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## Children as Witnesses: A Symposium on Child Competence and the Accused's Right to Confront Child Witnesses

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## Children as Witnesses: A Symposium on Child Competence and the Accused's Right to Confront Child Witnesses

AVIVA A. ORENSTEIN\*

The rules of evidence provide a mechanism for sorting through the mass of information that could be presented at trial, winnowing irrelevancies, and excising potentially distracting or unfairly prejudicial material. They also reflect basic tenets about how the finder of fact determines truth. For instance, the rules shield the jury from, or at least alert it to, some potentially unreliable sources. Most importantly for the purposes of this symposium, the evidence rules reflect and perpetuate deeply-held notions of who is sufficiently trustworthy to serve as a witness. The rules control who may testify, what the witnesses may say, and what sorts of questions may be asked of the witnesses on cross-examination.

Although problems concerning witnesses are always interesting and important—raising issues of competence, hearsay, impeachment, and expertise—such issues become even more difficult in criminal cases, where we must incorporate the accused's Sixth Amendment right to confrontation. As applied to children, with their still-developing cognitive abilities, immaturity, susceptibility to influence, and need for protection, such questions about witnesses are particularly acute.

Traditionally, the prospect of children as witnesses has presented thorny questions of competence. When are children able to testify? At what age do we trust that they are telling the truth, that they possess the cognitive skills to perceive such truth and the verbal skills to transmit their knowledge? Does it matter if the child understands the solemnity of the oath? At what age can a child witness be meaningfully cross-examined?

Concerns that arise with adult witnesses are heightened with children. To a certain extent, everyone is suggestible and susceptible of bias. With children, whose practical knowledge of the world is incomplete and who are especially dependent on others emotionally and physically, the potential for undue influence and bias increases. Relatedly, outright intimidation, another potential problem for adult witnesses, demands a more complicated and sensitive inquiry when child witnesses are involved.

The nature of children's cognitive abilities and practical experiences raises further questions in connection with the Supreme Court's recent reinterpretation of the Sixth Amendment Confrontation Clause. *Crawford v. Washington*<sup>1</sup> held that if a statement used at trial is testimonial, the declarant/witness must be made available for cross-examination. In defining the pivotal term "testimonial," the Court emphasized the intentions of the declarant/witness and whether the speaker could reasonably expect the statement he was making to be used in a future legal proceeding against the person implicated. In the case of children, who are unfamiliar with the legal system, and hence may not realize the potential or even obvious uses of their statements at future trials, such a focus on the expectations of the declarant/witness is problematic.

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1. 541 U.S. 36 (2004).

Finally, because of their immaturity and vulnerability, children may deserve special protection. If testifying would be traumatic, should the child be deemed unavailable? Are there any accommodations that can be made to the physical or psychological environment of the courtroom to help the child witness feel more comfortable without compromising the rights of the accused?

The scholars in this symposium address these questions from different angles, bringing to bear history, psychology, and a careful analysis of the recent Supreme Court cases on confrontation. They address five important themes: (1) the special status and rights of children as witnesses; (2) ways in which the special case of child witnesses illuminates contradictions, ambiguities, unresolved questions, and the unfortunate tendency towards all-or-nothing thinking in recent Supreme Court Sixth Amendment jurisprudence; (3) practical suggestions for balancing the interests of child witnesses and the rights of the accused in criminal cases; (4) an inquiry into the fate of pre-*Crawford* cases, most importantly *Maryland v. Craig*;<sup>2</sup> and (5) a critique of the uses and abuses of historical research by the Supreme Court in its attempt to address issues of confrontation.

Professors David Tanenhaus and William Bush provide a fascinating and vital historical overview of children on the witness stand. Their brief essay, *Toward a History of Children as Witnesses*, presents an invaluable summary of attitudes toward children in general, and child witnesses in particular. Their overview aptly argues for recognizing nuance and multiple threads, rather than searching for one fixed and certain historical truth about child witnesses. Placing the issue of children in a larger historical and philosophical context, their essay also debunks false assumptions about the nature of children's rights and conceptions of childhood as linear or progressing to more responsibility, freedom, and autonomy.

Tanenhaus and Bush note the differences between the approaches to history taken by lawyers—particularly those currently serving on the United States Supreme Court—and historians, and warn against attempts at oversimplification of what is necessarily a nuanced and sometimes contradictory record. As historians, they express skepticism about the accuracy, utility, and wisdom of the Court's resolution of contemporary constitutional questions through historical analysis. Uncovering courts' actual practices concerning child testimony requires the historian's skill of understanding the motives and approaches of the primary-source authors. For instance, Sir Matthew Hale's writings in the late-seventeenth and early-eighteenth centuries about limiting child witnesses may have been prompted by his desire to reform the law rather than to report accurately the status quo. Tanenhaus and Bush demonstrate how social, cultural, and philosophical notions of childhood affect the actual functions of trials. They persuasively argue that scholars, for the periods they cover, must focus on case histories and transcripts—not just on treatise writers' summaries of cases—to understand the true nature of testimony. For instance, during the period they dub "sheltered childhood," case studies indicate that, often, the decisive factor in how the court treated a child witness depended on whether the child behaved in conformity with social expectations.

Focusing on a specific period in English history, Professor Thomas Lyon and Raymond Lamagna analyze in detail the historical record of the hearsay use of child witness statements in rape cases heard in the Old Bailey from 1684 to 1789. Their

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2. 497 U.S. 836 (1990).

purpose is to illuminate and provide context for *The King v. Brasier*,<sup>3</sup> a case cited by *Davis v. Washington*,<sup>4</sup> a confrontation case decided a year after *Crawford*. *Davis* cited *Brasier* as historical support for the proposition that a hearsay declarant's statements made after the emergency has passed are inadmissible. The Supreme Court used *Brasier* to shore up the distinction between nontestimonial requests for help that need not be subject to cross-examination, and post-incident testimonial statements that trigger the right of confrontation.

If indeed the Supreme Court believes that the eighteenth-century English practice is vital to understanding the intentions of the Framers, then at the very least, it is essential that those English cases are correctly characterized. The confusion and contradiction Lyon and Lamagna document in the Old Bailey case histories from the *Brasier* era are at odds with the historical certitude claimed by the Supreme Court in support of its testimonial approach. Lyon and Lamagna's inquiry into the case histories debunks the notion that children's hearsay was routinely excluded either before or after *Brasier*. In many cases, children's hearsay statements were admitted even though they could not testify. Such hearsay may not have been sufficient to convict for the capital crime of rape, but it often led to a conviction for sexual assault. Hence, children's hearsay was afforded less weight, but was often received, particularly when it was the best a party could offer.

Rather than vindicating the Supreme Court's tidy world of categorical constitutional rules, the history of these child rape cases evinces a practical approach to admitting the evidence. The willingness to be flexible in order to achieve the fairest result explains why, despite the categorical rule that children under nine could not be sworn, an individualized inquiry into the capacity of a child to take an oath, advocated by Sir Matthew Hale, was adopted by some courts. Lyon and Lamagna make a compelling case that the Old Bailey cases demonstrated a best-evidence-available approach, reflecting the seriousness of the crime, the paucity of other evidence, and the pragmatism of the courts.

As do Tanenhaus and Bush, Professor Robert Mosteller questions the Supreme Court's use of history. Like Lyon and Lamagna, Mosteller provides a close analysis of *Brasier*, revealing the Court's ahistorical approach. In a startling piece of forensic scholarship, Mosteller demonstrates how the Court used a version of the *Brasier* case not available to the Framers in arguing the Framers' original intent.

Mosteller meticulously examines the new Supreme Court jurisprudence on the Sixth Amendment right to confront witnesses and uses the example of child testimony to challenge the development of that doctrine. He demonstrates how looking at the problems posed by child witnesses illuminates the Court's new confrontation doctrine. In quoting the prophetic phrase, "a little child shall lead them," Mosteller aptly encapsulates the way that tough questions about child witnesses reveal deep—and as yet unresolved—problems with the Court's new approach to Sixth Amendment confrontation.

Mosteller begins with the important observation that *Crawford* and *Davis*, though certainly revolutionary in approach, have actually answered only very narrow questions. *Crawford* purposely did not define the term testimonial, and after *Crawford*, we know for sure only that certain formal statements (such as affidavits and prior

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3. (1779) 1 Leach 199, 168 Eng. Rep. 202 (K.B.).

4. 126 S. Ct. 2266 (2006).

testimony) and statements made by an adult to a police officer at a police station are testimonial. From *Davis*, decided the following year, we learn that statements made to police officers in a domestic-violence case after the emergency has subsided are testimonial, but statements made during a 911 call for help and at the scene while an emergency still existed are nontestimonial.

Mosteller makes significant contributions to the discussion on confrontation, using the case of children to deconstruct the Supreme Court's emphasis on intent and on the formality of the proceedings. First, he presents a review and careful taxonomy of the various types of confrontation cases that have arisen in the lower courts concerning children, and explains the various trends in whether to characterize children's out-of-court statements as testimonial. Mosteller does an able job of demonstrating where consensus has developed. For instance, almost all children's statements to police will be deemed testimonial, regardless of the child's subjective understanding of the possible future uses of his statement. Mosteller also identifies the most difficult of the child confrontation cases as those that present dual roles for out-of-court questioners. Questioning by police to prepare for trial is clearly testimonial, while questioning by a doctor to address pain is clearly not. Often, however, especially with children, the purposes will be mixed. While trying to help a child medically or psychologically, the questioner also may attempt to collect evidence for use at trial.

Second, Mosteller critiques the Supreme Court's approach, noting its seemingly shifting definition of what is testimonial, particularly regarding the question of whose perspective matters, that of the declarant/witness or the person hearing/soliciting the child's statement. He points out that a Confrontation Clause analysis that focused exclusively on the intention of the child speaker would almost always find that the child had no intention to give testimony; this, in turn, would routinely admit such statements as nontestimonial, a dubious result, and one which the lower courts have not reached.

Finally, Mosteller brings together two different strands of Sixth Amendment jurisprudence that are rarely considered in tandem: (1) the question of what statements are testimonial and hence subject to the Sixth Amendment right to confront witnesses, and (2) the manner in which confrontation take place. Under *Maryland v. Craig*, the Court allowed certain compromises in terms of the face-to-face nature of the confrontation where a child might be traumatized by having to face the accused. Mosteller laments the tendency of some prosecutors to exempt the child from the process and to have the child declared unable to testify. While recognizing the difficulties to the child and the prosecution, he eloquently makes the case that every effort should be made to encourage testimony and cross-examination and that the law should not create incentives to declare children unavailable.

The symposium benefited tremendously from the astute commentaries of Professors Tom Lininger and Myrna Raeder. In *Kids Say the Darndest Things: The Prosecutorial Use of Hearsay Statements by Children*, Lininger distills and addresses three vital issues: (1) how courts can define whether statements by children are testimonial, (2) what accommodations could make the experience of being a child witness less traumatic, and (3) how forfeiture should be defined in the context of children.

Lininger addresses many of the same concerns as Mosteller, but takes a slightly more prosecution-friendly approach. Lininger concurs with Mosteller, observing that a declarant-centered approach that merely focuses on what the child believes will lead to too little confrontation. Instead, he recommends a hybrid approach whereby "a child declarant's statement would be testimonial if the child could foresee later prosecutorial

use, or if the government elicited the statement (or contrived a third-party interview that elicited the statement) for forensic purposes.”<sup>5</sup>

In considering potential accommodations for child witnesses, Lininger, like Mosteller, advocates for the continued viability of the Supreme Court doctrine in *Maryland v. Craig*, which permitted a child witness to testify via closed-circuit television where evidence of potential trauma existed. Lininger acknowledges that Justice Scalia, author of the new Sixth Amendment jurisprudence and dissenter in *Craig* is wildly hostile to the Court’s balancing approach and to any special deals for child witnesses. Nevertheless, Lininger believes that the closed-circuit-television method of cross-examination is still a viable option post-*Crawford*. He also advocates other creative approaches to making the courtroom more comfortable for child witnesses, including use of support personnel for the child, greater judicial supervision of the questions on cross-examination, and the substitution of pretrial cross-examination for cross-examination at trial.

Finally, Lininger tries to steer a middle road on the issue of forfeiture. He rejects the argument that all domestic violence cases present forfeiture arguments, and instead argues for a more expansive notion of forfeiture than Mosteller advocates. Lininger observes that “[b]y making the victim indispensable, the new confrontation jurisprudence has made the victim a more attractive target for coercion by the defendant.”<sup>6</sup> He proposes a test whereby forfeiture extends beyond obvious witness tampering to include wrongful conduct by the accused that “foreseeably and proximately causes the absence” of the child witness. This standard would include the incapacitation of the witness even when the primary purpose was not to silence the witness.

In her piece entitled *Comments on Child Abuse Litigation in a “Testimonial” World: The Intersection of Competency, Hearsay, and Confrontation*, Raeder summarizes the challenges created by child witnesses and critiques the historical approach, noting that “[i]t should come as no surprise that eighteenth-century values would silence the voices of children in the twenty-first-century courtroom.”<sup>7</sup> She argues that the Supreme Court’s rigid and categorical testimonial approach hampers both the accused (who seemingly has no remaining constitutional challenge for nontestimonial statements) and the prosecution (which is sometimes unable to produce a child witness and must therefore forfeit use of a child’s testimonial statement).

Although clearly not enamored with the Court’s testimonial approach, Raeder acknowledges that it is here to stay, and focuses, as do Mosteller and Lininger, on the practical implications of the new testimonial regime. In struggling with the difficult question of when children’s statements are testimonial, Raeder joins the other scholars in this symposium in rejecting the facile and accused-unfriendly notion that all child hearsay is constitutionally admissible because children do not understand the trial process sufficiently to be capable of making testimonial statements.

Raeder also argues for the continued vitality of *Maryland v. Craig*, despite its conflict in tone and constitutional theory with the Court’s jurisprudence in *Crawford*.

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5. Tom Lininger, *Kids Say the Darnedest Things: The Prosecutorial Use of Hearsay Statements by Children*, 82 IND. L.J. 999, 1002 (2007).

6. *Id.* at 1006.

7. Myrna S. Raeder, *Comments on Child Abuse Litigation in a “Testimonial” World: The Intersection of Competency, Hearsay, and Confrontation*, 82 IND. L.J. 1009, 1009 (2007).

She notes that, with the new approach to confrontation, more children will have to testify and courts will have to find ways of making that happen. To that end, Raeder recommends judicial education, the presence of victim advocates, and active judicial monitoring to avoid harassment of child witnesses. She notes that the doctrine of forfeiture, which would eliminate the accused's ability to question the child at all, presents a much less desirable alternative to *Craig's* balancing approach. She agrees with Mosteller and Lyon that there is tremendous benefit in having the child testify, even sans oath and even under slightly altered conditions. Testimony via the protections offered by *Craig* is always preferable to simply admitting the child's hearsay in the child's absence without an opportunity for questioning of any sort.

On the issue of forfeiture, Raeder observes that the current jurisprudence leaves the system with bad choices on either extreme. If forfeiture is interpreted too broadly, and child hearsay is routinely admitted, the constitutional rights of the accused fly out the window. Conversely, too narrow a definition of forfeiture means that when a child witness has been intimidated or otherwise prevented from testifying, the accused will benefit from that misconduct by entirely excluding the unavailable child's statements.

Raeder ponders how future cases will define meaningful confrontation of children, given children's tendency to freeze on the witness stand, forget prior incidents or statements, or become too emotional to testify. Raeder joins Mosteller in calling for accommodation of these "less-than-perfect witnesses."<sup>8</sup>

As to the testimonial character of mixed-use statements—those used for law enforcement as well as therapy or medical care—Raeder agrees with Mosteller's analysis of the developing case law, and she concludes that "*Crawford* appears to doom the use of multidisciplinary teams in child abuse as a way of introducing statements of children who do not testify." She also finds it anomalous, if not disingenuous, that courts, in assessing the testimonial value of a statement in a sexual abuse case to a doctor or teacher, do not take into account the mandatory reporting requirements of those professionals. Raeder argues that an identification of a child abuse perpetrator in a medical setting should be deemed testimonial because it is a child safety issue "inextricably intertwined with a law-enforcement purpose."<sup>9</sup> She notes, however, that courts have continued to treat statements to private individuals as nontestimonial, so that many hearsay statements will still be admitted under the *Crawford* standard.

Each of the pieces in the symposium makes a significant contribution to the scholarship surrounding children as witnesses and sheds light on the new Confrontation Clause jurisprudence. In addition to offering historical insights and practical suggestions, this body of work challenges the overarching assumptions of the Supreme Court's new approach to confrontation. As some of our authors demonstrate, from the time of the Old Bailey, courts exhibited flexibility and practical wisdom in their use of children's statements. Live sworn testimony, subject to cross-examination, has always been considered best. However, there is good evidence that, historically, courts were willing to admit second best evidence—unsworn testimony, or even garden-variety hearsay. Furthermore, given the complexity of the historical record and the differences in perspective and context between the eighteenth-century and today, it is not at all

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8. *Id.* at 1022; accord Robert P. Mosteller, *Testing the Testimonial Concept and Exceptions to Confrontation: "A Little Child Shall Lead Them,"* 82 IND. L.J. 917 (2007).

9. Raeder, *supra* note 7, at 1025.

obvious why the approaches of the Old Bailey cases should govern our modern law of confrontation.

Happily, the scholars in the symposium offer more than just criticism; while working within the confines of *Crawford* and *Davis*, they suggest creative solutions to the very difficult questions posed by child witnesses. In doing so, they wrestle with the delicate balance between child safety and the rights of the accused, propose effective compromises concerning the methods of cross-examination, and offer thoughtful suggestions for the development of the forfeiture doctrine. The authors' practical tone, their acknowledgment that children pose special challenges, and their willingness to consider context-based, nuanced solutions contrast favorably with the Court's rigid, categorical, and (supposedly) historical approach to the Sixth Amendment.

