The Child Quasi-Witness
by Richard D. Friedman and Stephen J. Ceci

Note to participants in the Cleveland Federal Criminal Practice Seminar: This is a very preliminary and incomplete draft of a paper I am writing with Steve Ceci, a leading developmental psychologist at Cornell. We consider how the criminal judicial system should treat statements made by very young children, especially statements purporting to describe a crime committed by the accused. Our two basic points are: (1) Some very young children are so undeveloped that they should not be considered witnesses for purposes of the right of a criminal defendant to be "confronted with the witnesses against him" under the Sixth Amendment to the Constitution. Accordingly, the Confrontation Clause should not be deemed applicable to them and it should not create any constraint on admissibility of their out-of-court statements, even if those statements would be deemed testimonial, and so subject to the Clause, if they were made by an adult. (2) Even if a child is not a witness, she is a source of evidence, perhaps of very significant and probative evidence, and the accused ought to be allowed to examine her in an appropriate manner. But "appropriate" in this context does not mean cross-examination by an attorney in a courtroom or other formal adjudicative setting. Rather, we believe the accused ought to be allowed to designate a qualified psychologist to interview the child out of court according to a protocol approved by the court.

We offer some comments on the criteria that might be used to determine which children should be treated in this way, and some suggestions as to what the contents of such a protocol might be. But we are not principally concerned with such matters; our primary purpose is to argue that there is some set of children who should be treated in this way.

Ultimately, we will contend that courts ought to recognize that the accused has a constitutional right to examine the child in a manner resembling the one we suggest. That part of the paper is as yet unwritten. But I regard it as essential to the project, because if the Supreme Court adopted our first point, rendering the child’s statements beyond the scope of the Confrontation Clause, without recognizing the type of right contemplated by our second point, states could severely impair the ability of an accused to test the accuracy of crucial evidence against him.

This draft is mainly my work; Steve has furnished summaries of psychological evidence and literature in response to particular questions of mine, but I have not yet incorporated all his contributions into the text (and when I have incorporated it I may have done it badly.) So as you can tell, this draft is very far from set – there are still a bunch of notes to myself – and we are very receptive to your comments.

I’m looking forward to the session on August 16. Thanks!

Rich Friedman
Brian Siler is charged with murdering his estranged wife Barbara, who was found hanging by a cord in the garage of her house. Medical evidence indicated that she had been choked to death from behind and then hanged. Among the evidence offered by the prosecution is the testimony of Detective Larry Martin, a plain-clothes police officer and trained child interviewer who was called to the scene, as to statements the couple’s 3-year-old son Nathan made soon after the body was discovered. According to Martin, Nathan said that his father had scared him the night before by banging loudly on the front door, that his parents had argued loudly in the garage, that his father had hurt his mother, by grabbing her from behind above the shoulders, and that “the yellow thing” that was holding his mother up was put on his mother by his father.

If Nathan were an adult, his statements to Officer Martin would clearly be testimonial for purposes of the Confrontation Clause of the Sixth Amendment to the Constitution. Thus, if Nathan himself did not testify at Siler’s trial, Martin’s account would not be admissible unless Nathan were unavailable to testify at trial and Siler had a prior opportunity to be confronted with him. But Nathan was three years old at the time of his mother’s death. Should a court treat his statement as testimonial without regard to that fact?

And suppose the court does decide that because of Nathan’s age his statement is not testimonial. With respect to statements by an adult, if a statement is not testimonial then the Confrontation Clause poses no obstacle to admissibility of his prior statement. But does it make sense to say that because of the weakness of the child declarant his prior statement is more likely to be admitted? Or, by contrast, should the result be that if Nathan appears to be incompetent as a witness his prior statement simply cannot be admitted? Or is there another possibility?

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In Crawford v. Washington, the United States Supreme Court revitalized the Confrontation Clause, which guarantees to every accused the right “to be confronted with the witnesses against him.” Under Crawford and its progeny, if a person makes a statement that is deemed testimonial in nature and that is offered against an accused, then that person is deemed for purposes of the Clause to be a witness against the accused. As a consequence, the statement may not be introduced against the accused unless the accused waives or forfeits the right or the witness testifies, or has testified, face to face with the accused and subject to cross-examination. Moreover, this opportunity for confrontation must occur at trial – rather than, say, at a deposition taken previously – unless the witness is deemed unavailable to testify there.

As the brief discussion of Siler indicates, some of the most difficult problems raised by the Confrontation Clause concern statements by children. The Supreme Court has not yet considered

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2 What the bounds of the term “testimonial” are is a question of considerable difficulty. In Michigan v. Bryant, 131 S.Ct. 1143 (2011), the Supreme Court adopted a rather narrow view in the context of police interrogations.
the implications of *Crawford* for such statements, but it is very likely to do so in the near future.\(^3\)

In this article, we consider two related issues: First, how should a court determine whether a child who makes a material out-of-court statement is a witness for purposes of the Confrontation Clause? Second, assuming the child is not competent to be a witness for purposes of the Clause, what are the consequences for admissibility of her out-of-court statement?

We argue that simply because a child is a human being able to communicate coherently concerning the events being litigated, or even to make a narrative statement about them, does not mean that she is capable of being a witness within the meaning of the Confrontation Clause. We believe that, to be deemed capable of being a witness, a child must attain some level of cognitive, and perhaps also of moral, development – or, alternatively, she must be of an age at which children ordinarily have achieved that degree of development. In this article, we are more concerned with establishing this basic proposition than with establishing the precise criteria for determining whether a child is capable of being a witness, though we will offer suggestions from the field of cognitive development for determining such criteria. For the moment, we will refer to those who are not capable of being a witness as very young children.

If, as we argue, a very young child is incapable of being a witness for purposes of the Confrontation Clause, then her statements do not fall within the coverage of the Clause. But she is still a source of evidence, perhaps highly probative evidence, in the way that animals or non-living objects such as firearms can be. Accordingly, if the prosecution relies on a statement made by the child, courts should recognize that the accused has a right to examine the child – but not through personal confrontation and cross-examination in open court or some other formal adjudicative setting. Rather, the accused should be able to designate an appropriate expert, presumably a qualified psychologist, to hold a session with the child in a setting and under procedures designed for the purpose of facilitating productive communication.

We outline in this article standards that might be used to govern such a session. We believe it is rather obvious that, properly administered, this out-of-court procedure tends to burden and traumatize a very young child less than does 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. We also believe that this procedure advances the truth-determining function of criminal adjudication; we argue that it both reduces the probability that a young child will recant accurate statements she previously and increases the probability that she will recant prior inaccurate ones. And we also argue that it better protects legitimate rights of the accused than does the opportunity for cross-examination, because it gives the accused a better opportunity to reveal defects in the child’s cognitive functioning and

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\(^3\) The petition for certiorari in *Allshouse v. Pennsylvania*, No. 09-1396, raised the question of whether a child’s statements in an interview with a child protection agency worker investigating allegations of abuse were testimonial. Pennsylvania, in its Brief in Opposition, acknowledged that decision of the case by the Supreme Court could bring needed clarity to the issue. But the Court held *Allshouse* pending the decision in *Michigan v. Bryant*, 131 S.Ct. 1143 (2011), and the week after it decided *Bryant* it remanded to the Pennsylvania Supreme Court for reconsideration in light of that decision. 131 S.Ct. 1597 (2011).
truth-telling capacities and flaws in her account of the events at issue.

I. Historical Overview

Anglo-American courts have struggled for centuries with the twin problems of whether a child may testify in court and whether her out-of-court statements may be presented in some way to the trier of fact; the courts have not always recognized that the two issues are related.

Courts have long treated some very young children as incompetent to take an oath and therefore to testify at trial. Sir Edward Coke apparently believed the minimum age for a child to testify was fourteen.\(^4\) Courts did not regularly adhere to such an abstemious standard, however. By the middle of the 18\(^{th}\) century, there appears to have been a rule, or at least a strong presumption, that a child under seven years old could not testify at trial.\(^5\)

Sir Matthew Hale, writing in the second half of the 17\(^{th}\) century, recommended a softening of the oath requirement; he suggested that a young child should be allowed to testify at trial against an accused without taking the oath, so long as sworn corroborative evidence was presented.\(^6\) Some judges adhered to this practice.\(^7\) It conformed to the practice governing statements by the accused, who likewise was barred from testifying under oath\(^8\) but who was not only allowed but expected and even pressured to speak at trial; indeed, Prof. John Langbein has spoken of the “accused speaks” trial.\(^9\) In 1775, in King v. Powell, the trial judge followed the procedure recommended by Hale, allowing a child between six and seven years of age to testify without taking the oath. The accused was acquitted, but the judge, believing that the practice might be improper, mentioned it to the Twelve Judges. And a majority of them agreed that “in criminal cases no testimony can be received except upon oath.”\(^10\)

The Twelve Judges further clarified the law in the landmark 1779 decision of The King v. [Holdsworth cite]

\(^4\) [Holdsworth cite]

\(^5\) JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW 399-400 (Chadbourn rev. 1976).

\(^6\) [1 Hale HPC 634, cited in Langbein Origins, 239 n. 276)]

\(^7\) Id.

\(^8\) No Anglo-American jurisdiction allowed the accused to testify under oath as a general matter until Maine did in 1864. [cite] In England, the defendant was not allowed to do so until 1898. [cite] The state of Georgia adhered to the common-law rule of incompetency until it was compelled to abandon it by Ferguson v. Georgia, 365 U.S. 570 (1961).

\(^9\) Origins at 48-62.

\(^10\) King v. Powell, 1 Leach 110, 168 E.R. 157, 158 (1775).
The case is notable for the assumption that the child’s statement – though made not to officials but to her mother and a boarder, and made almost immediately after the incident it described – is testimonial in nature and subject to the ordinary requirements governing testimony in court. This assumption is significant in indicating the understanding of the time concerning what types of statement should be considered testimonial and what the practice with respect to testimonial statements was.

**Brasier,** however, is not in itself a precedent that, under an originalist view of the Constitution, should have binding force in interpreting the Confrontation Clause. **Brasier** was decided after at least five states adopted constitutions including a confrontation right in terms similar to those later incorporated into the Sixth Amendment. See Md. Const. of 1776, § XIX, reprinted in SOURCES OF OUR LIBERTIES: DOCUMENTARY ORIGINS OF INDIVIDUAL LIBERTIES IN THE UNITED STATES CONSTITUTION AND BILL OF RIGHTS 376 (Richard L. Perry ed., 1952) [hereinafter SOURCES OF OUR LIBERTIES], at 348 (providing that “in all criminal prosecutions, every man hath a right... to be confronted with the witnesses against him”); N.C. Const. of 1776, § VII, reprinted in SOURCES OF OUR LIBERTIES, supra, at 355 (“[E]very man has a right... to confront the accusers and witnesses with other testimony.”); Pa. Const. of 1776, § IX, reprinted in SOURCES OF OUR LIBERTIES, supra, at 330 (“[A] man hath a right... to be confronted with the witnesses.”); Va. Const. of 1776, § 8, reprinted in SOURCES OF OUR LIBERTIES, supra, at 312 (“[A] man hath a right... to be confronted with the accusers and witnesses.”); Vt. Const. of 1777, ch. 1, § 10, reprinted in SOURCES OF OUR LIBERTIES, supra, at 366 (“[A] man hath a right... to be confronted with the witnesses.”). It does not even appear that **Brasier** was known in the United States at a time when it could have informed drafting of the Confrontation Clause. See Thomas Y. Davies, What Did the Framers Know, and When Did They Know It? Fictional Originalism in Crawford v. Washington, 71 BROOK. L. REV. 105, 153-62 (2005) (arguing that Leach’s Crown Cases was not available in America until very shortly before the drafting of the Confrontation Clause, and also that post-independence English cases were not deemed authoritative). And even if it were known, **Brasier** can hardly be taken – especially against the backdrop of prior and subsequent practice, see below [Lyon & LaMagna] – to establish a settled rule, which the Framers must have intended to incorporate into the Sixth Amendment, that in no circumstances might a child’s statement be introduced if it had been made by an adult.

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On the contrary, as Thomas Lyon and Raymond LaMagna have shown, 18th century courts, both before and after Brasier, often admitted secondary evidence of accusations made out of court by children. Of course, the judges never considered the possibility that Mary might be examined by some means other than giving live testimony under oath. Furthermore, the characterization of Mary’s statement as “testimony,” which was an essential part of the logic of the decision, may have reflected an implicit assumption that she was capable of giving testimony. Indeed, most of the brief report of the case presents a dictum suggesting that Mary might have been able to testify live. The judges declared

that an infant, though under the age of seven years, may be sworn in a criminal prosecution, provided such infant appears, on strict examination by the Court, to possess a sufficient knowledge of the nature and consequences of an oath, for there is no precise or fixed rule as to the time within which infants are excluded from giving evidence; but their admissibility depends upon the sense and reason they entertain of the danger and impiety of falsehood, which is to be collected from their answers to questions propounded to them by the Court; but if they are found incompetent to take an oath their testimony cannot be received.

Brasier can hardly be taken – especially against the backdrop of prior practice – to establish a settled rule, which the Framers must have intended to incorporate into the Sixth Amendment, that in no circumstances might a child’s statement be introduced if the statement would be admissible had it been made by an adult. In addition to the points made in the text, note that Brasier came after at least five states adopted constitutions including a confrontation right in terms similar to those later incorporated into the Sixth Amendment. See Md. Const. of 1776, § XIX, reprinted in SOURCES OF OUR LIBERTIES: DOCUMENTARY ORIGINS OF INDIVIDUAL LIBERTIES IN THE UNITED STATES CONSTITUTION AND BILL OF RIGHTS 376 (Richard L. Perry ed., 1952) [hereinafter SOURCES OF OUR LIBERTIES], at 348 (providing that “in all criminal prosecutions, every man hath a right... to be confronted with the witnesses against him”); N.C. Const. of 1776, § VII, reprinted in SOURCES OF OUR LIBERTIES, supra, at 355 (“[E]very man has a right... to confront the accusers and witnesses with other testimony.”); Pa. Const. of 1776, § IX, reprinted in SOURCES OF OUR LIBERTIES, supra, at 330 (“[A] man hath a right... to be confronted with the witnesses.”); Va. Const. of 1776, § 8, reprinted in SOURCES OF OUR LIBERTIES, supra, at 312 (“[A] man hath a right... to be confronted with the accusers and witnesses.”); Vt. Const. of 1777, ch. 1, § 10, reprinted in SOURCES OF OUR LIBERTIES, supra, at 366 (“[A] man hath a right... to be confronted with the witnesses.”). It does not even appear that Brasier was known in the United States at a time when it could have informed drafting of the Confrontation Clause. See Thomas Y. Davies, What Did the Framers Know, and When Did They Know It? Fictional Originalism in Crawford v. Washington, 71 BROOK. L. REV. 105, 153-62 (2005) (arguing that Leach’s Crown Cases was not available in America until very shortly before the drafting of the Confrontation Clause, and also that post-independence English cases were not deemed authoritative).

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The judges may have included this dictum to show that the consequences of the main ruling – that Mary Harris’s statement was not admissible under the circumstances of the case – were limited, because she may well have qualified as a live witness had she been brought to court.

In any event, Brasier’s dictum gained widespread acceptance, and is the best-known aspect of the case. Most courts adhere to the principle that the determination whether a child may testify at trial should not be based on a per se minimum age but rather on the child’s ability to take the oath. And that in turn depends on an assessment of the child’s understanding of the importance of telling the truth. As the reference to “impiety” suggests, Brasier itself appears to have been based in the religious sensibility of the day: The “danger” to which it referred was presumably the threat of eternal damnation for lying under oath. A modern judge is more likely to emphasize the unjust earthly consequences for others of false testimony. Nevertheless, the basic procedure is the same: The trial judge makes a preliminary inquiry of a young child to determine whether she understands the meaning and importance of telling the truth sufficiently well to be allowed to take the oath or some near-equivalent and testify at trial. As in earlier days, the inquiry is usually addressed principally to the child’s sense of obligation to tell the truth, with less attention paid to other aspects of testimonial capacity – her ability to observe, to remember, and to articulate what she intends to communicate.

Under current doctrine, an American court may determine on the basis of an individualized demonstration that the child would likely suffer from testifying in open court and that instead the child should testify under special conditions – in a separate room, outside the physical presence of the accused and the jury, but with the testimony transmitted by closed circuit video to the courtroom. Whether the court follows this procedure or not, the framework of the child’s testimony is the same as that of an adult: Direct examination by the prosecuting attorney, then cross-examination by defense counsel, redirect, and so forth.

The treatment of children’s out-of-court statements has developed along an entirely separate track. Note that the report in Brasier, in referring to Mary’s out-of-court “testimony,” did not label it as hearsay; as noted above, courts in this era often admitted accusatory statements made by children out of court. But in the decades after Brasier (and the adoption of the Confrontation Clause), the modern rule against hearsay took form. A later court would have spoken of Mary’s statement as hearsay, without need to characterize it as testimonial; under the rule against hearsay,

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15 E.g., Wheeler v. United States, 159 U.S. 523, 525 (1895).

16 Lyon. Fed. R. Evid. 602 requires every witness to “declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness’ conscience and impress the witness’ mind with the duty to do so.”

17 [cites for these capacities]

any out-of-court statement, whether it might be deemed testimonial in nature or not, is presumptively not admissible to prove the truth of a proposition that it asserts. There are, of course, many exemptions from the rule. The law governing out-of-court statements by a child, whether she would have been qualified to testify in court or not, has, at least in general and as a formal matter, been the same as that governing statements by an adult. That is, the child’s statement cannot be admitted to prove the truth of a matter that it asserts unless it fits within an exemption to the hearsay rule. Courts have sometimes been particularly generous in determining a child’s statement to fit within one of those exemptions. And towards the end of the twentieth century, some jurisdictions enacted “tender years” exceptions, applicable only to prescribed categories of statements by children.

Until 1965, the Confrontation Clause did not pose much of a limitation with respect to out-of-court statements, because it was not applicable to the states. Even after the Supreme Court held that the Fourteenth Amendment incorporates the Clause as a limitation on the states, for nearly four decades the Clause rarely prevented a prosecutor from introducing a child’s statement. Under the doctrine prevailing during most of that time, if a statement fit within a “firmly rooted” hearsay exception, it would usually be admissible despite the Clause. A court was usually able to fit the child’s statement within an exception that was deemed “firmly rooted.” The trial in , for example, was held before , and the trial court held that Nathan’s statements were admissible as excited utterances – though Nathan apparently did not exhibit distress until well into the interview. And even if a pre- court could not jam the statement into a firmly rooted exception, it could still secure admission of the statement if it found sufficient “particularized guarantees of trustworthiness” in the particular case.

If a child in the pre- era was not deemed competent as a witness, the same factors that led to that decision might also lead the court to decide that the statement was not sufficiently reliable to warrant admissibility, if the statement did not fit within a “firmly rooted” hearsay

19 [examples]
20 E.g., 42 Pa.C.S.A. § 5985.1 (Pennsylvania); Wash Rev. Crim Code 9A.44.120 (Washington).
22 Ohio v. Roberts, 448 U.S. 56, 66 (1980). supposedly imposed a rule that the Clause prohibited admission of a statement unless the declarant was unavailable to testify at trial. But the Court drastically limited the scope of that requirement, at times saying that it only applied to statements falling within the exception for former testimony. E.g., United States v. Inadi, 475 U.S. 387, 394 (1986).
24 , 448 U.S. at 66. In doing so, however, the court could not rely on corroborating evidence. Idaho v. Wright, 497 U.S. 805 (1990).
exception. And in an occasional case, those factors might lead a court to decide that the statement did not in fact fit within such an exception. Thus, if the two determinations – whether the child was able to testify in court and whether her out-of-court statements were admissible to prove the truth of what they asserted – were related, the correlation was clearly positive: The less capable the child seemed, the less likely she was to be deemed competent as an in-court witness and the less likely her out-of-court statement was to be admitted. But, for the most part, the two determinations had little to do with one another: Whether the child could testify in court was decided principally on the basis of whether she had a sufficient sense of obligation to tell the truth, and whether her out-of-court statement could be admitted was determined largely on the basis of whether the statement fit within a well-recognized hearsay exemption.

II. Issues Under Crawford

*Crawford* changes the landscape dramatically. *Crawford* and its progeny recognize that the Confrontation Clause does not address all hearsay but only statements that are testimonial in nature; the Clause is a rule about witnesses, and testifying is what witnesses do. *Crawford* also breaks the dependence of Confrontation Clause doctrine on hearsay law; fitting a statement within a hearsay exception, even a “firmly rooted” one, does not in itself mean that the Clause is satisfied. Thus, believing that modern hearsay law rarely provides a stringent independent constraint on the introduction of children’s statements, we will have little further need to refer to it. At the same time, the *Crawford* line recognizes that out-of-court statements and in-court testimony are not entirely

25 [examples?]

26 [examples? Perhaps courts requiring understanding for application of FRE 803(4)]

27 If the child was considered available to testify, then a narrow list of hearsay exceptions could not be invoked to admit the out-of-court statement. See Fed. R. Evid. 804. But these exceptions were not usually the ones that were used to admit children’s statements.

28 This point was made clear in *Melendez-Diaz v. Massachusetts*, 129 U.S. 2527, 2539-40 (2009) (“Business and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because – having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial – they are not testimonial.”). Dicta in *Michigan v. Bryant*, 131 S.Ct. 1143, 1155 (2011) (“In making the primary purpose determination, standard rules of hearsay, designed to identify some statements as reliable, will be relevant.”), seemed possibly to suggest a swing back towards merging the doctrines of confrontation and of hearsay, but a later comment by Justice Sotomayor, the author of the majority opinion in *Bryant*, in *Bullcoming v. New Mexico*, 131 S.Ct. 2705 (2011), indicated that little weight should be put on the dicta. *Id.* at 2720 & n.1 (Sotomayor, J., concurring) (“The hearsay rule's recognition of the certificates' evidentiary purpose [in *Melendez-Diaz*] thus confirmed our decision that the certificates were testimonial under the primary purpose analysis required by the Confrontation Clause. . . . The rules of evidence, not the Confrontation Clause, are designed primarily to police reliability; the purpose of the Confrontation Clause is to determine whether statements are testimonial and therefore require confrontation.”).
The Supreme Court has recognized that a doctrine of forfeiture limits the confrontation right.\footnote{The Supreme Court has recognized that a doctrine of forfeiture limits the confrontation right. Crawford, 541 U.S. at 62; Davis v. Washington, 547 U.S. 813, 833 (2006); Giles v. California, 554 U.S. 853 (2008). And the Court has at least recognized the possibility of a dying-declaration exception to the confrontation right. Crawford, 541 U.S. at 56 n.6.} Crawford, 541 U.S. at 62; Davis v. Washington, 547 U.S. 813, 833 (2006); Giles v. California, 554 U.S. 853 (2008). And the Court has at least recognized the possibility of a dying-declaration exception to the confrontation right.\footnote{Whorton v. Bockting, 549 U.S. 406, 419-20 (2007).} Crawford, 541 U.S. at 62; Davis v. Washington, 547 U.S. 813, 833 (2006); Giles v. California, 554 U.S. 853 (2008). And the Court has at least recognized the possibility of a dying-declaration exception to the confrontation right. Crawford, 541 U.S. at 56 n.6.

The Supreme Court has 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.”\footnote{The Supreme Court has 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.” Bryant, 131 S.Ct. at 1160, 1165.} Bryant, 131 S.Ct. at 1160, 1165.

This framework makes crucial the choice of standards for determining whether a statement is testimonial. The Supreme Court has 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.”\footnote{The Supreme Court has 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.” Bryant, 131 S.Ct. at 1160-62. Justice Scalia vigorously disagreed. Id. at 1168-70 (Scalia, J., dissenting). See also, e.g., Richard D. Friedman, Grappling with the Meaning of “Testimonial,” 71 Brooklyn L.Rev. 241, 255-59 (2005).} Bryant, 131 S.Ct. at 1160-62. Justice Scalia vigorously disagreed. Id. at 1168-70 (Scalia, J., dissenting). See also, e.g., Richard D. Friedman, Grappling with the Meaning of “Testimonial,” 71 Brooklyn L.Rev. 241, 255-59 (2005).
This, as noted above, is the view that Friedman has advocated.

Bryant disclaims the view that all that matters is the purpose of the interrogator, assuming there is one. The sole decisive factor under that view would be whether the person questioning the child intended to generate evidence for prosecution. This would require a dramatically different doctrine for determining whether a statement is testimonial depending on whether the speaker is a child or an adult. It would provide no help whatsoever if the child made the statement on her own initiative, without interrogation. And, we submit, it makes no sense. Police officers and others engaged in the criminal justice system seek to gain evidence from various sources, including, for example, inanimate objects. The mere intention of the officer to secure evidence does not make the prospective source of evidence a witness for purposes of the Confrontation Clause. For example, an undercover officer may speak to a member of a conspiracy with the intention of generating evidence for an anticipated prosecution. Statements made by the conspirator do not for that reason come within the Clause. [cites; contrast estoppel if misleading an innocent witness] The speaker is not engaged in the act of witnessing, and the Clause does not apply.

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35 E.g., State v. Snowden, 385 Md. 64, 867 A.2d 314 (2005); People v. Sisavath, 118 Cal.App.4th 1396 1402 n.3, 13 Cal.Rptr.3d 753, 758 n.3 (2004)
Alternatively, then, a court might take the child’s age into account. Rather than asking what the understanding of a reasonable person in Nathan’s position would have been, one might ask what the understanding of a child of Nathan’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 full well -- “reasonable three-year-old” is an oxymoron.)

Such a standard has its own problems, however. It creates a messy fragmentation of the law – it means that in determining whether a statement is testimonial, one approach (the one-type-fits-all posited reasonable person) is used for adults, and another (the continuously age-adjusted ordinary child) is used for children up to some presumed age of maturity. A more substantive concern is that under this age-adjusted standard, some statements would be deemed non-testimonial (and so beyond the reach of the Confrontation Clause) because they are made by children, even though they would be testimonial if made by an adult. And that appears to lead to the result that the child’s relative cognitive weakness results in less protection for the accused – which, at least on its face, may appear bizarre.

III. The Quasi-Witness Solution

We believe that the optimal solution to the conundrum of how to treat very young children under the Confrontation Clause lies in recognizing a distinction between witnesses and sources of evidence in general. A child who makes a statement that may be useful in a criminal prosecution is a source of evidence. But before asking whether the particular statement is testimonial in nature for purposes of the Confrontation Clause, the court should ask an underlying question – whether the child was capable when she made the statement of being a witness within the meaning of the

36 But some courts do ask that. See, e.g., People v. Vigil, 127 P.3d. 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 N.W.2d 393, 396 (Minn. Appps. 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.”), aff’d, 711 N.W.2d 508 (Minn. 2006). See also People v. Stechly, 225 Ill.2d 246, 870 N.E.2d 333 (2007) (summarizing cases [and endorsing Conundrum article]).

37 The Supreme Court has, however, adopted a similar approach in the Miranda context. J.D.B. v. North Carolina, 131 S.Ct. 2394 (2011).
Clause. If the answer is no, then the Clause does not apply to the statement; the Clause applies only to witnesses. But recognizing that the child was not acting as a witness when she made the statement – and presumably could not be a witness at trial – means that the method that we give the accused of challenging adverse testimony, confrontation and cross-examination, is not available. Nevertheless, the child remains a source of evidence, perhaps an important one, and therefore the accused ought to have a right to examine her in a developmentally appropriate manner.

**A. The Capacity to Be a Witness**

One key to the solution, we believe, is to focus on a central insight that underlies *Crawford*: The Confrontation Clause applies only to the conduct of witnesses, but a person may act as a witness for purposes of the Clause even though her statement is not made at trial or as part of a formal adjudicative proceeding. Thus, when Sylvia Crawford, speaking to police in the station-house, made statements that helped incriminate her husband, she was acting as a witness as fully as if she had made the statements at trial. Indeed, the very purpose of the Clause is to ensure that witnesses give their testimony at trial (or, when necessary, some satisfactory alternative proceeding like a deposition) rather than in other settings such as a police station.

With respect to statements by competent adults, it is sufficient to ask if the statement is testimonial in nature. If it is, the speaker was acting as a witness in making the statement; giving testimony is what witnesses do. But with respect to young children, we believe it is essential to ask a logically prior question: Does the child have sufficient capacity to be deemed a witness for purposes of the Confrontation Clause?

Note that this is not the same question as whether the child has sufficient capacity to be deemed competent to give acceptable testimony at trial or other formal proceedings. Indeed, the two questions have very different consequences. If a child is deemed not competent to give acceptable testimony at trial, then her testimony is excluded. If a child is deemed not capable of being a witness for purposes of the Confrontation Clause, then the Clause does not apply to her, and it would pose no constraint on admissibility of her out-of-court statements.

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38 State v. Bobadilla, 709 N.W.2d 243 (Minn. 2006) (three-year-old children “are simply unable to understand the legal system and the consequences of statements made during the legal process”).

39 *Crawford*, 541 U.S. at 43 (“The common-law tradition is one of live testimony in court subject to adversarial testing, while the civil law condones examination in private by judicial officers.”), 50 (the principal evil at which the Clause was directed was the civil-law mode of criminal procedure, particularly the use of *ex parte* examinations as evidence against the accused).

40 In many languages, the words for testimony and for witness have the same root. For example, in French témoin is witness and témoignage is testimony. In Spanish the corresponding words are testigo and testimonio. In German, zeugen is witness and zeugenaussage is one word for testimony.

Ultimately, we will contend that the standards for answering these questions should be the same. That is, if a child is not competent to give testimony in court, she should be deemed incapable of being a witness for purposes of the Confrontation Clause. A possible anomaly to which we have already referred – that the weakness of the child would be a reason for lowering constitutional restraints against admissibility of her statements – should be avoided by giving the accused an alternative means of testing the accuracy of the child’s statements.

For now, though, we will postpone discussion of that idea, as well as of the relation of the two questions of capacity and of the optimal answers to those questions. The essential point we want to make now is that some children, even though capable of making assertions that might be probative to a prosecution, are not capable of being witnesses for purposes of the Confrontation Clause.

Consider this case:

After Daniel Webb spent some time alone with his eighteen-month-old daughter, the girl’s mother, Webb’s former wife, Cindy, gave the girl a bath. As Cindy lowered the girl into the bath, the girl said, “Ow bum.” After the bath, the girl said, while Cindy examined her, “Ow bum daddy.”

We assume that the child’s utterances can be understood as asserting, “My bottom hurts, and it reminds me of what Daddy did to me,” or perhaps even “. . . and it’s because of what Daddy did to me.” In any event, it appears that the child had “purposeful communicative abilities.” But we do not believe that simply being human and having such abilities renders one capable of being a witness for purposes of the Confrontation Clause. Even if a police officer, hoping to build a case against Webb, asked the girl, “Did Daddy touch your bum?” and the girl nodded her head in response, she would not be acting as a witness, because she was incapable of doing so.

Consider first the child’s limited ability to understand the situation and to report accurately her observations. An eighteen-month old has no concept, of course, of crime and formal adjudication. Perhaps that is not necessary for a person to be a witness; perhaps it is enough to understand the possibility that one’s own statement can lead to punishment of another for wrongdoing. But an eighteen-month-old cannot understand that or, even more critically, the insight that her own erroneous statement can lead to unfair punishment.

Functionally, too, it makes little sense to think of the child as a witness. The aim of the Confrontation Clause is to ensure that testimony is given under appropriate conditions. But an eighteen-month-old cannot meaningfully take an oath; even if she is able to understand and respond accurately to a concrete question such as “If I say my hair is purple, is that the truth?,” she would have no understanding of the abstract concepts of truth and falsehood or of an obligation to tell the

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That does not mean that cross-examination may not be effective in getting the child to change her statements about past events; in fact, because of their suggestibility, they may often change. But one study of 5- and 6-year-old children, Rachel Zajac and Harlene Hayne, I don’t think that’s what really happened: the effect of cross-examination on children’s reports, 9 J. EXP. PSYCH.: APPLIED 187 (2003), found that “children were just as likely to change a correct response as they were to change an incorrect one,” and that “overall, cross-examination significantly decreased children’s accuracy levels to a point where accuracy did not differ significantly from chance.” Rachel Zajac and Harlene Hayne, The Negative Effect of Cross-examination Style Questioning on Children’s Accuracy: Older Children are Not Immune, 20 APPL. COGNIT. PSYCHOL. 3,4 (2006). A similar study of 9- and 10-year-old children indicated that they were less likely to change their stories than the younger group, and that they were significantly less likely to change a correct story than an incorrect one. Id. at 12. The authors noted that “they nonetheless changed over 40% of their correct responses, resulting in a significant decrease in accuracy.” Id. From a legal standpoint, though, the positive value of a retraction of a false accusation is far greater in magnitude than the negative value of a retraction of a true accusation. See generally Alexander Volokh, n Guilty Men, 146 U. PA. L.REV. 173 (1997).

In short, some set of children should be deemed incapable of being witnesses for purposes of the Confrontation Clause; we will return later to the question of what the bounds of that set are. For now, our point is that being human, or even being able to communicate purposively, does not suffice to make one capable of acting as a witness. Again, the proposition we are asserting is not merely that some children are not competent to give acceptable testimony; that is well understood. We are asserting more broadly that, if the term “witness” is given any reasonable definition for purposes of the Confrontation Clause, some children are insufficiently developed to fit the category.

In this sense, very young children are more comparable to animals and inanimate objects than to adult witnesses. Some inanimate objects – tire rubber, changing leaves, DNA molecules, firearms, etc. – may be important sources of prosecution evidence, but one would never consider them to be witnesses for purposes of the Confrontation Clause. And the same is true of some animals – bloodhounds, maggots, and occasionally parrots, for example. Even if dolphins, bloodhounds, and bonobos are deemed capable of “purposive” communication, they simply are not capable of conduct that would warrant classifying them as witnesses within the meaning of the Confrontation Clause. In short, the line between entities that are capable of being considered witnesses for purposes of the Clause and entities that are not so capable is not the line between human beings and all other entities; rather, only a subset of human beings – the vast majority of humans who have achieved some degree of development – have that capacity.

B. Probative Value

Assuming we are correct that at least some and possibly most very young preschool-aged

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children are incapable of being witnesses for purposes of the Confrontation Clause, that does not mean that their statements lack substantial probative value. The responses of inanimate objects and animals to given stimuli may have great probative value – litmus paper turns red in response to acid, maggots tend to attack a corpse at a given stage of decomposition leading to valid diagnosis of time of death, a bloodhound may bark insistently on recognizing a familiar scent, and so forth. The same is true of many statements by very young children.

The concept of the likelihood ratio will help make this point. The likelihood ratio of a piece of evidence with respect to a given hypothesis is the ratio of the probability that the evidence would arise given that the hypothesis is true to the probability that the evidence would arise given that the hypothesis is false. A likelihood ratio of 1 means that the evidence is equally likely to arise given that the hypothesis is true and given that the hypothesis is false; in that case, the evidence is irrelevant with respect to the particular hypothesis. Evidence gains probative value as to a given hypothesis to the extent that its likelihood ratio with respect to that hypothesis departs from 1.\(^45\)

Even if the probability is not very high that the piece of evidence in question would arise given that the hypothesis being tested is true, the likelihood ratio of the evidence with respect to the hypothesis may be far greater than 1; this may occur if the probability that the evidence would arise given that the hypothesis is false is very low. Thus, if maggots often attack a corpse at a given level of decomposition and virtually never attack it at any other time, then the fact that the maggots have attacked a particular corpse is strong evidence that the corpse had then reached the given stage of decomposition. (And of course this reasoning does not depend on any conclusion that the maggots have testimonial capacity.)

Now consider the statement of a very young child. Suppose the child has weak perceptive ability, a relatively unreliable memory, no mature appreciation of the obligation to tell the truth, and limited narrative ability. In short, she scores poorly in all the capacities that an ideal witness would have. Together, these deficiencies mean that the numerator of the likelihood ratio with respect to an hypothesis of interest will not be very high. That is, the probability, given that an event occurred, that she would report accurately on it cannot be very close to 1, which would represent certainty. There is a good chance that, at one or more points along the path from the event to an accurate report, the child will fail.

But that is not the whole story. The denominator of the likelihood ratio – the probability that she would report as she has given that the event did not occur as she described – may be far smaller than the numerator. It may be, for example, that the child reports a phenomenon – ejaculation of semen, for example – that she is highly unlikely to have concocted if she did not actually observe

\(^45\) Whether the likelihood ratio should be deemed to be the measure of probative value itself, or merely a critical component of such a measure – so that all other things being equal it is perfectly correlated with probative value – need not detain us here. See Richard D. Friedman, *A Close Look at Probative Value*, 66 B.U.L. Rev. 733 (1986); David H. Kaye, *Quantifying Probative Value*, 66 B.U.L. Rev. 761 (1986); Richard D. Friedman, *Postscript: On Quantifying Probative Value*, 66 B.U.L. Rev. 767 (1986).
it (on x-rated video, if not “live”). Or perhaps her description of a place matches an actual location in such a conjunction of details that it is highly unlikely she would have come up with such a description if she had not actually been present at that location.\textsuperscript{46} In such cases, even if we conclude that the child has no sense of obligation to tell the truth and is no more likely to report accurately than to report inaccurately, we may conclude that it is highly unlikely that the child would have given this particular report if the event did not happen as she said.

Moreover, the assumption that the child is no more likely to report accurately than to report inaccurately is far too pessimistic. The ability of preschoolers to recollect accurately events they experienced months and even years earlier – such as experiences at past birthday parties and trips to Disneyland – has been clearly demonstrated.\textsuperscript{47} Children often make inaccurate reports, of course, but the fact that a child reports that a given event occurred would in most circumstances substantially increase the probability that the event occurred as assessed by a reasonable trier of fact.

In short, to conclude that very young children are incapable of being witnesses does not mean that their statements necessarily lack probative value. In some cases, that probative value may be very considerable. But significant probative value is not in itself sufficient to guarantee admissibility.

\textbf{C. A Right of Out-of Court Examination by a Qualified Expert}

We have argued thus far in this Part that some very young children are incapable of being witnesses for purposes of the Confrontation Clause, but that nevertheless their statements may have great probative value. Assuming we are correct, if a prosecutor introduces such a statement against an accused, the Confrontation Clause should not be an obstacle, because the child was not a witness when she made the statement. But the child is still the source of potentially damaging evidence against the accused. Accordingly, we contend that in lieu of confrontation the accused should be recognized to have a right to examine the child through an appropriate agent. Such examination would not be cross-examination at trial or in some other formal proceeding. Rather, it would consist of an out-of-court interview, to be conducted under prescribed guidelines, by a qualified developmental-forensic psychologist.

\textsuperscript{46} Cf. Bridges v. State, 247 Wis. 350, 19 N.W.2d 529 (1945) (child’s description of a conjunction of features of apartment matching defendant’s). Richard D. Friedman, \textit{Route Analysis of Credibility and Hearsay}, 96 \textit{Yale L.J.} 667, 681-83 & n.40 (1987), takes the view that the child’s statement can be considered non-hearsay, because the fact that the child uttered a description closely matching the defendant’s apartment has probative value irrespective of her truth-telling ability in proving that she was in the apartment on the occasion in question, assuming she had not been there at any other time. For a different analysis of \textit{Bridges}, see Roger C. Park, \textit{McCormack on Hearsay and the Concept of Hearsay: A Critical Analysis Followed by Suggestions to Law Teachers}, 65 \textit{Minn. L. Rev.} 423, 437-41, 439 n.50 (1981).

Subsection 1 argues that the ordinary model, applicable to adults who make statements that provide useful evidence for the prosecution, is inappropriate as applied to very young children. Subsection 2 points to an alternative model that fits better circumstances in which a child makes out-of-court statements via an examination by a qualified expert. Subsection 3 presents a set of guidelines to suggest how this model might be applied in the case of very young children, whom we refer to as quasi-witnesses. Subsection 4 offers thoughts on the criteria by which a court should decide whether a particular child – or children in general of a given age – should be deemed capable of being witnesses. Subsection 5 explores advantages of the quasi-witness model. Finally, subsection 6 contends that, with respect to children insufficiently developed to qualify as witnesses for purposes of the Confrontation Clause, the accused should be recognized to have a constitutional right to an out-of-court examination of the type we describe, and that such a right should be recognized as an ordinary matter of civil procedure.

1. The Inappropriateness of the Ordinary Model

Ordinarily, when a prosecutor presents an adult’s statement as evidence, the principal means accorded the accused to challenge the evidence is examination of the speaker through counsel at trial. If the statement is testimonial, then the confrontation right applies, and (apart from some narrow exceptions) the statement may not be admitted unless the accused has had, or will have, a chance to cross-examine the speaker. Even if the statement is not testimonial, the accused has the option, assuming the speaker remains available, to compel the speaker to be a witness at trial so that he can examine her. In some circumstances as well, the accused may also take the speaker’s deposition. Whether the accused’s examination of the speaker is at trial or deposition or both, it is a formal testimonial event, conducted under oath, usually by the accused’s attorney, in question-and-answer form.

For three reasons, that model does not work when the speaker is a very young child. First, by hypothesis and according to the argument we have made in Section B, at the time she makes her statement the child is cognitively incapable of being a witness for purposes of the Confrontation Clause. Thus, the Clause does not give the accused the right to demand that if the prosecution wants

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48 See supra note [30].

49 If the prosecution wishes to present the testimonial statement of a witness, it must present the witness live; it cannot present secondary evidence of the witness’s statement and leave it to the accused, if he wishes, to call the witness as his own. Melendez-Diaz v. Massachusetts, 129 S.Ct. 2527, 2540 (2009). But if the out-of-court statement is not testimonial, then the speaker is not testifying when she makes it, and so she is not deemed to be a witness for purposes of the Confrontation Clause. Accordingly, so far as the Clause is concerned, it is satisfactory if the prosecution introduces a transcript or other secondary evidence of the statement, and the accused is left with the choice of whether to call the speaker as a witness so that she can examine her.

50 [Check whether Fed. R. Crim. P. 15 would apply if prosecution is planning to introduce statement by not present speaker. Compare states with more open discovery, e.g., Florida, R. Crim. P. 3.220, and Indiana.]
to use the child’s statement at trial the accused must have an opportunity to examine her formally under oath.

Second, even apart from the Clause, the accused probably will not be given that opportunity: If the child is not capable of being a witness for purposes of the Clause, then in all probability a court would hold that she is not competent to be a witness at trial.⁵¹

Third, even if the child were a witness at trial, the procedures followed there would, for several reasons, almost certainly be a highly unsatisfactory means of testing the truth of her statements, both for the prosecution and for the defense. Among the problems are the following:

• Between the time of the event and the time of trial, the child would likely have suffered significant memory loss, and this is especially true given that, by hypothesis, enough time has passed that the child, who was not capable of being a witness for Confrontation Clause purposes at the time she made the statement, is considered competent to be a witness when the trial is actually held.

• The formal setting of a courtroom populated mostly by adults – most of them strangers, but including the person the child is being asked to accuse, perhaps someone she has been close to – tends to be very inhibiting.

• The child is likely to tire easily and have difficulty focusing on the subject at hand.

• The unnatural method of both direct and cross-examination – the child seated, and one adult and then another posing a series of questions, often containing embedded relative clauses that are beyond the child’s comprehension – is not conducive to useful communication.

• The syllogistic logic so often central to cross-examination – “You’ve testified that X is true, but you’ve also said that Y is true, and they can’t both be true, so you must not be telling the truth one time or the other.” – is not likely to be useful with young children.⁵²

⁵¹ Even if the court applies the same standard for both questions, it is possible that because of the passage of time the child could be a competent witness at trial even though she was not capable of being a witness for Confrontation Clause purposes when she made the statement in question. But the passage of time raises its own problems, as discussed below.

⁵² Consider, for example, this transcript:

Defense Attorney: And then you said you put your mouth on his penis?
Child: No.
Defense Attorney: You didn’t say that?
Child: No.
Defense Attorney: Did you ever put your mouth on his penis?
Child: No.
Defense Attorney: Why did you tell your mother your dad put his penis in your mouth?
Child: My brother told me to.
Prosecutor: Jennie, you said you didn’t put your mouth on daddy’s penis?
Child: Yes.
Prosecutor: Did daddy put his penis in your mouth?
Child: Yes.
Prosecutor: Did you tell your mom?
Child: Yes.
Prosecutor: What made you decide to tell?
Child: My brother and I talked about it and he said I better tell or dad would just keep doing it.


53 See supra note [46]. Saying that this proportion is unfortunately high does not mean that cross-examination does more harm than good. But a lower proportion would plainly be better.

54 Numerous investigators have analyzed actual trial transcripts showing the highly complex linguistic constructions of “lawyerese” when examining child witnesses, including low frequency word choices (e.g., “In the incident depicted was the perpetrator in chartreuse apparel?”), double negatives (e.g., “Did Sam not say he was not having a good day?”), embedded propositions (e.g., “At any time before or after she cried did the blocks fall down?”), and multi-component questions (e.g., “At the end of the video was Jeff mad or was Katie happy?”). Debra A. Poole & Michael E. Lamb, *Investigative Interviews of Children: A Guide for Helping Professionals* (1998)(page cites). Use of complex, developmentally inappropriate, language can boomerang on attorneys, especially defense attorneys. See Angela D. Evans, Kang Lee, & Thomas D. Lyon, *Complex Questions Asked by Defense Lawyers But Not Prosecutors Predicts Convictions in Child Abuse Trials*, 33 Law & Human Beh.,258, (2009); Mark Brennan & Roslin E.Brennan, *Strange Language: Child Victims Under Cross-examination* (3rd ed, 1990); Roger W. Shuy, *Language Crimes: The Use and Abuse of Language Evidence in the Courtroom* (1993). The phenomenon is not surprising given that most lawyers lack formal training in language development.

Linguists have shown a progression in children’s understanding and use of many linguistic devices such as past tense, negation, and prepositions, as well as various “pragmatics” — that is, the
2. An Alternative Model: Examination of Non-Human Sources of Evidence

We have just argued that the usual model for testing the accuracy of a statement by a human observer – examination by a lawyer at trial or another formal proceeding – is inappropriate for very young children. But another model is available: Given that the child is a source of evidence but, unlike most adults, is poorly suited to being a witness, she should be treated in much the way that a tangible, non-human source of evidence is.

Suppose that the prosecution wishes to prove that a particular gun was used in a murder, and that this is proven by ballistics evidence generated by the gun. The gun is not a witness, obviously; it cannot testify on direct examination nor can it be cross-examined. But the gun is a source of prosecution evidence, and the defendant should (and usually would) be allowed to examine it out-of-court, through its own qualified witness. Such examination would not be conducted by a lawyer – rather, it would be by a ballistics expert – and presumably it would not be conducted in court. The prosecution would want to demonstrate that under a given set of conditions a given type of consequence would follow; for example, it may wish to demonstrate that if the trigger is pulled with a given type of bullet in the chamber the bullet will be fired along a certain trajectory and will leave a certain set of markings. The defense would seek evidence suggesting that these consequences do not necessarily follow.

If a very young child – a human being whom we have argued is not capable of being a witness – is a source of prosecution evidence, the logic of examination is much the same. The prosecution wants to demonstrate that, when exposed to a given set of conditions or stimuli, the child reacts in a given way. For example, the prosecution might want to demonstrate that when the child’s attention is drawn to an encounter with the accused – or perhaps when the child is explicitly asked about the encounter – the child has responded by making a statement describing abusive acts by the accused; perhaps the prosecution is planning to introduce into evidence a videotape showing the stimulus and response. The defense would like to demonstrate that, even if indeed the child responded in that way on the one occasion, the significance of that fact is limited. It may be, for example, that the child does not respond reliably to the same stimulus in the same manner. Or perhaps if the stimulus is slightly different, the response will be very different, in a way tending to show that the prosecution’s evidence tends to show very little. Or perhaps the defense can show that the child is highly receptive to suggestions and adult social pressure, that she is inconsistent in retelling her experiences, or that she uses language in an unorthodox manner.

[55] [cite or cross-refer]
When the defense has the opportunity to examine a firearm, it designates a ballistics expert rather than a lawyer to conduct the examination. And the examination, of course, does not resemble cross-examination; rather, it consists of examining and perhaps testing the gun. When the source of evidence being examined by the defense is a very young child, the examination will consist principally of communication with and testing of the child, largely but not exclusively through the use of words and pictures. But there the resemblance with cross-examination ends. The skills required are not those of the attorney, experienced in focused, logical, and even aggressive questioning. Rather, they are those of a child forensic expert, experienced in establishing rapport with the child and in techniques and protocols that have been empirically validated to explore the child’s memory and its limits without undue suggestions or pressures.


We suggest here guidelines for conducting the examination of the child. Guidelines 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; the essence of our proposal does not depend on the particulars of how the examination should be conducted.

First, as we have already suggested, 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. The interview protocol should be empirically validated by professionals not associated with pro-defense or pro-prosecution advocacy organizations.

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 if so this individual should not unwittingly enforce consistency. That is, if the adult is someone to whom the child has already disclosed some case-related information, then her presence in the room with the child could act influence the child to maintain the same story she


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. See, e.g., http://findingwordsoklahoma.com/about/. Over time, it might be preferable for an unaligned professional association such as the Association for Psychological Science or the American Psychological Association to create a rigorous, evidence-based set of procedures for training and certifying developmental-forensic interviewers and supervising their continuing education; a court might choose to require that the examiner be certified by an organization that is under the auspices of major scientific organizations rather than an advocacy-oriented organization associated with one side.
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, fostering self-empowerment) can corrupt the child’s recollection. They should be avoided in a forensic interview absent empirical validation.

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 attempting 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.\textsuperscript{58}

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. Ideally, a judicial officer would also be present 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, the examiner should be able to seek consultation at any time with persons outside the room. A party should be allowed to intervene on his own initiative 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.

4. Determining Whether a Child is Capable of Being a Witness

We have argued that some very young children should be treated as so-called quasi-witnesses. That is, they should be deemed incapable of being witnesses for purposes of the Confrontation Clause, and instead they should be treated as sources of evidence, subject to out-of-court examination on behalf of the accused by a qualified developmental-forensic expert. We have postponed until now discussion of the criteria by which a court should decide whether a particular child – or children in general of a given age – should be deemed capable of being witnesses. This is because our primary purpose has been to argue for recognition of the category of child quasi-witnesses. We are less concerned in this Article about just where the line should be drawn between children treated as quasi-witnesses and those treated as ordinary witnesses – or even on what basis the line should be drawn. Moreover, we are by no means convinced that there is an obviously right answer to these questions. But these issues have very significant consequences; our proposal would look very different if children up to, say, age fourteen were treated as quasi-witnesses rather than only children up to, say, age two or three.

\textsuperscript{58} 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, fostering self-empowerment) can corrupt the child’s recollection. They should be avoided in a forensic interview absent empirical validation.
A useful way of approaching this problem is to consider first an ideal adult witness. We can then ask what limitations, alone or in conjunction, that a child (or children in general of a given age) may have that should result in deeming the child incapable of being a witness.

The ideal adult witness has achieved a high state of cognitive development. At the time of the events in question, she is able to perceive them accurately and understand what she has observed, and she is able to remember them through the time she testifies. When she testifies, she understands the solemnity of the occasion – she understands that she is providing evidence for a criminal trial, that the consequences of an erroneous result may be serious for the accused or for society at large, that false testimony by her may contribute to an erroneous result, and that society regards her as having a serious obligation to tell the truth, an obligation that is represented by the required oath and violations of which are punishable. She has considerable resistance against false suggestions and social pressures.

The adult witness has also achieved a high state of moral development. She not only recognizes the importance society attaches to truthful testimony by her, but she also feels a weighty obligation herself to tell the truth.

She further has well developed expressive ability. She can describe the events and conditions that she observed in a useful way, and she can respond appropriately to lawyers’ questions, whether friendly or not. And her receptive ability is on par with that of an adolescent, appreciating that certain questions are unanswerable and to know when “I don’t know” is the correct answer.

Because of all of these developments, the adult witness has achieved sufficient maturity that society is willing to impose on her the responsibility of being a prosecution witness. Sherman Clark has emphasized this point. Being a witness, especially a witness against an accused, imposes substantial burdens on a person. She must take an oath, and so risk prosecution for perjury if she speaks falsely. She must make her statements in open court, surrounded by strangers – and in the presence of the accused, whose conviction she may be helping to secure. She must face cross-examination, which may be hostile and humiliating and is very likely aimed at demonstrating that she spoke falsely under oath. And she may be exposing herself to the presentation of other evidence designed to demonstrate that she has a poor character for truthfulness. In short, acting as a prosecution witness can be a difficult, painful ordeal – but this is a responsibility we are willing to impose on adults because it is essential to maintaining the type of system of criminal justice that we deem crucial to our society.

Now compare the ideal adult witness to the situation of very young children. With respect to each of the factors outlined above, young preschoolers may fall short; the age at which a child may be considered nearly equal to an adult will of course vary not only from child to child but from


60 See, e.g., Fed. R. Evid. 608, 609.
factor to factor. Our intention in discussing the limited capacities of young children is not simply to demonstrate that they tend to be inferior witnesses – but rather to explore the factors that should enter into the determination of the point at which a child should not be considered a witness at all.

Presented with unfamiliar situations, some children will be unable to understand or make sense of what they have observed. They have no basis for distinguishing between an avuncular kiss versus a sexualized one, for example, and their limited reasoning skills and immature sense of causality render them prone to erroneous reconstructions.

Their memories are more likely to deteriorate quickly, whether through the passage of time or the interference of external suggestions, so that by the time of trial they may have little or no direct memory of the events at issue. As compared to older children, younger ones not only recall less information, but they also recall a lower ratio of accurate to inaccurate information.

61 See Kuhn, 19xx.


63 At every juncture in the memory process, preschool children underperform older children and adults. Preschool children’s slower processing speed, see Kail & Ferer, 2007, leads them to encode less information from their environment into their memories than older children and adults, which in turn impedes their reasoning performance Robert V. Kail & Emilio F. Ferrer, Processing Speed in Childhood and Adolescence: Longitudinal Models for Examining Developmental Change, 78 CHILD DEVELOPMENT, 1760 (2007). Of the information that gets encoded, more of it is lost during storage than is true of older individuals. Finally, less of the subset of encoded information that survived during storage is accessible during retrieval. Much of these deficits is the result of young children possessing limited world knowledge that constrains the operation of their memory processes. Ceci et al., 2010. Similar deficits in preschool children have been charted for executive functioning, Phillip David Zelazo et al., The Development of Executive Function in Early Childhood, 68 MONOGRAPHS OF THE SOCIETY FOR RESEARCH IN CHILD DEVELOPMENT 138 (2003), ability to consider multiple representations simultaneously, id., and metacognitive insights that permit the efficient monitoring of the contents of their cognitions, Ceci et al., 2010. All of these areas are important for testimonial accuracy.

64 See Eva Beuscher & Claudia M. Roebers, Does a Warning Help Children to More Accurately Remember an Event, to Resist Misleading Questions, and to Identify Unanswerable Questions?, 52 EXPERIMENTAL PSYCHOLOGY 232 (2005) (studying 6-, 8-, and 10-year-olds’ memories about a brief video they were shown a week earlier, and reporting that the number of correct responses about the video increased with age; the youngest children included a higher proportion of false details in their
Young preschool children are usually unable to understand much at all about crime, courts, and official punishment. Although older preschool-aged children may have a primitive understanding of the concepts of wrongdoing, punishment, and “telling” on someone; below the age of four, they are unlikely to understand even this much.65

Very young children may not understand an obligation to tell the truth, and may have only a fuzzy sense of what the truth means. They may very well not understand the consequences of their statements or the gravity of those consequences; they may not associate their statements with the punishment that may be visited at some later time on the accused. This is in part because a future orientation possessed by most adults is absent in young children and still under development even among adolescents.66 And one result is that young children often feel no need for consistency in their statements.67 Even some children who understand that adults want them to tell the truth may reports than either of the older age groups). Preschool children are less likely than older children to mentally patrol the contents of their memories, which leads them to claim to have forgotten when they actually possess memories, to claim they do remember when they do not, and to be more vulnerable to suggestive interviews. Stephen J. Ceci, Stanka A. Fitneva, & Wendy M. Williams, Representational Constraints on the Development of Memory and Metamemory: A Developmental-Representational-Theory, 117 Psychological Review, 464, 465-495 (2010).


66 See LAURENCE STEINBERG, ADOLESCENCE, (6th ed. 2002); Laurence Steinberg & Elizabeth S. Scott, Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty, 58 Am. Psychologist 1009 (2003). Children are “less responsible, more myopic, and less temperate than the average adult.” Elizabeth Cauffman & Laurence Steinberg, (Im)maturity and Judgment in Adolescence: Why Adolescents May be Less Culpable Than Adults, 18 Behav. Sci. & L. 741, 757 (2000), particularly regarding taking the viewpoint and perspective of others. In this study it was not until age 19 that responsible decision-making reached an adult plateau. Id. Bonnie L. Halpern-Felsher & Elizabeth Cauffman, Costs and Benefits of a Decision: Decision-Making Competence in Adolescents and Adults, 22 J. Appl. Devel. Psych. 257 (2001), also demonstrated that decision-making competence was poor through adolescence. See id. at 271 (concluding that “it is clear that important progress in the development of decision-making competence occurs sometime during late adolescence” and that “these changes have a profound effect on their ability to make consistently mature decisions”).

67 Consider, in addition to the example presented by Berliner & Barbieri, note [54] supra, this example from a North Carolina trial:

Prosecutor: “Do you remember a time when you ever had to do anything to Mr. Bob’s hiney with your mouth?”
Child: “No, ma’am.”
Prosecutor: “Do you remember telling Dr. Betty that one time you had to lick Mr. Bob’s
not share the sense that they are obligated to tell the truth; children under age of four are unlikely to feel such an obligation.

Depending on the complexity of the events or conditions at issue, young preschool-aged children may have trouble describing them in a clear and comprehensible way. Children of this developmental level do not respond to an open-ended prompt (“Tell me in your own words everything you remember.”) is unlikely to be productive, and other communicative difficulties may make them unable to respond in any useful way even to well-worded lawyers’ questions on the subject.

Finally, there is the matter of responsibility. This is not so much an empirical matter as a value judgment: Can a child be so young and immature that we as a society are unwilling to impose on her the burdens of being a witness against an accused? So far as we are aware, no court has so held, or even been asked to hold, but we believe Prof. Clark may be right that the answer should be affirmative.

How a workable rule should be devised from all these considerations is not obvious; we believe there is a range of plausible answers. For example, if all that is necessary for a child to be deemed capable of being treated as a witness for Confrontation Clause purposes is that the child (or the ordinary child of the same age as the particular one) understand that her words may be getting another person into trouble, then perhaps a child as young as two could be deemed capable of being a witness. If what is required is the semblance of adult language usage and an appreciation of the

hiney? Did that happen? Did you ever have to do that?”
Child: “Yes, ma’am.”


69 Among other common problems, young preschoolers routinely misunderstand Wh questions and often fail to appreciate the transitive nature of a question. Frequently, they provide a non sequitur that leads the questioner to incorrectly guess the meaning of their responses. In part because they tend to use words in a non-traditional way, they do not recognize the interpretation that a typical adult would place on their statements. For example, one child, referring to her mother’s boyfriend, told a CPS interviewer, “He put his pee-pee in my pee-pee.” The interviewer understandably interpreted the statement to mean genital-to-genital contact. In fact, the child meant that the boyfriend had urinated in the toilet after the child had urinated without flushing. CEKI & BRUCK, JEOPARDY, at 104 [?].

70 [Discuss somewhere question of child very young at time of events, older at time of trial]
adult interviewer’s perspective and the pragmatics of language use, then a child of at least age 5 would be the minimum threshold. If what is required is some understanding of the nature of criminal punishment and of the potential role that the child’s statement might play in reaching a conviction, then an even older age might be the threshold. If our willingness to accord adult-like responsibilities to the child is essential, then setting a threshold around the onset of early adolescence might be appropriate; along these lines, Prof. Clark refers to the possibility of a “civil equivalent of a Bar Mitzvah” at about age 13.6\(^1\)

In any event, it is far better if the standard governing whether a child is deemed capable of being a witness for Confrontation Clause purposes is the same as the standard within a given jurisdiction as to when a child is competent to testify at trial. (More precisely, perhaps, any child allowed by the jurisdiction to testify at trial should be treated as a witness for Confrontation Clause purposes, and any child deemed incompetent by the jurisdiction to testify at trial should be treated according to the quasi-witness model.) The two can be made equivalent, or usually so, if (a) a general standard for the Confrontation Clause is adopted to conform to the generally prevailing standard for competency of child witnesses, (b) the standard for Confrontation Clause purposes is made to conform to the standard for competency within the given jurisdiction, or (c) the standard for competency within the jurisdiction is made to conform to the Confrontation Clause standard. However conformity is achieved, it is worthwhile because it avoids problems that occur in its absence.

First, note that it would make no sense for the category of children deemed capable of being witnesses for purposes of the Confrontation Clause to be narrower than the category of children deemed competent by the jurisdiction to testify at trial: If a child has given evidence for the prosecution under oath, or some equivalent of the oath, from the witness stand, the defense must have a prompt opportunity at trial to question the child. Thus, if the child actually does testify for the prosecution at trial, the prosecution should be prevented from denying that the child is a witness for Confrontation Clause purposes.

On the other side, note a problem that arises if the category of children deemed capable of being witnesses for purposes of the Confrontation Clause is broader than the category of children deemed competent by the jurisdiction to testify at trial, as under the prevailing practice, in which the Clause is assumed to apply to all human beings: In such a situation an unfortunate lacuna is left open because the jurisdiction may decide that a child is not competent to testify at trial even though she is deemed capable of being a witness for purposes of the Clause: 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: Even if the child cannot testify at trial, 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 videotaped interview conducted by a qualified forensic interviewer.

\(^{71}\) Clark, Accuser-Obligation Approach, 81 Neb. L. Rev. at 1284.
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.

5. Advantages of the Quasi-Witness Model

We believe that recognizing an alternative model, under which some very young children are treated as quasi-witnesses, offers several distinct benefits to the criminal justice system.

We have just discussed one structural advantage. If the system is operated optimally, there would be no gaps in coverage but several advantages we discuss below. A child who made a statement useful to the prosecution would be treated either as capable of being a trial witness or as a quasi-witness, a human source of evidence who is not capable of being a trial witness:

(1) If she is a capable of being a trial witness then she would be treated as an adult would.

(a) If her statement is testimonial, then – putting aside possibilities of forfeiture and the like – if the prosecution wishes to use the statement, it must present her as a live witness subject to cross-examination, at trial if reasonably possible and otherwise at a formal proceeding such as a deposition.

(b) If her statement is not testimonial, the prosecution may, so far as the Confrontation Clause is concerned, present secondary evidence of the statement, and the accused may, if he wishes, attempt to make her a trial witness.

(2) If the child is not capable of being a trial witness, she is treated as a quasi-witness. Secondary evidence of her statement is presumably admissible, and the accused has a right to examine her out of court through a qualified forensic child expert.

In either event, in the ordinary case, the prosecution 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. 72

72 The “ordinary case” qualification assumes that the child has not died or otherwise become unavailable to be examined. If the child is capable of being a witness, her statement is testimonial, she has become unavailable by the time of trial through no fault of the accused, and the accused has not had an opportunity to be confronted with her and cross-examine her, then the statement could not be admitted. If the child is not capable of being a witness and becomes unavailable through no fault of the prosecution before the accused has an opportunity to examine her in a forensic interview, presumably the statement would be admissible notwithstanding the absence of that opportunity; the situation would be comparable to that in which the state performs a laboratory test on material that
A related structural matter is that the availability of the quasi-witness model offers a solution to the problem, discussed in Part II, of age adjustment. This is the dilemma of whether, in determining whether a statement is testimonial, a court should assume that the posited hypothetical person whose anticipation is assessed is the same age as the child speaker. The problem with declining to adjust for age under current law is that then the question whether a young child’s statement is testimonial is determined at least in part on the basis of the assumed anticipation of a much more sophisticated adult. The availability of the quasi-witness model resolves this problem: If very young children are not considered witnesses at all, so that only children above a given level of development may be considered witnesses, 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 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 too little developed to be treated as witnesses at all.

Furthermore, treating very young children as quasi-witness rather than as ordinary trial witnesses has three very significant advantages.

First, testifying in open court – which can be difficult for everybody – can be very traumatic for a young child, especially if she is being asked to make an accusation of someone close to her.\(^73\) 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.

Second, jurists like to say that cross-examination is "beyond any doubt the greatest legal
disintegrates, through no fault of the state, before the accused has an opportunity to examine it.

\(^73\) One study compared the emotional consequences of children who testified in open court in sexual abuse cases with a matched control group of non-testifiers: Seven months following their testimony, those who testified evinced greater behavioral disturbance than nontestifiers, especially if the testifiers took the stand multiple times, were deprived of maternal support, and lacked corroboration of their claims. Once prosecution ended, adverse effects of testifying diminished. In courthouse interviews before and after testifying, the main fear expressed by children concerned having to face the defendant. Children who appeared more frightened of the defendant while testifying were less able to answer the prosecutors' questions; and later, after the cases were closed, they were more likely to say that testifying had affected them adversely. The two most pervasive predictors of children's experiences in the courtroom, however, were age and severity of abuse. Despite relevant laws, few innovative techniques were used to help the children testify.

engine ever invented for the discovery of truth. But for reasons we have stated above, this is not true with respect to very young witnesses. Cross-examination in open court is in fact a disastrously poor method for ensuring truthful statements by young children. A qualified developmental-forensic child interviewer operating in a comfortable setting, outside the gaze of the defendant, has a much better chance of developing information that may raise doubts about the child’s initial account without causing undue emotional trauma to the child.

Third, under the practice prevailing in most states, the accused does not have a right to examine the child 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 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.

These advantages would be of little account if treating a very young child as a quasi-witness were inconsistent with the accused’s rights under the Confrontation Clause. But for reasons we have stated above in Part III.A, we believe that very young children simply should be deemed incapable of being witnesses for purposes of the Clause, and so the Clause gives the accused no rights with respect to them. A separate question, to which we now turn, is whether the accused has rights founded anywhere else in the Constitution to the type of examination of a quasi-witness that we have argued he should be accorded.

6. Sources of the Right of Examination

[to be written]

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