evidence.[95]

Using *Roberts*, the Court determined whether the incriminating statements admissible under the Residual Hearsay Exception also met the requirements of the Confrontation Clause.[96] The Supreme Court assumed, without deciding, that the younger daughter was unavailable to testify.[97] Therefore, the primary issue before the Court was whether the State had established sufficient indicia of reliability for the girl's statement to the doctor to withstand scrutiny under the Clause.[98]

Idaho's Residual Hearsay Exception is not a "firmly rooted hearsay exception," so it did not automatically bear the reliability that established hearsay exceptions are afforded.[99] The Court held that particularized guarantees of trustworthiness should be shown from the totality of the circumstances surrounding the making of the statement.[100] The purpose of this requirement was

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rules and the interests of justice will best be served by admission of the statement into evidence.

95. *Wright*, 497 U.S. at 811-12.

96. *Id*. at 814. The Court recognized that hearsay rules and the Confrontation Clause are designed to protect similar values, but pointed out that the Court has been careful not to equate Confrontation Clause prohibitions with the general rule prohibiting the admission of hearsay. The Court explained that the Confrontation Clause is more far-reaching because it bars some evidence that might be admissible under a hearsay exception. *Id*. *Crawford* expands the gap between Confrontation Clause and evidentiary rules of hearsay, if not completely separating the two concepts. *Crawford* leaves nontestimonial hearsay regulation to the States, stating that "it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law—as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether." Crawford v. Washington, 541 U.S. 36, 68 (2004).

97. *Wright*, 497 U.S. at 816. The trial court had conducted a voir dire examination of the younger daughter, age three at the time of the trial, and found that she was "not capable of communicating to the jury." *Id*. at 809.

98. *Id*.

99. *Id*. at 817.

100. *Id*. at 819. The Court declined to hold that a showing of reliability required any specific procedural prerequisites, such as a record of the child's statements in some form. *Id*. at 818. Similarly, the Court stated that reliability is not necessarily established by evidence presented at trial that corroborates the statement. *Id*. at 819. For example, although medical evidence corroborated the child's allegations that sexual abuse occurred, it did not make her statements about the identity of the abuser any more reliable. *Id*. at 824. The Court cited factors identified by state and federal courts that "properly relate" to whether hearsay statements by a child witness in a sexual abuse case are reliable: spontaneity and consistent repetition, mental state of the declarant, use of terminology unexpected of a child of similar age, and lack of motive to fabricate. *Id.* at 821-22. Justice Kennedy, joined by the Chief Justice and Justices White and Blackmun, dissented from the majority opinion because he saw no constitutional reason to exclude corroborating evidence from the inquiry into the trustworthiness of a child's statements. *Id*. at 828 (Kennedy, J., dissenting). He stated that corroborating testimony and physical evidence is actually preferable because, unlike

to demonstrate that "the declarant's truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility."[101] The State was unable to rebut the presumption of unreliability with an affirmative reason arising from the circumstances in which the statement was made.[102] Therefore, the Confrontation Clause required exclusion of the girl's statements.[103]

2. White v. Illinois *(1992).*—In *White v. Illinois*, the Supreme Court held that out-of-court statements of a child sexual assault victim could be admitted under the spontaneous declaration and medical examination exceptions to the hearsay rule.[104] The State did not have to produce the victim at trial, nor did the court have to find that the victim was unavailable for testimony.[105] The four-year-old victim made statements to her babysitter, mother, a police officer, doctor, and nurse regarding an alleged sexual assault. The State attempted to call the child to the stand twice, but she left without testifying both times because she "experienced emotional difficulty on being brought to the courtroom."[106] Over the defendant's objections, the court allowed her babysitter, mother, and the police officer to testify about the child's statements pursuant to the Illinois hearsay exception for spontaneous declarations. The court allowed the doctor and nurse to testify to the child's statements based on both the spontaneous declaration exception and the exception for statements made in the course of securing medical treatment.[107] The defendant was convicted, but appealed on Confrontation Clause grounds under *Roberts* because there was no finding of unavailability of the child witness. The Court denied the defendant's Confrontation Clause challenge and affirmed the conviction.[108] The Court held

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an examination of the narrow circumstances in which a statement was made, it "can be addressed by the defendant and assessed by the trial court in an objective and critical way." *Id*. at 834.

101. *Id*. at 820 (majority opinion).

102. *See id*. at 821.

103. *See id*.

104. White v. Illinois, 502 U.S. 346, 349 (1992).

105. *Id*.

106. *Id*. at 350.

107. *Id*. at 350-51. The Illinois spontaneous declaration hearsay exception applies to "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." *Id*. at 351 n.1 (quoting People v. White, 555 N.E.2d 1241, 1246 (Ill. App. Ct. 1990)). The medical examination exception, 725 ILL. COMP. STAT. ANN. 5/115-13 (West 2005) (formerly ILL. REV. STAT. 1991, ch. 38, ¶ 115-13), states in relevant part that

> statements made by the victim to medical personnel for purposes of medical diagnosis or treatment including descriptions of the cause of symptom, pain or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment shall be admitted as an exception to the hearsay rule.

Id.; *see also White*, 502 U.S. at 351 n.2.

108. *White*, 502 U.S. at 353, 358.

that *Inadi v. United States*[109] had limited *Roberts*.[110] After *Inadi*, if the challenged out-of-court statements were not made during a prior judicial proceeding, the prosecution was not required to show that the declarant was unavailable.[111] The Court concluded that neither *Roberts* nor *Inadi* provided any basis for excluding spontaneous declaration and medical examination evidence on Confrontation Clause grounds.[112]

The Court also stated that *Coy* and *Craig* examined only the in-court procedures constitutionally required to guarantee a defendant's confrontation rights once a child witness was actually testifying.[113] Therefore, the "necessity requirement" from those cases could not be imported into "the much different context of out-of-court declarations admitted under established exceptions to the hearsay rule."[114]

Justice Thomas, joined by Justice Scalia, concurred in part and in the judgment.[115] The concurrence relied on text and history, as does Scalia's majority opinion in *Crawford*, and began to draw the line between formalized testimonial materials and nontestimonial hearsay.[116] The dissent also foreshadowed *Crawford*'s separation of Confrontation Clause doctrine from the rules of evidence regulating hearsay.[117] Thomas stated that "[n]either the language of the Clause nor the historical evidence appears to support the notion that the Confrontation Clause was intended to constitutionalize the hearsay rule and its exceptions."[118]

III. COMPETING POLICY INTERESTS AND CONTRADICTORY SCIENCE

Justice Scalia's dissent in *Maryland v. Craig* summarized two competing

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109. 475 U.S. 387 (1986).

110. *White*, 502 U.S. at 353-54.

111. *Id*. The *Inadi* court rejected a Confrontation Clause objection as to admission of co-conspirator statements. *Id*. For co-conspirators, a requirement of unavailability is unlikely to benefit the defendant because the statements are admissible without such a finding under the hearsay exception. *Id*. Because of the irreplicable context in which the statements were originally made, it is unlikely that the live testimony of the witnesses would add to the trial's truth-determining process. *Id*. at 354.

112. *Id*. at 357. The Court stated that hearsay testimony of spontaneous declarations and statements made during a medical examination, and indeed all "firmly rooted" exceptions, are made in contexts that provide "substantial guarantees of their trustworthiness." *Id*. at 355 & n.8. In fact, such statements may lose evidentiary value if replaced by live testimony because the conditions that made the statement reliable in the first place cannot be replicated in the relative calm of the courtroom. *Id*.

113. *Id*. at 358.

114. *Id*.

115. *Id*.

116. *Id*. at 365 (Thomas, J., concurring).

117. *See id*. at 365-66.

118. *Id.* at 366.

interests in all criminal prosecutions: the State wants more convictions of guilty defendants, while the defense wants fewer convictions of innocent defendants.[119] These interests are heightened for both sides when the crime is as heinous as sexual abuse of a child.[120] Scalia acknowledges that neither interest is "unworthy."[121] Nor are these interests necessarily in direct conflict. Presumably, both sides want a just outcome—convictions of the guilty, but not the innocent. A defendant's right to confrontation and the State's desire to protect child witnesses in abuse cases are more directly in opposition in the Confrontation Clause debate. Even *Crawford* acknowledges that "[t]he law in its wisdom declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused."[122] The question becomes how "incidental" is this confrontation benefit afforded to the accused, and how much of the public right can be sacrificed in its preservation? The conflict between protecting a child witness and preserving a defendant's constitutional right to confrontation is further complicated by the lack of consensus among social scientists about whether well-intentioned child witness protections actually benefit the child.

A. Defendant's Rights

In 1808, sixteen years after the Sixth Amendment was ratified, Chief Justice Marshall stated of the Confrontation Clause:

> I know of no principle in the preservation of which all are more concerned. I know none, by undermining which, life, liberty and property, might be more endangered. It is therefore incumbent on courts to be watchful of every inroad on a principle so truly important.[123]

Justice Scalia apparently agreed. Scalia felt that the Framers included the Confrontation Clause as a specific constitutional guarantee "to assure that none of the many policy interests from time to time pursued by statutory law could overcome a defendant's right to face his or her accusers in court."[124] In Scalia's eyes, statutes affording protection to child witnesses that infringe upon a defendant's right to confront that witness in court are precisely what the Confrontation Clause is intended to prevent.[125] He calls the Court's balancing of interests in *Craig* a "subordination of explicit constitutional text to currently

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119. Maryland v. Craig, 497 U.S. 836, 867-68 (Scalia, J., dissenting).

120. *See id*.

121. *Id*. at 867.

122. Crawford v. Washington, 541 U.S. 36, 75 (2004) (O'Connor, J., concurring in judgment only) (quoting Mattox v. United States, 156 U.S. 237, 243 (1895)).

123. *Id.* at 73 (quoting United States v. Burr, 25 F. Cas. 187, 193 (C.C. Va. 1807) (No. 14,694)).

124. *Craig*, 497 U.S. at 860-61 (Scalia, J., dissenting).

125. *See id*. at 861.

favored public policy."[126]

Scalia felt that the "'special' reasons that exist for suspending one of the usual guarantees of reliability in the case of children's testimony are perhaps matched by 'special' reasons for being particularly insistent upon it in the case of children's testimony."[127] Studies show that children are more suggestible than adults, unable to separate fantasy from reality, and perhaps unable to comprehend the gravity of the proceeding in which they participate.[128] Although there is contradictory evidence available, some would prefer to leave social science out of the debate entirely because it is susceptible to considerable bias.[129] Biased information can lead to "hasty and deceptively attractive remedies" for scientists as well as lawyers, judges, and legislators swayed by the emotionality of the issues.[130]

Some commentators feel that balancing the constitutional rights of the defendant against the psychological health of a witness is troublesome and expressed concern that the broad language of *Craig* "encourage[d] lower courts to uphold confrontation-restrictive procedures."[131] Advocates of this position maintain that reducing stress and anxiety, familiarizing the child witness with court personnel and procedures, and increasing support may improve a child's ability to participate competently as a witness, without jeopardizing the constitutional rights of the defendant.[132]

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126. *Id*.

127. *Id.* at 868.

128. *See id*. Scalia's dissent describes the Scott County investigations in 1983-84 in Jordan, Minnesota, in which child abuse allegations ballooned into allegations of multiple murders. Although twenty-four adults were charged with molesting thirty-seven children, prosecution resulted in only one guilty plea, two acquittals, and twenty-one voluntary dismissals against the alleged abusers. Highly questionable investigatory techniques were used with the children, including in some cases as many as fifty interviews with a child, suggesting answers based on what other children had said, and separation of the children from their parents for months. Some children were told by their foster parents that they would be reunited with their real parents if they admitted that the parents abused them. *But see* Jean Montoya, *On Truth and Shielding in Child Abuse Trials*, 43 HASTINGS L.J. 1259, 1283 (1992) (explaining that some scientists are critical of studies purporting to demonstrate suggestibility of children because the studies cannot replicate real life traumatic situations).

129. *See* Montoya, *supra* note 128, at 1288. Modern research suffers from a "lack of effort on the part of investigators to disconfirm their own hypotheses—in part because of their strong advocacy positions." *Id*. at 1288-89.

130. *Id*. at 1289.

131. Bryan H. Wildenthal, *The Right of Confrontation, Justice Scalia, and the Power and Limits of Textualism*, 48 WASH. & LEE L. REV. 1323, 1362 (1991) (quoting Comment, *The Supreme Court, 1989 Term: Leading Cases*, 104 HARV. L. REV. 129, 137 (1990) (suggesting that at least one state court has upheld confrontation-restrictive procedures under *Craig* in State v. Crandall, 477 A.2d 483 (1990))).

132. *See* Task Force on Child Witnesses, *The Child Witness in Criminal Cases*, 2002 A.B.A. CRIM. JUST. SEC. 5; Robert P. Mosteller, Crawford v. Washington*: Encouraging and Ensuring the*

Under the highly discretionary indicia of reliability test from *Roberts*, unpredictability and lack of consistency made many abuse cases difficult to defend because once the court deemed a witness unavailable and admitted the hearsay, there was no way to challenge it.[133] *Roberts*'s critics see *Crawford* as a confirmation that the Confrontation Clause is not worthless in such situations.[134]

B. Protection of Child Witnesses

The object of the Confrontation Clause "is to place the witness under the sometimes hostile glare of the defendant,"[135] commanding that reliability be assessed "by testing in the *crucible* of cross-examination,"[136] because such "adversarial testing 'beats and bolts out the Truth much better.'"[137] These descriptions alone make it clear why some feel inspired to protect an already-traumatized child from further harm in the courtroom. Protective procedures are motivated by concerns about mental and emotional trauma to the child related to giving testimony and the damage it may do to the truth-seeking function of the trial itself.[138] There are compelling examples of traumatic experiences in the courtroom to support this concern.[139]

Despite Justices Marshall and Scalia's objections, the Court has recognized from the inception of Confrontation Clause jurisprudence that some interests outweigh the defendant's right to confrontation.[140] The Court has gone so far as

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Confrontation of Witnesses, 39 U. RICH. L. REV. 511, 592 (2005) ("The hearsay exception has given prosecutors incentives to encourage children to appear and testify and to help them to do so by . . . making them comfortable in the courtroom and leading them through what happens during testimony.").

133. Carter & Lyons, *supra* note 42, at 22.

134. *See id*.

135. Maryland v. Craig, 497 U.S. 836, 866 (1990).

136. Crawford v. Washington, 541 U.S. 36, 61 (2004) (emphasis added).

137. *Id*. at 62 (quoting M. HALE, HISTORY AND ANALYSIS OF THE COMMON LAW OF ENGLAND 258 (1713)).

138. Wildenthal, *supra* note 131, at 1342.

139. *See id.* at 1364 n.220. Wildenthal refers to literature describing a seven-year-old girl's fear that trial delays would allow her abusive father to carry out threats to kill her mother, and describes a report by a ten-year-old boy that a grand juror was laughing as the boy described his rape by two men at a closed hearing where no family member or acquaintance of the witness was allowed to be present.

140. *See* Mattox v. United States, 156 U.S. 237, 243 (1895) ("A technical adherence to the letter of a constitutional provision may occasionally be carried further than is necessary to the just protection of the accused, and further than the safety of the public will warrant."); Coy v. Iowa, 487 U.S. 1012, 1022 (1988) (O'Connor, J., concurring) (discussing that a defendant's right to confrontation is not absolute "but rather may give way in an appropriate case to other competing interests so as to permit the use of certain procedural devices designed to shield a child witness from the trauma of courtroom testimony"); *Craig*, 497 U.S. at 853 ("[A] State's interest in the

to call "a state's interest in 'the protection of minor victims of sex crimes from further trauma and embarrassment' . . . a 'compelling one.'"[141]

Special hearsay exceptions were developed to deal with some of the unique difficulties children face in the legal system.[142] Often, the child, and perhaps the professionals who interview and treat them later, are the only witnesses to the alleged crime.[143] Victims may want to pursue charges initially, but recant or change their mind later due to fear, pressure to change their story, concern about a family member or friend getting in trouble, or because the initial allegations were false.[144] Child witness unavailability is frequent because of incompetency or emotional unavailability.[145] Even if the child is theoretically available to testify, undeveloped cognitive and language skills may prevent him or her from adequately communicating the details of the crime.[146] Corroborative physical evidence of abuse is generally scarce.[147]

Given these difficulties, out-of-court statements of a child are important to the prosecution—often such statements are the most compelling evidence that the crime occurred, since many children initially disclose abuse to parents, teachers, friends, or a doctor.[148] Out-of-court statements may be the only evidence of abuse if the prosecution is unable to find corroborative physical evidence.[149] Finally, out-of-court statements are seen by some as the only means by which the child can communicate to the court when the child is too traumatized to take the stand or an ineffective witness when he does.[150]

The *Craig* Court relied on social science evidence to conclude that shielding child witnesses may further truth-seeking better than physical confrontation.[151] Yet the degree of trauma that testifying can cause a child witness is disputed among social scientists. Indeed, some studies suggest that a child's ability to

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physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court.").

141. *Craig*, 497 U.S. at 852 (quoting Globe Newspaper Co. v. Superior Court of Norfolk County, 457 U.S. 569, 607 (1982)).

142. Carter & Lyons, *supra* note 42, at 22 (stating that many of the same difficulties are shared by elderly abuse victims and domestic violence victims).

143. *Id*. at 21.

144. *Id*.

145. *Id*.

146. Elizabeth J.M. Strobel, Note, *Play it Again, Counsel: The Admission of Videotaped Interviews in Prosecutions for Criminal Sexual Assault of a Child*, 30 LOY. U. CHI. L. J. 305, 322 (1999).

147. *Id*.

148. *Id*. at 323.

149. *Id*.

150. *Id*.

151. Maryland v. Craig, 497 U.S. 836, 857 (1990) (citing favorably Gail S. Goodman & Vicki S. Heleson, *Child Sexual Assault: Children's Memory and the Law*, 40 U. MIAMI L. REV. 181, 203-04 (1985)).

testify is diminished in a courtroom setting,[152] and that "child witness-defendant confrontations can have a substantial negative effect on the child's ability or willingness to be accurate."[153] On the opposite front, some feel that testifying could actually be beneficial to a child. Scholarly literature offers some support for the proposition that testifying at the trial could be cathartic and a coping strategy for a child that provides some sense of control or vindication.[154] Still others say that even if short term effects of testifying are negative on the child, both testifying and non-testifying child abuse victims show gradual improvement over time.[155]

IV. ANALYSIS

Crawford should not affect child hearsay exceptions. First, in-court protective procedures like the use of closed-circuit television should remain untouched because *Crawford* does not apply when the child testifies. Second, *Crawford* does not apply if the statement is nontestimonial, and many statements by children are likely to be considered nontestimonial, even when such statements might be testimonial in other contexts. Third, *Crawford* maintained that forfeiture by wrongdoing is a waiver of the defendant's Confrontation Clause rights, and particularly in the area of child abuse, this forfeiture exception is likely to be broadly interpreted so as to remove any Confrontation Clause obstacles to the admission of out-of-court statements of the victim. Fourth, policy and public pressure on the courts support an interpretation that allows continued use of child hearsay exceptions and in-court protective procedures.

A. Crawford *Does Not Apply When the Child Testifies*

In-court protective procedures like the use of closed-circuit television should remain untouched after *Crawford*. The new rule from *Crawford* does not apply if the declarant testifies and is therefore subject to cross-examination.[156] Because the child is testifying and subject to cross-examination, albeit by closed-circuit television or through another shielding method, *Crawford* should not limit any in-court procedure that would be upheld under *Craig*. Reluctantly, some think, the *Crawford* decision did not overturn *Maryland v. Craig*.[157] The rule from

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152. Montoya, *supra* note 128, at 1281.

153. *Id*. at 1292 (quoting Douglas J. Peters, *The Influence of Stress and Arousal on the Child Witness*, *in* THE SUGGESTIBILITY OF CHILDREN'S RECOLLECTIONS 60, 75 (John L. Dorris ed., 1991)). The study reaching this conclusion demonstrated that children gave a higher percentage of accurate responses when picking a "thief" out of a photo lineup than they did when trying to identify the same thief in a live lineup.

154. Wildenthal, *supra* note 131, at 1363-64 n.219; Task Force on Child Witnesses, *supra* note 132, at 4.

155. *See* Task Force on Child Witnesses, *supra* note 132, at 4.

156. Crawford v. Washington, 541 U.S. 36, 53-54 (2004).

157. *See* John F. Yetter, *Wrestling with* Crawford v. Washington *and the New Constitutional Law of Confrontation*, 78 FLA. B.J. 26, 29 (2004) (stating that *Craig* is less secure after *Crawford*,

Craig regarding the use of in-court protective procedures is still governing precedent.[158] Therefore, "the Confrontation Clause does not prohibit use of a procedure that, despite the absence of face-to-face confrontation, ensures the reliability of the evidence by subjecting it to rigorous adversarial testing and thereby preserves the essence of effective confrontation."[159]

Crawford actually seems to back away from the Court's previous emphasis on face-to-face contact between the defendant and the accuser.[160] The *Crawford* Court focuses on the Confrontation Clause's procedural guarantee that a statement's "reliability be assessed in a particular manner: by testing in the crucible of cross-examination."[161] Without the emphasis on face-to-face contact, many in-court procedures, such as the use of videotaped or broadcasted testimony become even less problematic. As long as the procedure in question allows for cross-examination of the testifying witness, it should not violate the defendant's right to confrontation, despite the lack of in-person or eye-to-eye contact between the accuser and the defendant.

Some commentary suggests that encouraging prosecutors to put children on the stand to testify, with proper preparation, could allow compliance with *Crawford* without causing prosecutions to suffer.[162] *Crawford* stated that "when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements."[163] The Court previously articulated what it means to be "available for cross-examination" in *California v. Green*, and concluded that a witness is available despite memory loss about the event, or even failure to remember or subsequently recanting the prior statement itself.[164] When the rules from *Crawford* and *Green* are read together, it appears that even if the child is a poor witness on the stand, the child is considered "present to defend or explain" any prior testimonial statements unless the restrictions on cross-examination are truly

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but not overruled); Richard D. Friedman, *Adjusting to* Crawford*: High Court Decision Restores Confrontation Clause Protection*, 19 CRIM. JUST. 4, 8 (2004) ("[T]he rule of *Maryland v. Craig* is presumably preserved.") (internal citation omitted).

158. *See* Maryland v. Craig, 497 U.S. 836, 855-57 (1990) (holding that the Confrontation Clause does not bar a child witness in an abuse case from testifying via one-way closed-circuit television outside the defendant's physical presence upon a case-specific finding that the procedure is necessary to protect the welfare of the child from "more than *de minimis*" trauma caused by testifying in the defendant's presence).

159. *Id*. at 857.

160. *See* Coy v. Iowa, 487 U.S. 1012, 1019-20 (1988). *Coy* left open the possibility of exceptions to the requirement of face-to-face contact, which had previously been recognized in *Craig*, 497 U.S. at 843.

161. *Crawford*, 541 U.S. at 61.

162. Mosteller, *supra* note 132, at 595 (explaining the Court's rule in United States v. Owens, 484 U.S. 554 (1988)); *see also* Yetter, *supra* note 157, at 32 (suggesting that the final impact of *Crawford* might be slight because compliance with the rules may be feasible).

163. *Crawford*, 541 U.S. at 59 n.9 (citing California v. Green, 399 U.S. 149, 162 (1970)).

164. Mosteller, *supra* note 132, at 586.

significant.[165] Therefore, if the child is testifying in even a minimal capacity, the prosecution can then presumably admit any prior out-of-court statements without raising a Confrontation Clause issue.

Crawford does not add to or change the Court's definition of unavailability, generally, for trial.[166] The issue of availability, both for cross-examination and for trial, leads to questions about the level of competency required for a child to be considered a witness. Neither *Crawford* nor any prior Supreme Court case adopts a constitutional concept of minimal competency, or clarifies whether confrontation with an incompetent witness is adequate under the Constitution.[167] In *Wright*, the Court refused to adopt a rule that the out-of-court statements of a child were "*per se* unreliable" because the trial court found the child witness incompetent to testify at trial.[168] Post-*Crawford* commentary suggests that the standard for competency of a child witness should be relatively low, or at least flexible.[169] The ability to take an oath in a technical sense should not be

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165. Allie Phillips, *A Flurry of Court Interpretations: Weathering the Storm After* Crawford v. Washington, 38 PROSECUTOR 37, 40 (2004); Mosteller, *supra* note 132, at 594-95 (citing Bugh v. Mitchell, 329 F.3d 496, 505 (6th Cir. 2003) (finding that the child witness was adequately available although only responding verbally to questions about one act of abuse and then nodding or shrugging only, which the court interpreted as memory failure)). *But see* Mosteller, *supra* note 132, at 587 (refusing to answer questions makes a witness unavailable). Scalia's dissent in *Craig* equated being unable to testify in the defendant's presence with a refusal to testify. *Craig*, 497 U.S. at 866 (Scalia, J., dissenting). However, the Court's prior interpretation of when "refusal" to testify rendered the witness unavailable under the Confrontation Clause involved a witness invoking Fifth Amendment privilege in response to all questions about the alleged crime. Mosteller, *supra* note 132, at 587-88. If a child actually appears on the stand and is capable of responding to any questions, even to say that they do not remember, the child is likely "available" for cross-examination. *See id*. at 594-96.

166. Friedman, *supra* note 157, at 8; *see* Ohio v. Roberts, 448 U.S. 56, 74 (1980) (describing constitutional unavailability); *see also supra* note 36 and accompanying text.

167. Mosteller, *supra* note 132, at 597. The issue of competency is significant when looking at Indiana's Protected Persons Statute, IND. CODE § 35-37-4-6 (e)(2)(b) (amended by 2005 Ind. Legis. Serv. P.L. 2-2005 H.E.A. 1398 (West) (technical corrections)), which allows a witness to be found unavailable if the court determines that "the protected person is incapable of understanding the nature and obligation of an oath." This appears to allow incompetence as a prerequisite for admission of the out-of-court statement of a protected person. *But see infra* notes 168-72 and accompanying text (exploring the difference between competency and the technical requirement of an oath).

168. Idaho v. Wright, 497 U.S. 805, 824 (1990). Idaho allows a child to testify if she is "[capable] of receiving just impressions of the facts . . . [and] of relating them truly." *Id.* (quoting IDAHO CODE § 9-202 (Supp. 1989); IDAHO R. EVID. 601(a)).

169. *See* Mosteller, *supra* note 132, at 599 (suggesting that legislatures should revise the rules of evidence and courts should interpret competency requirements more flexibly to allow for testimony and cross-examination of child witnesses); Friedman, *supra* note 157, at 10 (suggesting that a child should understand that his statement could lead to adverse consequences for the person accused, but that he needs no real understanding of the legal system before he may be considered

required.[170] The advisory committee's note to Federal Rule of Evidence 603 acknowledges the need for flexibility in the oath requirement for child witnesses,[171] and several courts have established competency rules that eliminate the oath requirement explicitly or indirectly for child witnesses in abuse cases.[172]

In conclusion, *Crawford* should have no effect on in-court protective procedures because the witness is testifying, and therefore subject to cross-examination. Courts should maintain flexible standards for competency and availability for cross-examination to allow child abuse witnesses to fully take advantage of this exception created by the *Crawford* Court.

B. Crawford *Does Not Apply to Nontestimonial Hearsay*

Crawford does not apply if the statement is nontestimonial. The *Crawford* Court "[left] for another day any effort to spell out a comprehensive definition of 'testimonial,'" saying that the term "applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations."[173] Lower courts should apply the Court's "minimum" definition, at least until the Supreme Court provides more guidance.[174] This narrow definition means many child abuse victims' out-of-court statements will be found nontestimonial. Yet even under more expansive interpretations of the term

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a witness).

170. Mosteller, *supra* note 132, at 598.

171. FED. R. EVID. 603 advisory committee's note; Mosteller, *supra* note 132, at 598.

172. Mosteller, *supra* note 132, at 598 n.480.

173. Crawford v. Washington, 541 U.S. 36, 68 (2004). The Supreme Court may be ready to begin clarifying the definition of testimonial statements. The Court granted certiorari to review two state court decisions applying *Crawford*. Hammon v. State, 829 N.E.2d 444 (Ind. 2005), *cert. granted*, 74 U.S.L.W. 3265 (U.S. Ind. Oct. 31, 2005) (No. 05-5705); State v. Davis, 111 P.3d 844 (Wash. 2005), *cert. granted*, 74 U.S.L.W. 3272 (U.S. Wash. Oct. 31, 2005) (No. 05-5224). Both are domestic abuse cases. In *Hammon*, the Indiana Supreme Court determined that an oral statement by a domestic violence victim to police who arrived on the scene, admitted as an excited utterance, did not violate the Confrontation Clause, but admission of an affidavit made at the scene did violate the Confrontation Clause. *Hammon*, 829 N.E.2d at 458. The Indiana Supreme Court held that "statements to investigating officers in response to general initial inquiries are nontestimonial but statements made for purposes of preserving the accounts of potential witnesses are testimonial." *Id.* at 446. The court concluded that "generally . . . testimonial statements are those where a principal motive of either the person making the statement or the person or organization receiving it is to preserve it for future use in legal proceedings." *Id.* In *Davis*, the Washington Supreme Court examined whether admission of an emergency 911 call is barred under the Confrontation Clause and decided that 911 calls should be evaluated on a case-by-case basis because they could contain both nontestimonial and testimonial statements. *Davis*, 111 P.3d at 851. Statements made while "seeking assistance and protection from peril" were nontestimonial and properly admitted. *Id.*

174. *See infra* note 198 and accompanying text (describing post-*Crawford* interpretations of the term testimonial by lower courts).

"testimonial," many statements by young children are likely to be considered nontestimonial, even when they might be testimonial if made by an adult or older child.

Crawford listed, without adopting, three possible interpretations of the types of statements that could be considered testimonial and, therefore, inadmissible without confrontation: "*[E]x parte* in-court testimony or its functional equivalent," "extrajudicial statements . . . contained in formalized testimonial materials," and "statements . . . which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."[175] The first of these definitions would require the Court to identify "statements elicited by state agents in contexts analogous to ex parte judicial proceedings, the target evil of the framers."[176] These are formal, procedural events conducted for the purpose of obtaining testimonial evidence for later use and are discernable without reference to the intentions of the participants.[177] The second definition, perhaps because of its similarity to the first, has not received much individual attention.[178] *Crawford* elaborates that "formalized testimonial materials" include "affidavits, depositions, prior testimony, or confessions."[179]

The third possible definition, that the statement must be made in contemplation of future evidentiary use, is arguably the most expansive because it is not limited to statements made to a government official.[180] This definition itself can be viewed in multiple ways and may require a different conception of statements by children than statements by adults.[181] Using the hypothetical of a young child talking to his mother, there are four different ways to view the statements by the child. The child could have no comprehension of future evidentiary use of his statement, and it would then be considered nontestimonial.[182] A second view is that the child has some concept that telling his mother will get the person he is accusing in trouble, and that this is sufficient comprehension of future evidentiary use to render the child's statement to his mother testimonial.[183] A third view is that regardless of the age of the declarant, the perspective of an "objective observer" should determine whether future evidentiary use should have been contemplated.[184] This formulation is supported

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175. *Crawford*, 541 U.S. at 51-52.

176. Yetter, *supra* note 157, at 28.

177. *Id*. Yetter suggests that the interviewing of complainants of sexual abuse by members of child protection units is likely to produce testimonial statements under this definition. *But see* Phillips, *supra* note 165, at 38-40 (suggesting that forensic interviews should not be testimonial because they are conducted for the benefit of the child and not primarily for the purpose of criminal prosecution).

178. *See Crawford*, 541 U.S. at 51-52.

179. *Id*.

180. *See* Friedman, *supra* note 157, at 9.

181. *Id*. at 10-11.

182. *Id*. at 11.

183. *Id*.

184. *Id*.

by the language of *Crawford*, which refers to an "objective witness."[185] The question remains, should this observer be an objective child, or an objective adult? One post-*Crawford* court chose the perspective of an objective adult.[186] It applied an "objective observer" standard, as opposed to a proposed "objective witness in the same category of persons as the actual witness."[187] Finally, it is possible that the court could consider whether the hypothetical mother, or the person receiving the statement, contemplates future evidentiary use.[188]

Commentary suggests that courts are unlikely to adopt the third and most expansive approach suggesting that contemplated evidentiary use renders a statement testimonial.[189] It is criticized as unpredictable, unsupported by the historic view that Justice Scalia favors in the *Crawford* majority opinion, and under-inclusive of some categories of testimonial statements.[190] Furthermore, the Court actually used a different method to decide *Crawford*, so the "contemplated later evidentiary use" formulation is unsupported by Supreme Court precedent.[191]

Ironically, child protection advocates may be conflicted about opposing the adoption of the contemplated evidentiary use formulation because it leaves open the possibility that many potentially testimonial statements by children could avoid classification as testimonial.[192] This formulation's potential to allow children's statements that would not be allowed if they were made by adults is one reason the definition is labeled under-inclusive by critics.[193] Consequently, in some jurisdictions, adoption of this definition could actually be less restrictive on the use of children's out-of-court statements when the child is unavailable to testify.

Because the Court refrained from adopting any of the above formulations, the "safest" route for lower courts applying *Crawford* is to use the Court's "minimum" definition, including only prior testimony at a preliminary hearing, before a grand jury, or at a former trial, and police interrogations. This definition is the most restrictive and most likely to render a child's out-of-court statement nontestimonial.

One interesting element of the *Crawford* decision indicates that under any definition of testimonial statements, children's statements may be treated differently than those of adults in the same context. The Court left *White v.*

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185. *See* Crawford v. Washington, 541 U.S. 36, 52 (2004).

186. People v. Sisavath, 13 Cal. Rptr. 3d 753, 757-58 (Ct. App. 2004).

187. *Id*.

188. Snowden v. State, 846 A.2d 36, 47 (Md. Ct. Spec. App. 2004) (stating that the children's statements were testimonial because the social worker interviewed them "for the expressed purpose of developing their testimony"); *see* Mosteller, *supra* note 132, at 538; Phillips, *supra* note 165, at 40.

189. Yetter, *supra* note 157, at 29.

190. *Id*.

191. *Id*.

192. *Id*.

193. *Id*.

Illinois as good precedent.[194] In *White*, the Court held that a child's statements to a police officer made forty-five minutes after the abuse occurred, admitted under the spontaneous declaration hearsay exception, did not violate the defendant's confrontation rights.[195] If the *Crawford* Court considered this statement by the child victim to an investigating police officer testimonial, then *White* should have been overruled, because its admission violated the defendant's confrontation rights.[196] Because the Court did not overrule *White*, this implies either that it did not consider the child's statement testimonial, despite its classification as a statement taken during a police interrogation, or that this type of testimonial statement is an exception to the new rule.[197]

In conclusion, courts should use a narrow definition of testimonial, such as the "minimum" definition, until the Court offers more guidance.[198] Within this minimum definition, the term "interrogations" can also be construed narrowly, allowing many "informal" statements to police officers by child witnesses to be deemed nontestimonial.[199] According to one commentator, "if the testimonial

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194. *See* Crawford v. Washington, 541 U.S. 36, 58 n.8 (2004) (describing *White* as "one case arguably in tension with the rule" in *Crawford*); *id.* at 61 ("Although our analysis in this case casts doubt on [*White*'s] holding, we need not definitively resolve whether it survives our decision today . . . ."); *see also* Yetter, *supra* note 157, at 29 n.27 (citing *Crawford*'s refusal to overrule *White* as support for his view that the *Crawford* Court did not consider a child's statement to a police officer forty-five minutes after the alleged abuse "testimonial").

195. White v. Illinois, 502 U.S. 346, 357 (1992). The *Crawford* Court does not refer to the child's statements to her babysitter, mother, and medical personnel, and only mentions the child's statement to the police officer, perhaps because this statement is most directly implicated by the Court's conclusion that "[s]tatements taken by police officers in the course of interrogations are . . . testimonial under even a narrow standard." *Crawford*, 541 U.S. at 52.

196. Yetter, *supra* note 157, at 29 n.27.

197. *See Crawford*, 541 U.S. at 61. Another testimonial statement that may be an exception to the *Crawford* standard is testimonial dying declarations, which were historically admitted under the Confrontation Clause. *Id*. at 56 n.6 ("If this exception must be accepted on historical grounds, it is *sui generis*."). *But see* Yetter, *supra* note 157, at 29 n.27 (suggesting that the testimonial dying declaration exception is better explained by the doctrine of forfeiture by wrongdoing, under which the defendant waives his Confrontation Clause rights).

198. *See* Ramirez v. Dretke, 398 F.3d 691, 695 (5th Cir. 2005) (finding spontaneous out-of-court statements made outside a judicial or investigatory context nontestimonial under *Crawford*'s "minimum" definition); Leavitt v. Arave, 383 F.3d 809 (9th Cir. 2004) (finding that declarant's statements to police in her home were not testimonial statements under *Crawford*); United States v. Lopez, 380 F.3d 538 (1st Cir. 2004) (finding that defendant's statements at police station were not testimonial and therefore not subject to *Crawford* principles); Evans v. Luebbers, 371 F.3d 438 (8th Cir. 2004) (relying on narrow definition of testimonial statements as including only prior testimony at a preliminary hearing, before a grand jury, or at a former trial, and to police interrogations); United States v. Reyes, 362 F.3d 536 (8th Cir. 2004) (finding co-conspirator statements non-testimonial and therefore not subject to *Crawford* principles).

199. *Crawford* uses the term "'interrogation' in its colloquial, rather than any technical legal sense." *Crawford*, 541 U.S. at 53 n.4 ("Just as various definitions of 'testimonial' exist, one can

statement category is limited, the *Crawford* regime might be no less favorable to the admissibility of hearsay than the displaced 'reliability' structure of *Roberts*."[200] Between this narrow definition and evidence that statements by child abuse victims may be treated differently under any definition, many children's statements are likely to be excluded from *Crawford*'s requirements as nontestimonial. This supports the position that *Crawford* should not pose much threat to child witness protections.

For nontestimonial statements, it is clear that *Crawford* has no impact, but it is unclear whether nontestimonial statements still have any Confrontation Clause implications. *Crawford* leaves two possibilities: Either the nontestimonial statements are still subject to the *Roberts* reliability analysis, or they are completely outside the reach of the Confrontation Clause.[201] If nontestimonial hearsay is outside the reach of the Confrontation Clause, then state rules of evidence and hearsay law govern what is admissible.[202] This option removes any Confrontation Clause barrier to the admission of out-of-court statements of child witnesses that even *Roberts* may have posed.[203] If nontestimonial statements still have Confrontation Clause implications, then the Court indicated that *Roberts* may still be the operative test.[204] In the recent aftermath of *Crawford*, and presumably until the Court clarifies whether *Roberts* remains as a secondary form of constitutional protection for the accused, many lower courts will avoid the risk of reversal and apply the *Roberts* reliability analysis to nontestimonial hearsay.[205] The application of *Roberts* is good news for most child hearsay exceptions, which were drafted to comply with *Roberts*'s reliability analysis, and have subsequently withstood challenges to their facial constitutionality.[206]

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imagine various definitions of 'interrogation,' and we need not select among them in this case."). The Court leaves the selection of a definition of interrogation open, but states that the recorded statement at issue in *Crawford*, knowingly given in response to structured police questioning, "qualifies under any conceivable definition." *Id.*; *see also White*, 502 U.S. at 357; *Leavitt*, 383 F.3d at 830 n.22; *supra* note 195 and accompanying text.

200. Yetter, *supra* note 157, at 32.

201. *Crawford*, 541 U.S. at 68.

202. *Id*. The Court left the possibility of an "approach that exempted such statements from Confrontation Clause scrutiny altogether."

203. The evidence in question would still be subject to objection based on the requirements of state hearsay law, but at least would not raise the possibility of Confrontation Clause objections.

204. *Id*. "Where nontestimonial hearsay is at issue, it is wholly consistent with the Framer's design to afford the States flexibility in their development of hearsay law—as does *Roberts* . . . ."

205. *See* Mosteller, *supra* note 132, at 13 (citing State v. Rivera, 844 A.2d 191 (Conn. 2004) and People v. Coker, No. 238738, 2004 WL 626855 (Mich. Ct. App. Mar. 30, 2004)). The author suggests that a court can always, if it wants to, find the *Roberts* analysis satisfied and admit the evidence in question.

206. *See* Task Force on Child Witnesses, *supra* note 132, at 42.

C. Crawford *Does Not Apply if a Defendant Waives His Confrontation Rights by Forfeiture*

Crawford maintained that forfeiture by wrongdoing is a waiver of the defendant's Confrontation Clause rights.[207] Courts should interpret this exception in a way that allows prosecutors of child sexual abuse to show that the abuse itself prevented the victim/witness from testifying.[208]

Crawford states that "the rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds . . . ."[209] The doctrine of forfeiture is based on the idea that a defendant should not profit from his own bad acts.[210] The principle is explained in *Reynolds v. United States*:

> The Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him; but if a witness is absent by his own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away. 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.[211]

If the prosecution can make an individualized showing that the defendant procured the child witness's absence in an abuse case, *Crawford* does not bar the admission of any out-of-court statements of the victim, testimonial or not, because the procurement constitutes a waiver of the defendant's Confrontation Clause rights.[212]

Forfeiture's application in child abuse cases raises more difficult issues than a scenario in which a defendant hires someone to murder the key witness against him shortly before he is scheduled to testify. In child abuse cases, the argument is that acts committed during the crime itself led to the victim's unavailability to testify.[213] Under this theory, guilt, embarrassment, or fear are caused during the abuse and ultimately render the child unable to testify.

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207. *Crawford*, 541 U.S. at 62.

208. *See* Friedman, *supra* note 157, at 12.

209. *Crawford*, 541 U.S. at 62 (citing Reynolds v. United States, 98 U.S. 145, 158-59 (1879)); *see also* Motes v. United States, 178 U.S. 458, 471 (1900) (holding that admitting ex parte deposition testimony would violate the defendant's right to confront his accusers unless the declarant was "absent from the trial by suggestion, procurement, or act of the accused").

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

211. *Id*. at 158.

212. *See Crawford*, 541 U.S. at 62.

213. Domestic violence is another context in which prosecutors may seek to expand the forfeiture exception. *See* Adam M. Krischer, *"Though Justice May be Blind, It Is Not Stupid": Applying Common Sense to* Crawford *in Domestic Violence Cases*, 38 PROSECUTOR 14, 14 (2004) (suggesting that the judiciary and public may need to be educated over time to accept the view that domestic violence almost always involves forfeiture).

The primary objection is that this use of forfeiture is bootstrapping: The wrongful act that allegedly rendered the witness unavailable is the very act with which the accused is charged (and presumed not to have committed).[214] However, a commentator has suggested that this is analogous to courts' regular admission of hearsay statements made by a conspirator of the defendant in support of the conspiracy that the defendant is currently charged with committing.[215] Post-*Crawford*, courts have held that it is proper to apply the forfeiture doctrine when the act rendering the witness unavailable is the same act with which the defendant is charged.[216] The Federal Rules of Evidence require corroborating evidence of the conspiracy before admitting co-conspirator statements.[217] Based on this requirement, courts may ask for corroborating evidence of abuse before admitting out-of-court statements of a child victim to show that abuse by the defendant procured the victim's unavailability and constituted a waiver of his Confrontation Clause rights. Even so, the bootstrapping argument should not prevent use of the forfeiture doctrine in the child abuse context.

A second objection to this application is that the defendant did not act with the purpose of rendering the witness unavailable.[218] This requirement of intentional procurement, if it is even appropriate to apply to forfeiture under the Confrontation Clause, should not prevent use of the doctrine in a child abuse context. First, with child abuse, there is evidence that the procurement is intentional, as abusers will often tell victims that the acts are "secret" and that they should not tell, actions apparently "intended to prevent the child from disclosing [the abuse] and testifying against the abuser."[219] Second, a

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214. Friedman, *supra* note 157, at 12.

215. *Id.*; *see* FED. R. EVID. 801(d)(2)(E). Statements "by a coconspirator of a party during the course and in furtherance of the conspiracy" are not hearsay, even when admitted against a defendant who is actually charged with the very conspiracy which renders the statement admissible. FED. R. EVID. 801(d)(2)(E).

216. *See* State v. Meeks, 88 P.3d 789, 793-94 (Kan. 2004) (holding that admission of testimonial hearsay did not violate the homicide defendant's Confrontation Clause rights because the defendant forfeited such rights when he killed the declarant/victim); People v. Moore, No. 01CA1760, 2004 Colo. App. LEXIS 1354 (Colo. Ct. App. July 29, 2004) (holding that the defendant waived his right to confrontation when the victim was unable to testify because her death was the result of the defendant's actions).

217. FED. R. EVID. 801(d)(2)(E).

218. Friedman, *supra* note 157, at 12. This argument likely rests on the last sentence of Federal Rule of Evidence 804(a), which defines unavailability of a declarant for purposes of the hearsay doctrine. The rule states, in relevant part, "[a] declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement *for the purpose of preventing the witness from attending or testifying*." FED. R. EVID. 804(a) (emphasis added).

219. *See* Tom Harbison, *Using the* Crawford v. Washington *"Forfeiture by Wrongdoing" Confrontation Clause Exception in Child Abuse Cases*, REASONABLE EFFORTS (National District Attorneys Association, American Prosecutors Research Institute), Volume 1, Number 3, 2004,

commentator suggests that the requirement of intentional procurement, inasmuch as it originated under the Federal Rules of Evidence for application in a hearsay analysis, should not be required in a forfeiture analysis under the Confrontation Clause.[220] The basic rationale behind the forfeiture doctrine—that the defendant should not profit from his bad acts—supports the conclusion that the appropriate question should not be *when* the bad act occurred, but whether the act caused the unavailability and was incompatible with maintaining the right to confrontation.[221]

Arguments for application of the forfeiture doctrine in cases where the abuse itself is shown to have procured the child victim's absence are strong. Abusers will commonly tell victims not to tell, threaten the victim, their family, or even pets if the child tells; or abusers will ask others, like family members, to keep the child from telling.[222] Courts have found procurement of a witness's unavailability, although not necessarily in a child abuse context, by "persuasion, the wrongful disclosure of information, control by the suspect, acquiescence in others performing acts of procurement, and asking others to persuade the witness not to testify."[223] Prior to *Crawford*, it was recognized that the abuse itself could render a victim unavailable to testify, without any subsequent act of procurement by the defendant.[224] If post-*Crawford* courts continue to recognize or expand the exception for forfeiture by wrongdoing in child abuse cases, *Crawford* and the Confrontation Clause should not affect child hearsay exceptions or protective procedures where the prosecution can show that the abuse itself caused the victim's unavailability.

D. Public Policy Supports Continued Use of Child Witness Protections

Finally, policy and public pressure on the courts mitigate in favor of interpretations that allow continued use of child hearsay exceptions. The established purpose of the Confrontation Clause is to further the truth-seeking function of trial.[225] In child abuse prosecutions, requiring the witness to face the

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available at http://www.ndaa-apri.org/publications/newsletters/reasonable_efforts_volume_1_number_3_2004.html (last visited Aug. 31, 2005).

220. Richard Friedman, The Confrontation Blog: A Strange Federal Opinion on Dying Declarations and Forfeiture, http://www.confrontationright.blogspot.com/2005/03/strange-federal-opinion-on-dying.html (Mar. 28, 2005) ("Whether the confrontation right is forfeited is a matter of federal constitutional law, and there is no reason why the constitutional standard of forfeiture must conform to the Federal Rules' expression of the doctrine.").

221. *See* Harbison, *supra* note 219; Friedman, *supra* note 157, at 12.

222. Harbison, *supra* note 219.

223. *Id*. Harbison cites several cases in which the defendant procured a witness's unavailability. *Id.* at n.20.

224. *See* New Jersey v. Sheppard, 484 A.2d 1330 (N.J. Super Ct. Law Div. 1984) (holding that the defendant waived his right to confrontation at his trial for child abuse by procuring the victim's unavailability through acts committed during the crime).

225. Crawford v. Washington, 541 U.S. 36, 61 (2004) ("[T]he Clause's ultimate goal is to

defendant in court or answer questions on cross-examination may not serve this purpose.[226] The Court in *Craig* stated that "[w]here face-to-face confrontation causes significant emotional distress in a child witness, there is evidence that such confrontation would in fact *disserve* the Confrontation Clause's truth-seeking goal."[227] The nature of child witnesses and child abuse prosecutions begin to illustrate why adversarial testing may not be the best guarantor of reliability.[228] Few lawyers can effectively cross examine a child witness, a task that requires great sensitivity and skill.[229] It is also suggested that jurors may not be able to evaluate accurately what they see and hear from such a witness.[230] If face-to-face confrontation and adversarial testing do not serve the purposes of confrontation, and may even disserve its purposes, it is unclear whether courts can justify the potential harm done to child witnesses in carrying out the mandates of *Crawford*.

Crawford is seen as a barrier to the admission of many previously-admissible statements. Because of the damaging impact to prosecutions in the already politically-charged context of child sexual abuse, there will be public pressure on courts to narrow the definition of testimonial statements, and to expand the scope of other exceptions, to minimize *Crawford*'s impact.[231] This public and political pressure, as well as the uncertainty about whether *Crawford*'s mandates will further the truth-seeking goals of confrontation, supports lower court interpretations that minimize or eliminate any impact *Crawford* may have on child hearsay exceptions and protective in-court procedures for child witnesses.

CONCLUSION

Much of the commentary following *Crawford* was quick to state that the decision brought about a radical change in Confrontation Clause jurisprudence. Doubtless, *Crawford* has changed the way courts must evaluate the admission of testimonial out-of-court statements. However, it is not clear whether this new analysis will keep many previously admissible hearsay statements out of court. Although it appears to be a dramatic change, *Crawford* may not bring about such

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ensure reliability of evidence."); Maryland v. Craig, 497 U.S. 836, 845 (1990) ("The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant . . . ."); Ohio v. Roberts, 448 U.S. 56, 65 (1980) (stating that the Clause's purpose is to "augment accuracy in the factfinding process").

226. Although the author feels there is no better alternative, he suggests that adversary testing may not lead to reliable and trustworthy evidence from children. Mosteller, *supra* note 132, at 593.

227. *Craig*, 497 U.S. at 857 (citing Coy v. Iowa, 487 U.S. 1012, 1032 (1988) (Blackmun, J., dissenting) (stating that face-to-face confrontation "may so overwhelm the child as to prevent the possibility of effective testimony, thereby undermining the truth-finding function of the trial itself")).

228. *See* Mosteller, *supra* note 132, at 593.

229. *Id*.

230. *Id*.

231. *Id*. at 516.

dramatic changes in the courtroom. In particular, the author of this Note feels that *Crawford* is unlikely to have a damaging impact on child abuse prosecutions. *Crawford* should not be construed to prevent prosecutors from using techniques to protect child witnesses, including in-court protective procedures and evidentiary rules allowing the use of hearsay statements by child victims. The defendant's right to confrontation is not to be ignored or taken lightly. However, to allow *Crawford* to act as a road block to child abuse prosecutions would present an even greater risk to the Confrontation Clause's ultimate truth-seeking function.