

The Child Quasi-Witness

by Richard D. Friedman and Stephen J. Ceci

Pre-school teachers noticed that L.P., a boy not quite three and a half years old, had facial bruises and a blood shot eye. In response to repeated questioning – “Who did this? What happened to you?” – he ultimately said that “Dee,” as Darius Clark, his mother’s boyfriend was known, had done it. Clark was eventually charged with several counts of child abuse. The trial court deemed L.P. incompetent to be a trial witness, but it allowed evidence of his out-of-court statement identifying Clark. The jury found Clark guilty, but the Ohio Court of Appeals, and then the Ohio Supreme Court, held that admission of L.P.’s statement violated Clark’s right under the Sixth Amendment to the Constitution to “be confronted with the witnesses against him.”²

This case reflects a sadly recurrent pattern: A very young child makes a statement to some authority figure describing criminal activity, often but not necessarily physical or sexual abuse inflicted on the child. If an adult had made the statement in similar circumstances, she would understand its gravity and the likely consequence that the information provided would be used in a prosecution of the person she described as having committed a crime. Accordingly, under the United States Supreme Court’s decision in *Crawford v Washington*,³ the adult’s statement should be considered testimonial for purposes of the Confrontation Clause, and it could not be admitted against an accused unless he had an opportunity to be confronted with her and cross-examine her, at trial if reasonably possible. But does it make sense to treat the situation the same when the speaker is a very young child who may not appreciate the gravity and likely consequences of her statement?

In the decade since *Crawford* transformed the law governing the Confrontation Clause, the Supreme Court has declined to take a case that would help demonstrate how *Crawford* applies when the speaker is a child. Sooner or later, it will almost certainly have to, because the conundrum of how to apply *Crawford* to children is a pressing one. It seems to make little sense to hold that a young child’s statement should be deemed testimonial, and so subject to confrontation, because an adult in the position of the child would have understood the likely prosecutorial consequences of the statement. On the other hand, to hold that the accused lacks the confrontation right *because of* relative deficiencies on the speaker’s part may seem utterly bizarre and wrongheaded.

We contend in this Article that some very young children should be treated very differently from adults for purposes of the Confrontation Clause. Our basic thesis is this: To be deemed a witness for purposes of the Confrontation Clause requires that the speaker be capable of making a testimonial statement. That capacity includes at least a cognitive component: The speaker must recognize that her statement may cause serious adverse consequences for another person, and that others regard her as having an obligation to speak accurately. The capacity to be a witness may also include a moral component: Testifying in a criminal prosecution is an ordeal,

² *State v Clark*, 999 NE2d 592 (Ohio 2013).

³ 541 US 36 (2004).

and properly so, and it may be that as a society we do not wish to impose it on very young children. Whatever the capacities required for a person to be a witness for purposes of the Confrontation Clause, we contend that some very young children lack them. As a consequence, out-of-court statements by such children, even statements made to authority figures and describing criminal activity, do not fall within the strictures of the Clause. At the same time, even very young children may be sources of evidence, in some cases quite good evidence that our adjudicative system ought to be able to use. But if a child is deemed not capable of being a witness for purposes of the Confrontation Clause, either at the time of her statement or at the time of trial, then the usual method that our system offers parties for testing adverse statements made by a human observer – cross-examination under oath at trial or in some other formal proceeding – is not appropriate. Rather, an accused should be able to have a qualified expert examine the child in an informal, out-of-court setting, subject to a prescribed, scientifically validated, protocol.

Hence, we speak of some children as quasi-witnesses – lacking the capacity to be witnesses and so not subject to confrontation, but nevertheless potentially valuable sources of evidence and so subject to a different form of examination.

We believe it is rather obvious that, properly administered, an alternative procedure of the type we propose tends to burden and traumatize a very young child less than a system in which she is expected to testify in open court in the presence of the accused and face the cross-examination of his lawyer. Relatedly, we also believe that the proposed procedure both reduces the likelihood that a young child will recant accurate statements she previously made and increases the probability that she will recant prior inaccurate ones. Thus, we contend that this procedure also gives the accused a better opportunity to reveal defects in the child's cognitive functioning and truth-telling capacities and flaws in her account of the events at issue.

I. The Doctrinal Conundrum

To understand the confrontation right, it is necessary to recognize that in providing how witnesses give testimony a judicial system could choose from a wide range of procedures. Witnesses could commit their testimony to writing and seal it before trial, for example, as the ancient Athenians did, or give it behind closed doors to a court official, as was the norm in the old continental courts. But *Crawford* held that the Confrontation Clause requires that witnesses against an accused testify in the manner that has been prescribed for centuries by the common law: under oath, subject to cross-examination, and if reasonably possible at trial. *Crawford* thus establishes that the Confrontation Clause does not create a substantive standard for admissibility of evidence. Rather, the Clause provides a procedural right governing the manner in which witnesses testify against an accused. That right reaches statements that are *testimonial* in nature, wherever made. And, as subsequent cases have made clear, it *only* applies to such statements.⁴

⁴ *Davis v Washington*, 547 US 813, 823-26 (2010); *Whorton v Bockting*, 549 US 406, 420 (2007).

The Supreme Court has not yet given a comprehensive answer to the question of how to determine whether a statement is testimonial. But in *Michigan v. Bryant*⁵ it indicated that, in the context of an interrogation, the test is whether the “primary purpose” of the interrogation is “to establish or prove past events potentially relevant to later criminal prosecution.”⁶ The Court asserted that in making this assessment

the relevant inquiry is not the subjective or actual purpose of the individuals involved in a particular encounter, but rather the purpose that reasonable participants would have had, as ascertained from the individuals’ statements and actions and the circumstances in which the encounter occurred.⁷

Bryant further indicates that the perspectives of both the speaker and the questioner must be taken into account. Ultimately, it is the speaker who is, or is not, deemed to be a witness for purposes of the Confrontation Clause. Accordingly, we believe the best interpretation of *Bryant* is that (1) the intent of a reasonable person in the speaker’s position⁸ is the determining factor as to whether a statement is testimonial, but (2) crucial factors in discerning that intent are what that reasonable person would understand to be the questioner’s purpose in conducting the conversation and the questioner’s likely conduct in response to it.

But how is this standard to be applied in the case of children? Courts could apply it straightforwardly and ask, as in the case of an adult speaker, what the understanding of a reasonable person would be.⁹ The use of a reasonable-person standard, after all, is meant to avoid the need for determining the mental state of the particular speaker at the time of the statement. An objective test of this sort necessarily does not match perfectly with reality: The understanding of the posited reasonable person will be less insightful than that of some people and more insightful than that of others, but we accept the divergence for the sake of clarity and simplicity. The same principle could be applied to speakers of all ages. But to ignore the child’s age requires the court to engage in a rather bizarre inquiry, asking about the understanding that a reasonable adult would have if that adult were in the position of the child speaker – which would be essentially impossible, given that the cognitive distributions of adults and preschoolers are largely non-overlapping. It is at least somewhat strange to treat the statement of a very young child as testimonial on the basis that a reasonable adult would anticipate prosecutorial use of the statement, even if in fact the child could not plausibly have such an anticipation.

⁵ 131 SCt 1143 (2011).

⁶ *Id.* at 1160, 1165.

⁷ *Id.* at 1156.

⁸ We are using “intent” here as a shorthand; in fact, we believe that if a reasonable person in the position of the speaker would anticipate likely evidentiary use of the statement, that also would be sufficient to make the statement testimonial.

⁹ See, for example, *State v. Snowden*, 867 A2d 314 (Md 2005); *People v. Sisavath*, 118 13 CalRptr3d 753, 758 n3 (Cal Apps 2004).

Alternatively, a court might take the child's age into account. Rather than asking what the understanding of a reasonable person in L.P.'s position would have been, for example, one might ask what the understanding of a child of L.P.'s age, and of ordinary development, would have been. One could thus ask what the understanding of a three-year-old of ordinary development would be. (It does not make sense to ask what a reasonable three-year-old would understand, because – as parents know – “reasonable three-year-old” is an oxymoron.¹⁰)

Such a standard has its own problems. It creates a messy fragmentation of the law – it means that in determining whether a statement is testimonial, continuous age-adjustment is used for children up to some presumed age of maturity and then abandoned in favor of an approach based on the one-type-fits-all posited reasonable person for adults.¹¹ A more substantive concern is that this age-adjusted standard raises what at first appears to be a rather bizarre anomaly, that the child's relative cognitive weakness, by taking the statement outside the scope of the Confrontation Clause, results in *less* protection for the accused.

Nevertheless, we believe that the law should take into account the child's age – meaning that under our approach, as under the age-adjustment approach to determining whether a statement is testimonial, there are some circumstances in which a child's statement will fall outside the Confrontation Clause even though a statement by an adult in similar circumstances would fall within it. But the approach we propose here avoids the anomaly of the age-adjustment approach by posing a different question: Before asking whether a statement was testimonial, the court should ask whether the child is capable of being a witness for purposes of the Clause. The consequences of a negative answer are very different for each of the two questions. When a court decides that a given statement is not testimonial, the result is simply that the Clause does not apply and it poses no obstacle to admission of the statement. But a decision under our approach that the child is incapable of being a witness would trigger an altogether different procedure, assuring that ordinarily the statement cannot be admitted unless the accused is accorded substantial rights that are more appropriate than cross-examination for dealing with a very young child.

¹⁰ But some courts do ask that. See, for example, *People v Vigil*, 127 P3d 916, 925 (Col 2006) (“an assessment of whether or not a reasonable person in the position of the declarant would believe a statement would be available for use at a later trial involves an analysis of the expectations of a reasonable person in the position of the declarant. Expectations derive from circumstances, and, among other circumstances, a person's age is a pertinent characteristic for analysis”); *State v. Scacchetti*, 690 NW2d 393, 396 (Minn Apps 2005) (asking whether “the circumstances surrounding the contested statements led the three-year-old to reasonably believe her disclosures would be available for use at a later trial, or that the circumstances would lead a reasonable child of her age to have that expectation.”).

¹¹ The Supreme Court has, however, adopted a similar approach in the *Miranda* context. *J.D.B. v. North Carolina*, 131 SCt 2394 (2011).

II. The Capacity to be a Witness

When a statement by an adult is at issue, it is not ordinarily necessary to ask whether the speaker is capable of being a witness for purposes of the Confrontation Clause; the court need only ask whether the particular statement is testimonial in nature. But when the speaker is a child, we believe the best approach is to ask first the logically prior question: Does the child have sufficient *capacity* to be deemed a witness for purposes of the Confrontation Clause?

We will elaborate in Part III on what we believe the consequences should be if the answer to this question is negative. For now we will consider the question of what is required for a person to be a witness and discuss the reasons why we believe some very young children ought to be deemed to lack the requisite capacity. It is important to bear in mind two points throughout this discussion. First, the question here is what it means to be a witness – that is, to speak testimonially – not what the requirements are of being a *good* or *acceptable* witness. Thus, to be a witness, it is not necessary that the person herself regard it as important that she tell the truth or that she have a good memory; there are, after all, witnesses who lie or otherwise speak inaccurately. Second, the testimonial act that may make a person a witness for purposes of the Confrontation Clause need not occur in court. Our focus in this Article is on the out-of-court context.

The Supreme Court has defined “testimony” as “[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.”¹³ For a person to be a witness under this definition, it is necessary first that she be able to provide a coherent narrative for the purpose of “establishing or proving some fact.” And second, it is necessary that she be capable of solemnity. In this context, we believe, solemnity is best understood not to refer to the manner in which the statement is made but rather to an appreciation of the gravity of the declaration – that is, of the potential consequences that it might have and of their significance.

In other words, in order to be capable of giving testimony, a person must be able to recognize and understand the truth of the propositions in the following causal chain:

As a result of my statement, my listeners may believe that what I say happened did in fact happen; as a result of that belief they may take action; and as an ultimate result of that action the person whose conduct I am describing may suffer serious adverse consequences. Accordingly, my listeners, or others, regard it as important that I speak truthfully.

Adults of ordinary intelligence have the capacity to recognize this chain of causation, though it involves comprehending the perceptions, understandings, desires, and reactions of others, including people not part of the immediate conversation. Very young children do not.¹

¹³ *Bryant*, 131 SCt at 1153, quoting *Crawford*, 541 US at 51.

¹**Error! Main Document Only.** See *People v Stechly*, 870 N.E.2d 333 (Ill 2007) (endorsing the statement in Richard D. Friedman, *The Conundrum of Children, Confrontation, and Hearsay*, 65 Law & Contemp Prob 243, 251–52 (2002), that “[e]ven statements by very young children may be highly probative[, b]ut very young children are not yet at a stage where they can be expected

Just what children should be considered to have sufficient capacity to be deemed a witness is a very complex question. Developing a sound answer requires two very different steps. One is to understand a realworld phenomenon: the intricacies of children’s development of the various competencies necessary for a child to be capable of the act of witnessing. The second is to choose a standard for determining when – given that individual children develop differently, and that particular capacities tend to develop at different times, and gradually over time – a given child, or class of children, should be considered sufficiently developed cognitively, and perhaps morally as well, to be deemed capable of being witnesses.

Our primary purpose is to establish that *some* class of children should not be considered capable of being witnesses; we believe that, once one focuses on the nature of witnessing, that proposition is rather obvious. An eighteen-month-old child may be capable of making a statement that appears to describe criminal conduct;¹⁴ she does not, however, have the capacity to be a witness for purposes of the Confrontation Clause. A fifteen-year-old, at the other extreme, clearly has the capacity, both cognitive and moral, to be a witness. Where and how should the line between these two poles be drawn? We offer some thoughts that might help lead to a resolution of this question, but we do not attempt to develop a definitive answer here.

Researchers have amply documented that young children – particularly those prior to first grade – are fundamentally unlike older persons in their social cognitions. That is, the inferences they derive from social encounters are qualitatively different from those that older persons derive: preschool-aged children fail to understand other persons’ mental states – beliefs, intentions, motives, and desires – and they make errors predicting the consequences of their statements to such other persons. There is a biological basis for this deficit. The prefrontal cortex of the developing brain controls so-called “executive functions” such as planning, monitoring, and organization.¹⁵ Although functional from early in life, this brain region is not mature until late adolescence.¹⁶ Numerous studies reveal the deficits that result in young

to take the responsibility of being a witness”). In addition to the cognitive argument presented here, there is a moral argument – which we will not analyze further but which we think deserves serious consideration – that society should not impose on young children, perhaps not even until adolescence, the ordeal and responsibility of being witnesses. See Sherman J. Clark, *An Accuser-Obligation Approach to the Confrontation Clause*, 81 Neb L Rev 1258, 1280-85 (2003).

¹⁴ See *State v Webb*, 779 P2d 1108, 1109 (Utah 1989) (concerning eighteen-month-old girl who, after bath taken shortly after visit with father, said to mother, “Ow bum daddy”).

¹⁵ Marilyn C. Welsh, Bruce F. Pennington, and Dena B. Groisser, *A normative-developmental study of executive function*, 7 *Developmental Neuropsych* 131 (1991).

¹⁶ See Hiroki R. Hayama and Michael D. Rugg, *Right dorsolateral prefrontal cortex is engaged during post-retrieval processing of both episodic and semantic information*, 47 *Neuropsychologia* 2409 (2009); Monica Luciana and Charles A. Nelson, *The functional emergence of prefrontally-guided working memory systems in four- to eight-year-old children*, 36 *Neuropsychologia* 273 (2009); Dima Amso and B. J. Casey, *Beyond what develops when: neuroimaging may inform how cognition changes with development*, 15 *Current Directions in*

children's cognitions as a result of this neural immaturity.¹⁷ These deficits affect a web of interrelated psychological abilities that are involved in understanding the mental states of others as well as the effects that one's own actions and statements have on others.

Most adults can simulate the mental states of other people – put themselves in others' shoes, in the colloquial phrase – so that they can predict others' future behavior and the effect of their own conduct on that behavior.¹⁸ To do so requires that the person understand that others have thoughts, feelings, and beliefs that may differ from their own and that may motivate others' behavior. Without this understanding—often referred to as “theory of mind” (“ToM”)—people would be unable to make sense of the social world and be ill-suited for social encounters.¹⁹ The term “social understanding” is sometimes used within the framework of ToM to refer to “the ability to conceptualise mental states such as beliefs, desires, and intentions and to use these constructs to interpret and predict the actions of others.”²⁰ The various aspects of these abilities have different developmental trajectories.²¹ But before age four very few children exhibit even rudimentary forms of ToM; by age six nearly all normally-developing children have acquired these rudiments.²²

Thus, below the age of four, most children are not aware that other people might have false beliefs.²³ Indeed, below this age, most children do not recognize that the information they have based on matters that they have observed is not known by other people; therefore, the basic

Psych Sci 24 (2006); John R. Best, Patricia H. Miller and Lara L. Jones, *Executive functions after age 5: changes and correlates*, 29 *Developmental Rev*, 180 (2009).

¹⁷ See Stephen J. Ceci, Stanka A. Fitneva, and Wendy M. Williams, *Representational Constraints on the Development of Memory and Metamemory: A Developmental-Representational-Theory*, 117 *Psych Rev* 464 (2010).

¹⁸ Nicholas Epley and David A. Dunning, *Feeling “holier than thou”: Are self-serving assessments produced by errors in self or social prediction?*, 79 *J Pers and Soc Psych* 872 (2000); Emily Balcetis and David A. Dunning, *Considering the situation: Why people are better social psychologists than self-psychologists*, 12 *Self and Identity* 1 (2013); Richard E. Nisbett and Ziva Kunda, *Perception of social distributions*, 48 *J Pers and Soc Psych* 309 (1985).

¹⁹ Sandra Bosacki & Janet Wilde Astington, *Theory of mind in preadolescence: Relations between social understanding and social competence*. 8 *Soc Devel* 237, 237 (1999).

²⁰ *Id* at 237-38.

²¹ *Id* at 238; Welsh, et al., *Normative-Developmental Study*, cited in note.

²² Heinz Wimmer and Josef Perner, *Beliefs about beliefs: representation and constraining function of wrong beliefs in young children's understanding of deception*, 13 *Cognition* 103 (1983).

²³ Jeremy Carpendale & Charlie Lewis, *How Children Develop Social Understanding* (2006), at 24.

concept of *informing* another person, and adding to that other person's state of knowledge, is foreign to them. Even well after they gain this recognition, most children lack the ability that adults have to use readily available information to draw an inference about the mental state of another person.²⁴ Lacking well-developed executive functions, preschool-aged children are unlikely to be capable of the solemnity of recognizing that giving a false account of a past event may cause their listeners and others to take action that will lead to unjustified consequences for another person; they are likely to say what they believe will please their listeners.²⁵

The many experiments testing the limitations on young children's ToM are not, of course, set in the forensic context. But they show in strong terms an inability on the part of very young children to appreciate the mental states of other persons and to predict the consequent behavior of those others – and they do so with respect to relatively simple matters. They therefore provide strong evidence that a very young child speaking to an adult about an incident in the past will fail to have the far more sophisticated understanding necessary to recognize that the adult's purpose in conducting the conversation is to gather information that may be used against the person whose conduct the child has described and that as a result that person may suffer punishment.

This is especially true because the contemplated punishment involves an intricate series of events – well in the future and involving many other people not part of the conversation – that a very young child is not likely to contemplate or understand; even through age 10, children's very rudimentary comprehension of the legal system is unlikely to include familiarity with the concept of evidence or understanding of why it is needed in court.²⁶

²⁴ Numerous experiments demonstrate this. A classic one is described in Carpendale & Lewis, *How Children Develop*, note 23; Francesca G.E. Happé, *An advanced test of theory of mind: understanding of story characters' thoughts and feelings by able autistic, mentally handicapped, and normal children and adults*, 24 *J Autism & Devel Disord* 129 (1994); Tatiana Aboulafia-Brakha, et al, *ToM tasks and executive functions: a systematic review of group studies in neurology*, 5 *J Neuropsychol* 39 (2011). **Error! Main Document Only.** It suggests that before ages four to six children have difficulty recognizing that others operate on a base of information different from their own. See Welsh, et al., *Normative-Developmental Study*, cited in note ____.

²⁵ See Amelia C. Hritz, et al., *Lie to Me: Compliant False Accusations by Children* (unpublished manuscript 2014) (compliant behavior by all of the six-year-olds studied, and a majority of the children through age eleven); Rhona H. Flin, et al., *Children's Knowledge of Court Proceedings*, 80 *Brit J Psych* 285 (1989), at 294 (very few of the eight-year-olds studied, but most ten-year-olds, thought that honesty in court is important “because of the risks of convicting the innocent or releasing the guilty”).

²⁶ Karen J. Saywitz, *Children's Conceptions of the Legal System: “Court is a Place to Play Basketball”* in Stephen J. Ceci, et al, eds, *Perspectives on Children's Testimony* (1989), 131, 135; Flin, et al, *Children's Knowledge*, at 291, 295; Amye Warren-Leubecker, et al, *What Do Children Know About the Legal System and When Do They Know It? First Steps Down a Less Traveled Path in Child Witness Research*, in *Perspectives* 158, at 165, 167.

III. Children as Sources of Evidence

A. Probative Value and Prejudice

Very young children, we have argued, lack the capacities necessary for their conduct to be deemed to be the act of witnessing. But this does not mean that their statements fail to provide useful evidence. On the contrary, the statements of children can be extremely probative – and this may be true even if the child is not considered a particularly reliable observer or reporter, and whether or not she understands the intentions of those who interview her.

Evidence that a child has asserted a proposition **X** can be significantly probative of **X** even if (a) it is far less than certain that the child would assert **X** if **X** were true, and (b) it is plausible that the child would assert **X** though it were not true. What is significant is the *likelihood ratio* of the two probabilities: The evidence will tend to prove **X** if it is *more probable* that the child would assert **X** if **X** were true than that she would do so if **X** were false. If two probabilities are the same – so that the likelihood ratio is 1 – the evidence has no probative value. But usually the likelihood ratio for a child's assertion of a proposition is far greater than 1.

We can consider this matter by using a standard rubric, assessing the capacities of perception, memory, sincerity, and communication.²⁸ Flaws in any of these capacities *can* lead to an inaccurate statement. But children are not random communicators; their capacities usually operate reasonably well. Children's perception of events within their understanding is good.²⁹ Though very young children are often more vulnerable to suggestion than adults are,³⁰ their memory is reasonably good, even over an extended period;³¹ despite limitations, memory functions from birth, and it is well-developed long before ToM, which usually does not occur before the fourth birthday.³² A child, like an adult, might have a motive that deflects her from a

²⁸ See, for example, 2 Kenneth S. Broun, gen ed, *McCormick on Evidence* 178 (7th ed 2013) (speaking in terms of perception, memory, narration, and sincerity).

²⁹ See Alan Slater and Scott P. Johnson, *Visual sensory and perceptual abilities of the newborn*, in Francesca Simion and George Butterworth, eds, *Development of Sensory, Motor, and Cognitive Capacities in Early Infancy*, ____, 138 (Psychology Press, 1997); Elizabeth Spelke, *Infants' intermodal perception of events*, 5 *Cognitive Psych* 553, 554 (1976).

³⁰ See generally Stephen J. Ceci & Richard D. Friedman, *The Suggestibility of Children: Scientific Research and Legal Implications*, 86 *Cornell L Rev* 133 (2000); Stephen J. Ceci, et al., *Suggestibility of children's memory: Psycholegal implications*, 116 *J Experimental Psych: General* 38 (1987); Stephen J. Ceci and Maggie Bruck, *Jeopardy in the Courtroom* (American Psych Assn 1995). In some situations, suggestibility appears to *increase* with age. See Charles J. Brainerd, Valerie Reyna & Stephen J. Ceci *Developmental reversals in false memory: A review of data and theory*, 134 *Psych Bull* 334 (2008).

³¹ Ceci and Bruck, *Jeopardy*, at x.

³² See generally David F. Bjorklund, *Children's Thinking* (Thomson Wadsworth 2005).

sincere desire to tell what she believes to be the truth. But young children are less likely to have such insincere motives than are older persons, and they tend to have a less well developed ability to lie;³³ in any event, like adults, they are far more likely to intend to communicate a given proposition if it is true than if it is false. And, although young children have limited communicative ability, they are usually able to communicate events that they understand reasonably well;³⁴ they are certainly more likely to communicate that a given event happened if it was their intent to do so than if it was not.

Thus, the probability that, if an event occurred, sound operation of these capacities would lead the child to state accurately that it did is usually far greater than the probability that, if the event did not occur, unsound operation of one or more of the capacities would lead the child to state inaccurately that the event occurred. This is especially true if the child's statement describes an event – such as ejaculation – with which the child is presumably unfamiliar; in such a case one might conclude that, even if the child is not a particularly accurate reporter, it would be unlikely, if the event did not occur, that the child would happen to come up with the description.³⁵

We do not mean to argue that because the child asserts a proposition it is probably true; how probable the proposition ultimately appears will depend not only on that assertion but also on the prior odds (the odds of the proposition as assessed without the child's assertion), which in turn depend on how plausible the proposition is at the outset and on the other evidence in the case. We mean only to assert that, in most cases, the child's assertion is likely to be significantly probative – it will have a likelihood ratio well greater than 1, so whatever may be the prior odds of the proposition asserted by the child, it will raise them, and in most cases by a substantial amount.

Furthermore, the potential prejudicial effect of the evidence is not likely so great as to outweigh the probative value, even assuming the child does not appear in court. Such prejudice, if it exists, would arise principally from the jury's overvaluation of the evidence. But we should not jump to the assumption that the jury will substantially overvalue such evidence. Some of the defects of the evidence will probably be apparent to the jury; jurors are not likely to believe that because a very young child made a statement it must be true.³⁸ Expert testimony about the weaknesses of children as observers and reporters may further assist the jury, as may

³³ Michael Lewis, *The development of deception*, in Michael Lewis and Carolyn Saarni, eds, *Lying and deception in everyday life* 92 (Guilford 1993). Ceci and Bruck, *Jeopardy*, at x, notes children's "propensity to speak forthrightly."

³⁴ Robyn Fivush and Judith Hudson, eds, *Knowing and Remembering in Young Children* (Cambridge 1990).

³⁵ See, e.g., Richard D. Friedman, *Route Analysis of Credibility and Hearsay*, 96 Yale LJ 667, 681-85 (1987).

³⁸ See Richard D. Friedman, *The Mold That Shapes Hearsay Law*, 66 Fl L Rev 433, 446 & n 72 (2014) (reviewing empirical literature suggesting that jurors do not overvalue hearsay).

commentary by the court. And substantial further assistance may be provided by the procedure that we now discuss, involving out-of-court examination of the child by a qualified expert.

B. Out-of-Court Examination: Selecting the Proper Model

Given that statements by some very young children may be very probative evidence, providing crucial assistance to the litigation system in its attempt to determine the facts, even though the children are incapable of acting as witnesses, how should a court deal with those statements?

Two models are available, governing two distinct types of source of evidence. Under both models, the accused has an opportunity to examine the source of evidence, at least if it is available, in an attempt to undermine the inference that the prosecution seeks to draw from the evidence. But those opportunities are very different in the two models. Courts and commentators have assumed that the model for young children is the one generally governing statements by human beings. But we contend that this is inadequate for children deemed incapable of being witnesses; instead, the model governing non-human sources of evidence should apply.

When the prosecution offers an adult's statements to prove the truth of a proposition the adult asserted, the accused attempts to demonstrate that the person may have come to make the statement by paths other than the one for which the prosecution contends – that she accurately reported an event or condition she had observed. Adverse questioning conducted under formal conditions, usually by counsel and if reasonably possible at trial, is the primary method by which the accused can do so. If the statement is testimonial, then the Confrontation Clause applies, and even if the speaker is unavailable at trial the statement cannot be admitted unless the accused has had an opportunity for cross-examination.³⁹ Even if the statement is not testimonial, the rule against hearsay may still require exclusion of the statement unless either the declarant is brought to trial or the accused had a prior opportunity for cross-examination. And even if an exemption to that rule allows the prosecution to present the statement without producing the declarant, then the Compulsory Process Clause of the Sixth Amendment gives the accused the option, assuming the declarant is available, of bringing her to court and examining her there. Though some jurisdictions allow an accused to take depositions for discovery of potential adverse witnesses, this is not the usual model: The accused's opportunity to examine the maker of the statement ordinarily occurs at trial; the Supreme Court has declared that confrontation is “basically a trial right.”⁴⁰

Assuming we are correct that some very young children are incapable of being witnesses for purposes of the Confrontation Clause, this model offers an inadequate opportunity for examining them. We believe this is essentially self-evident if at the time of trial the child is still incapable of being an adequate witness – and all the more so if she is still incapable of being a witness at all. But even if, by the time of trial, the child has become capable of being an

³⁹ *Crawford*, 541 US at 59. This simplifies slightly: The accused may have forfeited the confrontation right, and perhaps there is a dying-declaration exception to the right. *Id* at 56 n.6.

⁴⁰ *Barber v Page*, 390 US 719, 725 (1968).

adequate witness, we believe that adverse questioning at that time offers an inadequate opportunity for examination with respect to the prior statement: The child will still presumably be very young, and the accused would be in a position of having to call the child to the witness stand to examine her about a statement she made a considerable time before, concerning an event that occurred some time before that.⁴¹

Now compare the model that applies in the case of nonhuman sources of evidence. Suppose, for example, a prosecutor presents evidence that a bloodhound's barking associated the accused with an article of clothing, or that the striations on a bullet indicate that it was fired by a particular gun. In each case, the accused wishes to undermine the inference sought by the prosecution. Perhaps given the same stimulus, the bloodhound would not *always* give the same response, and perhaps a different stimulus *could* produce the same response; similarly, perhaps the particular gun would not always produce the same type of striations, and perhaps such striations could be produced by a different gun. In other words, it may be that the likelihood ratio of the evidence is not as great as the prosecution suggests. Cross-examination of the bloodhound, the gun, and the bullet is obviously not a possibility. But instead, the accused should have the opportunity to examine them out of court, if feasible.⁴²

Such an examination is not, like cross-examination, a series of questions posed by an attorney. Rather, it is examination in a more literal sense -- by an expert, chosen by the accused, who is qualified to look at the source of evidence, and perhaps conduct some experiments, to determine how reliably it responds to stimuli of the given type in the way that the prosecution contends, and whether other stimuli might produce that response.

The accused's right to conduct such an examination and present the expert testimony is a rule of preference. That is, it does not ordinarily preclude the presentation of the prosecution's evidence if, through no fault of the prosecution, examination of the source of the evidence became impractical. For example, if shortly after barking at the accused the bloodhound died suddenly and of natural causes, the evidence could be admitted even though the accused had not had a chance to have the dog examined by an expert.⁴³ In this respect, the right is less comprehensive than the confrontation right. The latter right states the minimum acceptable conditions for a witness to give testimony against an accused. It is the prosecution that must bear the risk that -- assuming no fault on the part of the accused -- one or more of these conditions

⁴¹ Ceci and Bruck, *Jeopardy*, at 190, 200-01, suggests problems that may arise in this situation (cited in note 30)

⁴² See, for example, *United States v Walker*, 6 MJ 721, 742-43 (USN-MC Ct Crim Apps 2008) (noting that federal courts recognize a constitutional right of accused to perform independent testing of physical evidence, by an expert of his choosing, under appropriate safeguards). Note also Fed R Crim P 16(E)(ii) (giving accused right to inspect a tangible object, if within the government's control, that the government intends to use at trial).

⁴³ Similarly, the state might perform a laboratory test on material that disintegrates, through no fault of the state, before the accused has an opportunity to examine it.

cannot be satisfied.⁴⁴ But the accused's right to examine a non-human source of evidence is part of a generalized right of fairness; if it is feasible to provide the accused an opportunity to examine the source, then ordinarily it is unfair to deny him that opportunity, but if there is no such opportunity then admission of the evidence does not create the unfairness.

The same model should be applied to the statements of very young children who are insufficiently mature to be considered witnesses. The accused should be allowed to select a qualified expert to examine the child out of court, unless for some reason this is not feasible.⁴⁵ The expert would attempt to assess the relative magnitude of the two components of the likelihood ratio – the probability that the child would make the statement she assertedly did if the event she reported occurred as she said, and the probability that she would make the statement if the event did *not* occur as she said.

We will assess the benefits of using this model after presenting a fuller picture of how the examination should be conducted.

C. Guidelines for Conduct of the Examination

The essence of our proposal does not depend on the particulars of how the examination of the child should be conducted. But if the proposal were adopted, some protocol would be necessary, and we suggest here a possible set of guidelines. Standards such as these might be imposed by a trial court on an *ad hoc* basis, or more generally by an appellate court, or they might be codified. And even in the absence of constraint, the defense might adopt most of these guidelines as a matter of sound practice. Several excellent manuals and memoranda discuss good practice in more depth than we do here.⁴⁶

First, the examination should be conducted by a qualified developmental-forensic interviewer, preferably one with ample training in all relevant areas of developmental science, including children's memory, perception, language, reasoning, emotional development, and family dynamics. Ideally, the interview protocol should be empirically validated by professionals not associated with pro-defense or pro-prosecution advocacy organizations.⁴⁷

⁴⁴ These conditions are that the testimony be under oath, face-to-face with the accused, and subject to cross-examination. The Confrontation Clause *also* prescribes a rule of preference, that the testimony be given at trial if reasonably possible.

⁴⁵ Examination of this sort would ordinarily be feasible unless the child died or became severely incapacitated after making the statement.

⁴⁶ An example is Debra A. Poole & Michael E. Lamb, *Investigative Interviews of Children: A Guide for Helping Professionals* 98-99 (1998).

⁴⁷ A number of training programs that are affiliated with either pro-prosecution or pro-defense organizations currently accredit or sponsor training workshops. The National District Attorneys Association's National Center for Prosecution of Child Abuse, for example, has established training programs in many states. For a link to Pennsylvania's, see <http://www.childfirstpa.com/>.

Second, the examiner ordinarily ought to be the only person in the room with the child. If necessary, an adult with whom the child is familiar may be in the room to comfort her and facilitate the interview, but this individual should not unwittingly enforce consistency. That is, if the adult is someone to whom the child has already disclosed case-related information, then her presence in the room with the child could influence the child to stick to her story, even if the child wants to recant it. In the majority of cases, if the interviewer and child become acclimated to each other before the start of any forensic interviewing, the need for a support person would be greatly reduced.

Third, the interview ought to be video-recorded. Child advocacy centers across the country routinely videotape child protective service interviews in rooms that are outfitted with audio-video equipment.

Fourth, the examiner should conduct the interview in such a way that, while allowing her to attempt to determine and assess the child's recollection of the events at issue, also attempts to minimize the likely trauma to the child and tainting of the child's memory.⁴⁸

Fifth, a prosecutor and defense attorney should have the opportunity to observe the interview as it occurs, either through a one-way mirror or by video transmission to a nearby room. This would allow either party to seek intervention if necessary and allow the other party to contest the request. Ideally, a judicial officer would also be present with the attorneys or able to observe a video transmission. At least, if there is any concern that intervention may be necessary, a judicial officer should be available by telephone.

Sixth, a party should be allowed to initiate intervention only with the consent of the other party or by approval of the court. Such interventions should be made only to protect the child or to ensure that the examination stays within proper bounds – including time bounds, which may be determined previously.

Seventh, the examiner should be able to seek consultation at any time with persons outside the room. This could be important if any significant problems arise, or if the examiner is in doubt whether the protocol prevents her from continuing the examination in the way she thinks is optimal.

IV. Practical Advantages of the Quasi-Witness Model

We have advocated the model presented here as a matter of principle: Some very young children lack the capacity to be deemed witnesses, they should not testify at trial, and the Confrontation Clause should not apply to their statements, even if those statements would clearly

⁴⁸ The aim of a forensic interview is to collect the facts and their context. In contrast, a therapeutic interview may involve bringing to the surface suspected intrapsychic conflicts. Techniques that may be valuable for therapeutic purposes (e.g., play therapy, role-playing, symbolic interpretation, and fostering self-empowerment) can corrupt the child's recollection. Absent empirical validation, they should be avoided in a forensic interview.

be deemed testimonial were they made by an adult; despite the children's limitations, evidence of their statements may be very probative and worthy of admission; and basic fairness gives the accused a right to examine the child out of court, as a source of evidence rather than as a witness, by a qualified psychological examiner and pursuant to a pre-determined protocol.

This quasi-witness model also offers several distinct practical advantages to the criminal justice system as compared to the prevailing model, in which the Confrontation Clause is assumed to apply to all human beings.

1. Under prevailing practice, if a child is deemed not competent to testify at trial, an unfortunate lacuna is left open. Either her prior statement is excluded, denying the trier of fact potentially valuable information, or it is admitted but the accused has no opportunity to examine her. If, however, any child who cannot be made a witness at trial is treated as a quasi-witness, then the lacuna disappears: Secondary proof of the child's statement presumably could be admitted and fully vetted; the Confrontation Clause would pose no barrier. And the accused would have a right to examine the child – not through cross-examination by an attorney in open court, but through a pre-trial video-taped interview conducted by a qualified forensic interviewer.

Thus, it would be plausible to maintain even a rather high threshold for determining when a child may testify at trial. *Such a threshold does not mean either the loss of prosecution evidence or a vacuum of rights for the accused; it simply means that the child is treated under a different model for purposes both of presenting the child's account and of allowing the accused to examine her.* In either event, the prosecution ordinarily has the ability, so far as the Confrontation Clause is concerned, to present the child's statement, and the accused has some right of examining the child.

2. A related structural matter is that the availability of the quasi-witness model offers a possible solution to the dilemma of whether, in determining if a statement is testimonial, a court should assume that the posited hypothetical person whose anticipation is assessed is the same age as the speaker. If only children above a given level of development may be considered witnesses, and if that threshold is set rather high, it becomes less odd, in the context of asking whether a particular statement is testimonial, to ask what the expectations of a reasonable adult would be. In other words, it becomes more plausible to treat all children in either of two ways, as ordinary witnesses, judged by the same standards as all adults not severely limited, or as not sufficiently developed to be treated as witnesses at all.

3. Testifying in open court – which can be difficult for anybody – can be very traumatic for a young child, especially if she is being asked to make an accusation of someone close to her.⁵⁰ The quasi-witness model allows the child to make her statements, and to be examined on behalf of the accused, in a private, comfortable setting.

⁵⁰ See, for example, Gail S. Goodman, et al, *Testifying in Criminal Court: Emotional Effects on Child Sexual Assault*, Monographs of the Soc for Res in Child Dev, p. v (1992).

4. It is part of American juridical dogma that cross-examination is “beyond any doubt the greatest legal engine ever invented for the discovery of truth.”⁵¹ But for various reasons, this is not true with respect to very young children. Cross-examination by an attorney in open court is in fact a disastrously poor method for ensuring truthful statements by young children.⁵² A qualified developmental-forensic child interviewer operating in a comfortable setting, outside the gaze of the defendant, has a much better chance of eliciting information that may raise doubts about the child’s initial account without causing undue emotional trauma to the child.

5. Under the practice prevailing in most states, the accused does not have a right to examine the child – if at all – until the time of trial, which may be very long after the events at issue. In many cases the defense’s request for pretrial access to a child witness is not approved. Under the quasi-witness model, examination would occur pre-trial, and usually there would be no reason why it could not occur when events are relatively fresh in the child’s mind.

Conclusion

The advantages we have cited for a system that does not bring very young children to court would be of little account if it were inconsistent with the accused’s rights under the Confrontation Clause. But given our view that very young children simply should be deemed incapable of being witnesses for purposes of the Clause, the Clause gives the accused no rights with respect to them. Even children too young to be deemed witnesses may still be sources of useful evidence, however, and if they are treated that way fundamental fairness requires that the accused be afforded a well controlled right of examination through a properly qualified expert. As compared to the prevailing system, we believe the one we propose would yield more accurate fact-finding, a more meaningful right of examination for the accused, and more humane treatment of young children.

⁵¹ 5 John Henry Wigmore, *Evidence* § 1367, at 32 (Chadbourn rev 1974); *Lilly v Virginia*, 527 US 116, 124 (1999).

⁵² See Rachel Zajac & Harlene Hayne, *The Negative Effect of Cross-examination Style Questioning on Children’s Accuracy: Older Children are Not Immune*, 20 Appl Cognit Psych 3, 4(2006) **Error! Main Document Only.**(finding that cross-examination reduced accuracy, “to a point where accuracy did not differ significantly from chance” with 5- and 6-year-olds, and significantly even in 9- and 10- year-olds).