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CHILD WITNESSES AND THE CONFRONTATION CLAUSE

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ABSTRACT

Subsequent to the Supreme Court's ruling in Crawford v. Washington that a criminal defendant's right to confront the witnesses against him is violated by the admission of un-cross-examined testimonial hearsay, lower courts have overturned convictions in which hearsay from children was admitted after child witnesses were either unwilling or unable to testify. A review of social scientific evidence regarding the dynamics of child abuse suggests two doctrinal approaches that will facilitate the fair receipt of children's evidence. First, the courts should hold that defendants forfeit their confrontation rights if they exploit a child's vulnerabilities such that they can reasonably anticipate that the child will be unavailable to testify. Exploitation includes choosing victims on the basis of their filial dependency, their vulnerability, and their immaturity, as well as actions taken to create or accentuate those vulnerabilities. Second, defendants waive their confrontation rights if they render the child unavailable at trial through an objection to the child's testimonial competency.

- I. INTRODUCTION
- II. HOW CRAWFORD ALTERED THE PROSECUTION OF CHILD ABUSE
- III. THE FORFEITURE BY WRONGDOING EXCEPTION TO THE CONFRONTATION CLAUSE
- IV. THE DYNAMICS OF CHILD ABUSE
- V. FORFEITURE BY EXPLOITATION IN THE COURTS

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VI. OBJECTIONS TO THE CHILD'S COMPETENCY AT
TRIAL
VII. CONCLUSION

I. INTRODUCTION

In *State v. Waddell*,² a seven-year-old child named J.M.J. disclosed sexual abuse to a social services investigator in a videotaped interview.³ In the interview, J.M.J. described “sexual intercourse, anal sex, the touching of her breast, and touching of [defendant’s] penis.”⁴ Waddell was J.M.J.’s next-door neighbor. J.M.J. would visit Waddell to watch T.V., to use his bathroom, and to play with his puppies. She would also visit his daughter and granddaughter when they were in his home. J.M.J. also revealed the abuse to her grandmother, a teacher, a nurse, a day-care provider, and a therapist. She explained that she had not immediately disclosed the abuse because she wanted to continue playing with Waddell’s puppies, and because Waddell had threatened her with a knife that she should not tell. At trial, J.M.J. refused to testify.

At trial it was also revealed that Waddell had previously abused his own daughter. She testified to 11 years of sexual abuse, and Waddell’s warning that “she would be sent to an orphanage if she told their secret.”⁵ She also testified that Waddell had taken naked pictures of her when she was a child.⁶ J.M.J. had said that Waddell showed her a picture of a naked child, and a picture of a naked young girl was found in the defendant’s bedroom. Waddell admitted abusing his daughter, but emphasized that it was “nonforcible.” He admitted taking naked pictures, but asserted that she was 17 and that she had “volunteered to be a photography model.”⁷ He denied abusing J.M.J.

The jury convicted Waddell, but his conviction was overturned because of the Supreme Court’s decision in *Crawford v. Washington*.⁸ The appellate court held that because J.M.J. refused to testify, and because her videotaped statement to a social services investigator constituted “testimonial” hearsay, admitting the videotape violated the defendant’s constitutional right to cross-examine J.M.J.⁹ The fact that the trial court had admitted the videotape after assessing its reliability under a special hearsay

² 2006 WL 1379576 (Kan. Ct. App. 2006).

³ *Id.* at *1–3.

⁴ *Id.* at *2.

⁵ *Id.* at *3.

⁶ *Id.* at *2–4.

⁷ *Id.* at *4.

⁸ 541 U.S. 36 (2004).

⁹ *Waddell*, 2006 WL 1379576 at *9.

exception for children's statements¹⁰ mattered naught, because *Crawford* emphasized that the confrontation clause guaranteeing defendants a right to confront witnesses was a procedural right, making the reliability of the hearsay irrelevant. Because of the centrality of the videotaped interview to the state's case, the error could not be considered harmless, and the conviction had to be overturned.

The case is one of many cases around the country in which criminal convictions have been overturned because children's statements were admitted after children failed to testify.¹¹ These cases include allegations of sexual abuse, physical abuse, and domestic violence, the types of cases in which child witnesses are most often called to testify.¹² Typically, children's statements were admitted after the trial court found the child unavailable to testify and assessed the statement's reliability under special hearsay exceptions for children's complaints. Most states have such exceptions, promulgated to address the difficulties of proof in child abuse prosecutions, while mindful of the need for individualized assessment of the trustworthiness of children's reports.¹³

Crawford radically altered the treatment of hearsay under the confrontation clause of the Sixth Amendment.¹⁴ In *Crawford*, the Court held that a criminal defendant's confrontation rights are violated by the admission of un-cross-examined testimonial hearsay. Testimonial hearsay has been held to include most statements to government officials. Social workers and the police are often the first responders in cases of child abuse and domestic violence, and therefore frequently question children soon after the initial report. Testimonial hearsay also includes most statements made to agents of the police. In many cases involving child witnesses, particularly when child abuse is alleged, children are interviewed by specially trained forensic interviewers who work closely with social services and the police.¹⁵ At the best centers, interview protocols are followed, the interviews are videotaped, and both social services and the police observe the interview in order to minimize the need for multiple interviews. Because the interviews are recorded, the exact words used by the interviewer and by the child can be closely scrutinized for evidence of suggestion, confabulation, and misinterpretation. Ironically, however, because of the formality and the input provided

¹⁰ *Id.*

¹¹ *See infra*.

¹² Gail S. Goodman et al. *Innovations for Child Witnesses: A National Survey*, 5 PSYCHOL., PUB. POL., & L., 255, 264-265 (1999).

¹³ NATIONAL CENTER FOR PROSECUTION OF CHILD ABUSE, INVESTIGATION AND PROSECUTION OF CHILD ABUSE (Sage Publications eds., 3d ed. 2004).

¹⁴ The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. CONST. amend. VI.

¹⁵ Myrna S. Raeder, *Distrusting Young Children who Allege Sexual Abuse: Why Stereotypes Don't Die and Ways to Facilitate Child Testimony*, 16 WIDENER L. REV. 239, 252 (2010).

by government agents, the statements are sure to be deemed testimonial, triggering application of *Crawford*.

One of the few exceptions to the rule announced in *Crawford* is the doctrine of forfeiture by wrongdoing. In *Giles v. California*¹⁶, the state sought to introduce the statements of a murder victim to the police against the defendant.¹⁷ The defendant successfully argued that his confrontation rights were presumptively denied because he could not cross-examine the victim at trial.¹⁸ However, *Giles* held that the defendant can be found to have forfeited his right to confront an unavailable hearsay declarant if the court finds that he engaged in wrongdoing that was designed to and did in fact cause the unavailability of the declarant.¹⁹ A majority of the Court expressed the view that repeated acts of domestic violence against the declarant should suffice to prove that murdering the declarant was motivated by a desire to control the declarant, and render her unavailable.²⁰ The opinion constitutes unusual willingness on the Court to consider the dynamics of crime in assessing the rights of criminal defendants.

The *Giles* opinion provides an opportunity for applying forfeiture doctrine to the special challenges facing the prosecution in child witness cases. Assessing the dynamics of child abuse, we will argue that forfeiture should apply if the defendant *exploited* a child's vulnerabilities such that he could reasonably anticipate that the child would be unavailable to testify. Exploitation includes *choosing* victims on the basis of their filial dependency, their vulnerability, and their immaturity. Exploitation also includes actions taken to create or accentuate those vulnerabilities. The causal connection between the defendant's choices and actions and the child's foreseeable unavailability is provided by delays and difficulties in disclosure. In some cases, the only obstacle to the child's availability is the defendant's objection to the child's testimonial incompetency. In these cases, we will argue that it is legitimate to force the defendant to choose: if he wishes to exercise his right to cross-examine the child, he cannot complain of the child's inability to answer correctly questions regarding her testimonial competency.

Section 2 will explore how *Crawford* altered the prosecution of child abuse. Section 3 will describe the forfeiture by wrongdoing exception to the Confrontation Clause, and discuss how a majority of the Court exhibited a willingness to consider the dynamics of abuse in applying forfeiture doctrine. Section 4 will describe the dynamics of child abuse and how perpetrators exploit the foreseeable unavailability of their victims. Section 5 will demonstrate how the

¹⁶ 554 U.S. 353 (2008).

¹⁷ *Id.* at 356.

¹⁸ *Id.* at 358-359.

¹⁹ We will routinely use the word "declarant" to refer to hearsay declarants. Because most child witnesses are victims of child sexual abuse, and because perpetrators of child sexual abuse tend to be males, and victims of child sexual abuse tend to be females, we will routinely use "he" to refer to defendants and "she" to declarants.

²⁰ *Giles*, 554 U.S. at 377.

lower courts have missed the opportunity to apply forfeiture to child witness cases. Section 6 will address the issue of objections to the child's competency that the defendant raises at trial. Section 7 concludes.

II. HOW *CRAWFORD* ALTERED THE PROSECUTION OF CHILD ABUSE

Crawford v. Washington changed the status of hearsay evidence under the confrontation clause. Under *Ohio v. Roberts*,²¹ hearsay statements from unavailable declarants were admissible only if they bore "indicia of reliability."²² Reliability could be assumed if they fell within a "firmly-rooted hearsay exception," and if they did not, there had to be "particularized guarantees of trustworthiness."²³ Many hearsay statements by children had to satisfy the trustworthiness standard because they were admitted under exceptions that were not firmly rooted, such as the residual exception or special statutory exceptions for children's abuse complaints. Hence, in *Idaho v. Wright*,²⁴ the Court upheld reversal of a sexual abuse conviction because statements made by a 2 ½ year old to a physician admitted under the "residual" exception to the hearsay rule lacked guarantees of trustworthiness.²⁵ The Court held that the Confrontation Clause required exclusion of such statements "unless an affirmative reason, arising from the circumstances in which the statement was made, provides a basis for rebutting the presumption that a hearsay statement is not worthy of reliance at trial."²⁶ The prosecution would have to prove that "the declarant's truthfulness [was] so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility"²⁷ Although the Court rejected a procedural requirement that the statements be recorded,²⁸ it endorsed several factors that are facilitated by

²¹ 448 U.S. 56 (1980).

²² *Id.* at 66.

²³ *Id.* See also, *Lee v. Illinois*, 476 U.S. 530, 539 (1986) ("presumptively unreliable and inadmissible for Confrontation Clause purposes"). In *Roberts* and subsequent cases, the Court held that a number of hearsay exceptions were-firmly-rooted, including public records, business records, dying declarations, co-conspirator statements, and of most relevance to child abuse cases, the spontaneous utterances exception and the medical diagnosis exception. *Roberts*, 448 U.S. 56 (public records, business records, prior testimony); *Bourjaily v. United States*, 483 U.S. 171 (2005) (co-conspirator); *White v. Illinois*, 502 U.S. 346 (1992) (medical diagnosis and spontaneous utterances).

²⁴ 497 U.S. 805 (1990).

²⁵ *Id.* at 827. The residual exception was Idaho R. Evid. 803(24) (allowing admission of any "statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness"). This language appears in the federal rules (Fed. R. Evid. 807) as well as in many states.

²⁶ *Wright*, 497 U.S. at 821.

²⁷ *Id.* at 820.

²⁸ *Id.* at 818-819. This factor was weighed heavily by the Idaho Supreme Court. Of course, in future applications of the residual exception to child abuse statements, whether the statements were videotaped would remain a valid factor in applying the statutory exception.

recording: analysis of the spontaneity, consistency, and age-appropriateness of the child's responses.²⁹

Crawford and its progeny overruled *Roberts*.³⁰ *Crawford* emphasized that the Confrontation Clause was about procedure, rather than substance: the defendant has the right to be confronted with the witnesses against him. Hence, the question is not whether the hearsay is true or false, but whether the hearsay declarant could be called a "witness" or not, and if defendant had not been given the right to confront the declarant. "To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination."³¹ The court coined the term "testimonial hearsay," which refers to hearsay that substitutes for testimony.³² The Court has since clarified that hearsay is testimonial when it has "a primary purpose of creating an out-of-court substitute for trial testimony."³³ *Crawford* and subsequent cases have held that testimonial hearsay includes most statements made to the police,³⁴ other governmental officials,³⁵ or agents of the police,³⁶ unless there is an emergency,³⁷ or the primary purpose of the interaction is something other than pursuing prosecution.³⁸ And if the testimonial declarant fails to testify, for whatever reason, then the defendant could be said to have been deprived of his right to confront a witness against him. In short, *Crawford* held that admission of testimonial hearsay from an un-cross-examinable declarant violates the Confrontation Clause. *Crawford* abandoned

²⁹ *Id.* at 821-822.

³⁰ *Crawford*, 541 U.S. at 68 ("Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law-as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether."); *See also*, *Whorton v. Bockting*, 549 U.S. 604 (2007) (confirming that *Crawford* overruled *Reynolds*); *Davis v. Washington* 547 U.S. 813, 823 (2006) (the Confrontation Clause applies only to testimonial hearsay).

³¹ *Crawford*, 541 U.S. at 61. *See also id.* at 62: "Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty."

³² *Id.* at 53.

³³ *See Michigan v. Bryant*, 131 S.Ct 1143 (2011); *see also Davis v. Washington*, 547 U.S. 823 (2006).

³⁴ *Crawford*, 541 U.S. at 52 ("Statements taken by police officers in the course of interrogations are also testimonial under even a narrow standard.")

³⁵ *Id.* at 53 ("The involvement of government officers in the production of testimonial evidence presents the same risk, whether the officers are police or justices of the peace"); *Id.* at 55 n.7 ("[i]nvolvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse-a fact borne out time and again throughout a history with which the Framers were keenly familiar").

³⁶ *Davis*, 547 U.S. at 823 n.2 ("If 911 operators are not themselves law enforcement officers, they may at least be agents of law enforcement when they conduct interrogations of 911 callers").

³⁷ *Id.* at 822 ("Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.")

³⁸ *Id.* (testimonial when "the primary purpose of the [police] interrogation is to establish or prove past events potentially relevant to later criminal prosecution").

any application of the Clause to non-testimonial hearsay, and abandoned any attempt by the courts to analyze the reliability of hearsay under the Clause.

It immediately became clear that *Crawford* would have a major effect on the prosecution of crimes within the family and the home, because of the frequency with which family members will fail to testify. *Crawford* itself involved a case in which the defendant's wife was the hearsay declarant, and failed to testify because the defendant claimed the spousal privilege. *Davis v. Washington*,³⁹ in which the court carved out an exigency exception to the rule, involved two domestic violence cases; one in which a woman gave statements to the police in her home while her husband was detained in another room, and the other in which a woman called 911 to report her boyfriend's abuse as he was fleeing the home.⁴⁰ In *Giles*, in which the court considered the forfeiture by wrongdoing exception to the rule, the defendant was charged with murdering his ex-girlfriend, and the challenged hearsay involved her statements to a police officer complaining of an attack after he accused her of having an affair.⁴¹

The Supreme Court has been asked a number of times to review cases involving child witnesses, but has never accepted review.⁴² The appellate reports are replete with cases in which application of *Crawford* led to reversals of convictions in which children's hearsay had been admitted when they were either unwilling or unable to testify. These are typically cases in which the child's inability to testify was unexpected, and in which other evidence of guilt convinced the prosecutor to attempt to go forward without the child's testimony.

In *State v. Pitt*,⁴³ the four-year-old victim, while living with her mother and the defendant, began to resist being alone with the defendant and disclosed sexual abuse to her mother.⁴⁴ She made consistent statements to a physician, a psychologist, and a forensic interviewer in a videotaped interview.⁴⁵ The physician found physical evidence of abuse.⁴⁶ The child also disclosed having seen the defendant sexually abuse the child's five-year-old cousin, who confirmed abuse of both girls in a videotaped interview.⁴⁷ The state presented both girls at trial, but they appeared too upset and

³⁹ 547 U.S. 823 (2006).

⁴⁰ *Id.*

⁴¹ *Giles*, 547 U.S. at 358.

⁴² *State v. Bobadilla*, 709 N.W.2d 243 (2006), cert denied 127 S.Ct. 382 (2006); *State v. Bentley*, 739 N.W.2d 296 (2007), cert denied 128 S.Ct. 1655 (2008); *Seely v. State*, 373 Ark. 141 (2008), cert denied 555 U.S. 898 (2008); *State v. Arnold*, 933 N.E.2d 775 (2010), cert denied at 132 S.Ct. 341 (2011).

⁴³ 147 P.3d 940 (Or. App. 2006), *aff'd on reh'g*, 159 P.3d 329 (Or. App. 2007). The case was retried, both girls testified, and the defendant was convicted. *State v. Pitt*, 237 P.3d 890 (Or. App. 2010), review allowed, 249 P.3d 1281 (Or. 2011).

⁴⁴ 147 P.3d at 942.

⁴⁵ *Id.* at 942–43.

⁴⁶ *Id.* at 942.

⁴⁷ *Id.* at 942–43.

frightened to answer questions and were declared unavailable.⁴⁸ The videotaped interviews of both children were admitted, and the conviction was reversed.⁴⁹

In *State v. Noah*,⁵⁰ an eleven-year old broke down during the preliminary hearing.⁵¹ Her hearsay was allowed under an exception requiring reliability.⁵² She had told her brother and mother that the defendant touched her “private spot” and had recounted seven specific incidents of abuse to a social worker and police.⁵³ The Kansas Supreme Court upheld reversal of the conviction on the ground that the statements to the social worker and the police were testimonial hearsay.⁵⁴

In *People v. Sharp*,⁵⁵ a five-year-old was found unavailable because she was “too traumatized.”⁵⁶ The trial court admitted a videotaped statement, in which she disclosed to a forensic interviewer her father’s sexual abuse, which was consistent with what she previously had told her mother.⁵⁷ The appellate court reversed the conviction.⁵⁸

In *In re S.R.*,⁵⁹ a four-year old was deemed unavailable after becoming “hysterical” at trial, but her hearsay was admitted after the trial court assessed its reliability.⁶⁰ The mother had heard the child say “Do you want me to do it to you?” during play, and the victim disclosed that the defendant had digitally penetrated her anus.⁶¹ The victim later disclosed other details of abuse to a forensic interviewer.⁶² The appellate court reversed the conviction on the ground that the forensic interview was testimonial hearsay.⁶³

Courts also have excluded or reversed admission of statements from child witnesses in murder cases where the children were the only witnesses to the murder. In *Bell v. State*,⁶⁴ a woman’s daughters (ages four and five) saw her killed. The younger daughter told police officers that Bell (her father) “asked [her mother] for money” and that her mother “emptied her purse out on the floor.”⁶⁵ She then told the officers that “Bell pushed [her mother] down over a

⁴⁸ *Id.* at 943.

⁴⁹ *Id.* at 945–46.

⁵⁰ 162 P.3d 799 (Kan. 2007)

⁵¹ *Id.* at 802.

⁵² *Id.* at 801.

⁵³ *Id.* at 800–01.

⁵⁴ *Id.* at 806.

⁵⁵ 155 P.3d 577 (Colo. Ct. App. 2006),

⁵⁶ *Id.* at 578.

⁵⁷ *Id.* at 578.

⁵⁸ *Id.* at 581–82.

⁵⁹ 920 A.2d 1262 (Pa. Super. Ct. 2007), *cert. granted*, 941 A.2d 671 (Pa. 2007) (regarding whether statements to mother were also testimonial).

⁶⁰ *Id.* at 1264.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 1269.

⁶⁴ 928 So.2d 951 (Miss. Ct. App. 2006).

⁶⁵ *Id.* at 953.

table, broke the table . . . broke a mirror in [the] bathroom . . . [and] used a small knife to put 'blood on [her mother's] back.'"⁶⁶ The child's statements were corroborated by the physical evidence—police found an overturned coffee table, a purse with its contents emptied, a broken mirror in the bathroom, and multiple knife wounds in the mother's body.⁶⁷ Both girls were found unavailable after they were unable to endure a mock pretrial practice session.⁶⁸ The conviction was reversed because the statements were testimonial.⁶⁹

In some cases the child failed to testify because the court found the child incompetent. In these cases, the child can be said to be unable rather than (or in addition) unwilling to testify. In *State v. Henderson*,⁷⁰ a three-year-old child diagnosed with gonorrhea disclosed in a videotaped interview that the defendant "touched my body and it was hurting," adding "with the ding ding," the defendant's term for his penis.⁷¹ The mother reported that the defendant was the only man who had unsupervised contact with the victim.⁷² The defendant acknowledged being tested and treated several times for sexually transmitted diseases.⁷³ When the child could not qualify as competent to testify, the trial court admitted the videotaped interview after assessing its reliability.⁷⁴ The conviction was reversed on the ground that the videotaped interview constituted testimonial hearsay.⁷⁵

In *State v. Hooper*,⁷⁶ a mother awoke to find her six-year-old daughter locked in the bathroom with the child's father.⁷⁷ After questioning her child and the father, the mother called the police.

⁶⁶ *Id.*

⁶⁷ *Id.* at 954.

⁶⁸ *See id.* at 956.

⁶⁹ *Id.* at 959. In *State v. Siler*, 876 N.E.2d 534 (Ohio 2007), a three-year-old witnessed his father beat and then hang his mother in their garage. In response to questioning by a detective trained to interview children, the child stated that his mother was "sleeping standing" in the garage. *Id.* at 536. The child told how "Daddy, mommy fighting" in the garage had scared him. *Id.* at 537. When asked "if anyone was hurting mommy," he responded, "Daddy did." *Id.* Although officers prevented the child from seeing his mother's body, the child informed the detective that "the yellow thing" had held his mother upright in the garage. *Id.* A yellow cord had been tied around his mother's neck. *Id.* When asked who put the yellow thing on her, the child responded, "Daddy." *Id.* Despite this vivid account of the murder and other corroborating evidence of threats the father made against the mother as well as past incidents of domestic violence, the conviction was reversed because the child's out-of-court statements were testimonial. *Id.* at 554. In *Flores v. State*, 120 P.3d 1170 (Nev. 2005), the defendant's five-year-old daughter told her foster mother and police that after her step-sister "peed on her [own] pants," her mother hit her and "she never woke up." *Id.* at 1172–73. The child refused to testify against her mother and the trial court admitted her hearsay after assessing its reliability. *Id.* The Nevada Supreme Court reversed the murder conviction on the grounds that the statements to police were testimonial hearsay. *Id.* at 1179–80.

⁷⁰ 160 P.3d 776 (Kan. 2007).

⁷¹ *Id.* at 779–80.

⁷² *Id.* at 778–79.

⁷³ *Id.* at 780.

⁷⁴ *Id.* at 781.

⁷⁵ *Id.* at 792.

⁷⁶ 176 P.3d 911 (Idaho 2007).

⁷⁷ *Id.* at 912.

The child described the sexual abuse in a videotaped interview, and a physician confirmed “breaking and swelling in the rectal area.”⁷⁸ When the victim failed to qualify as competent to testify, the trial court admitted the videotape after assessing its trustworthiness.⁷⁹ The conviction was reversed on the ground that the videotaped interview constituted testimonial hearsay.⁸⁰

Findings of incompetency have also led to the exclusion of children’s hearsay in murder cases. In *State v. Mack*,⁸¹ the three-year-old brother of a two-year-old who died of “smothering by facial compression” reported in a videotaped interview that the defendant “knocked [the victim’s] crib over, hit him on the head, and rubbed him on the floor.”⁸² The boy was incompetent to testify, and the trial court found that the hearsay was reliable, but held that it should be excluded as testimonial hearsay; the Oregon Supreme Court agreed.⁸³

III. THE FORFEITURE BY WRONGDOING EXCEPTION TO THE CONFRONTATION CLAUSE

Crawford and subsequent cases hinted at a solution when child witnesses were too scared or too young to testify: forfeiture by wrongdoing. In *Crawford* the Court mentioned the concept in passing. Justifying its position that the protections of the Confrontation Clause are procedural (testimonial hearsay must be subjected to cross-examination), rather than substantive (hearsay must be reliable), it noted that forfeiture as an exception to the Confrontation right makes “no claim to be a surrogate means of assessing reliability” but rather is founded “on essentially equitable grounds.”⁸⁴ In *Davis*, in which the Court considered a pair of domestic violence cases, the Court sought to reassure critics concerned about the effects of the holding on domestic violence prosecutions by again referring to forfeiture by wrongdoing, and

⁷⁸ *Id.* at 913.

⁷⁹ *Id.*

⁸⁰ *Id.* at 917–18. In *People ex rel. R.A.S.*, 111 P.3d 487 (Colo. Ct. App. 2004), a mother entered the room to see the defendant pulling up his pants, whereupon her four-year-old son stated that the defendant “had me suck his pee pee.” *Id.* at 488. The victim repeated the allegation in a videotaped interview but failed to qualify as competent to testify, and the interview was admitted after the trial court assessed its reliability. *Id.* The appellate court held the hearsay testimonial and reversed the conviction. *Id.* at 490–91. In *Anderson v. State*, 833 N.E.2d 119 (Ind. Ct. App. 2005), another three-year-old was incompetent to testify, but her hearsay was admitted under an exception requiring reliability. *Id.* at 124. The victim told her grandmother the defendant was “going to let me suck his dick” and described oral sex and other abuse to a social worker and police detective. *Id.* at 121 (stating defendant “puts it in my mouth all the time” and “wet, yucky candy” comes out). The appellate court vacated the conviction on other grounds but held the hearsay testimonial. *Id.* at 122, 125–26.

⁸¹ 101 P.3d 349 (Or. 2004) (en banc).

⁸² *Id.* at 349–50.

⁸³ *Id.* at 353.

⁸⁴ *Crawford*, 541 U.S. at 62.

expanded on the concept by noting that defendants “have the duty to refrain from acting in ways that destroy the integrity of the criminal-trial system.” The Court noted that under forfeiture, “one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation.”⁸⁵

Both cases cited *Reynolds v. United States*, the only Supreme Court case to give any serious attention to the concept of forfeiture by wrongdoing.⁸⁶ In *Reynolds*, George Reynolds was indicted on bigamy charges for marrying Amelia Jane Schofield, who lived with him in his home.⁸⁷ The Sheriff attempted to serve Schofield several times at Reynold’s home.⁸⁸ On one occasion, he was told by Mr. Reynolds’ first wife that she had not been there for several weeks.⁸⁹ On another occasion Mr. Reynolds’ told the Sheriff that he would not help him find Schofield, and that she would “not appear” in the case.⁹⁰ The Sheriff, after several attempts and failed inquiries in the neighborhood, never served Ms. Schofield.⁹¹

The Court approved admission of Ms. Schofield’s former testimony under forfeiture by wrongdoing, concluding that “[t]he Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts. It grants him the privilege of being confronted with the witnesses against him; but if he voluntarily keeps the witnesses away, he cannot insist on his privilege.”⁹² Reynolds’ intent to keep Schofield from testifying was established by the fact that he failed to offer any assistance to the Sheriff and in fact boasted to the Sheriff that she would not appear.⁹³ The only evidence of causation was that Reynolds cohabited with Schofield, thus giving him privileged access to her whereabouts.⁹⁴ This was enough for the Court to conclude that the burden was shifted to Reynolds’ to demonstrate that he had not kept her away.⁹⁵

⁸⁵ *Davis*, 547 U.S. at 833.

⁸⁶ 98 U.S. 145 (1878). *See also* *Motes v. United States*, 178 U.S. 458, 471-74 (1900) (holding that the defendants did not forfeit their confrontation rights because “there was not the slightest ground in the evidence to suppose that [the witness] had absented himself from the trial at the instance, by the procurement, or with the assent of either of the accused”).

⁸⁷ *Reynolds*, 98 U.S. at 146, 148.

⁸⁸ *Id.* at 149.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 159-160.

⁹² *Id.* at 158.

⁹³ *Id.*

⁹⁴ *Id.* at 159.

⁹⁵ *Id.* at 160 (“Clearly, enough had been proven to cast the burden upon him of showing that he had not been instrumental in concealing or keeping the witness away”).

The Court squarely faced forfeiture by wrongdoing in *Giles*.⁹⁶ In *Giles* the defendant, Dwayne Giles, was charged with murdering his ex-girlfriend, Brenda Avie.⁹⁷ At trial, the defendant claimed self-defense, and testified to prior acts of violence by Avie.⁹⁸ The hearsay at issue involved statements that Avie had made to the police responding to a domestic violence call three weeks before the shooting:

Avie, who was crying when she spoke, told the officer that Giles had accused her of

having an affair, and that after the two began to argue, Giles grabbed her by the shirt, lifted her off the floor, and began to choke her. According to Avie, when she broke free and fell to the floor, Giles punched her in the face and head, and after she broke free again, he opened a folding knife, held it about three feet away from her, and threatened to kill her if he found her cheating on him.⁹⁹

In order to identify the proper scope of forfeiture, *Giles* looked to the common law at the time that the Bill of Rights were enacted, and found that hearsay from unavailable witnesses was admissible when they were “detained” or “kept away” by the “means or procurement” of the defendant.¹⁰⁰ *Giles* agreed with *Reynolds* that the rationale of the rule is “a defendant should not be permitted to benefit from his own wrong,” and added that “[t]he absence of a forfeiture rule covering this sort of conduct would create an intolerable incentive for defendants to bribe, intimidate, or even kill witnesses against them.”¹⁰¹

Because murder renders a declarant unavailable, the Court did not question whether the causation element of forfeiture was satisfied. Rather, the question was intent. *Giles* rejected an approach in which the defendant must simply have been aware of the effect of his actions on the declarant’s unavailability, which would mean the forfeiture rule would apply in all cases in which the defendant murdered the declarant. Rather, the plurality (and the concurrence) held that the exception “applied only when the defendant engaged in conduct *designed* to prevent the witness from testifying.”¹⁰²

⁹⁶ The case produced a plurality opinion (authored by Justice Scalia and joined by Justices Roberts, Thomas, and Alito), a concurrence by Justices Souter and Ginsburg, and a dissent by Justices Breyer, Kennedy, and Stevens. Of course, Souter and Stevens have been replaced with Sotomayor and Kagan, and their views on forfeiture are unknown, although there are hints that they are somewhat skeptical of the practical difficulties engendered by *Crawford*’s originalist approach. In *Bullcoming v. New Mexico*, 131 S.Ct. 2705 (2011), Sotomayor and Kagan did not join the part of the court’s opinion dismissing concerns that “unbending application of the Confrontation Clause...would impose an undue burden.”

⁹⁷ *Giles*, 547 U.S. at 356-57.

⁹⁸ *Id.* at 356.

⁹⁹ *Id.* at 356-357.

¹⁰⁰ *Id.* at 359.

¹⁰¹ *Id.* at 365.

¹⁰² *Id.* at 359.

Crucially, *Giles* acknowledged the role that the dynamics of domestic violence may play in assessing forfeiture.¹⁰³ The plurality opinion acknowledged that the domestic violence context within which the case occurred was relevant, because domestic violence is often “intended to dissuade a victim from resorting to outside help.”¹⁰⁴ Hence, it may be possible to prove that the crime “expressed the intent to isolate the victim and to stop her from reporting abuse to the authorities or cooperating with a criminal prosecution.”¹⁰⁵ The opinion concluded that “[e]arlier abuse, or threats of abuse, intended to dissuade the victim from resorting to outside help would be highly relevant to this inquiry.”¹⁰⁶ The concurrence argued that such intent is equivalent to the “intent *inferred* on the part of the domestic abuser in the classic abusive relationship, which is meant to isolate the victim from outside help, including the aid of law enforcement and the judicial process.”¹⁰⁷ The dissent argued that mere knowledge rather than purpose should be sufficient, and thus agreed with a possible reading of the concurrence: purpose could be “based on no more than evidence of a history of domestic violence.”¹⁰⁸ A majority of the court thus believed that a history of domestic violence would support a forfeiture finding, based on the theory that repeated violence is motivated by a desire to exert control over the victim.

Lessons of *Reynolds* and *Giles*. There are several principles that one can extract from *Reynolds* and *Giles* that are significant for considering forfeiture in the context of child witnesses testifying against familiar adults. First, intent can be inferred. In *Giles*, a majority of the justices endorsed the view that a court can presume intent based on a pattern of domestic violence. This inference can be based on an understanding of the dynamics of abuse between intimates.

Second, the relationship of the defendant and the declarant is important. In *Reynolds*, the court recognized that a relationship and cohabitation equates with influence, so that if one proves intent and a means of carrying out that intent, causation can be presumed. Following *Reynolds*, the lower courts have also recognized the importance of the relationship between the defendant and the declarant in assessing forfeiture.¹⁰⁹ Moreover, particularly when

¹⁰³ *Id.* at 377.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 377. The plurality opinion was signed by Justices Scalia, Roberts, Thomas, and Alito.

¹⁰⁷ *Id.* at 380 (Souter, J., concurring) (emphasis added) (“If the evidence for admissibility shows a continuing relationship of this sort, it would make no sense to suggest that the oppressing defendant miraculously abandoned the dynamics of abuse the instant before he killed his victim, say, in a fit of anger.”) For the control theory see, e.g., Tom Lininger, Article, *The Sound of Silence: Holding Batters Accountable for Silencing Their Victims*, 87 TEX. L. REV. 857, 867 (2009) (chief motive of spouse abusers is to control their victims).

¹⁰⁸ *Giles*, 547 U.S. at 406 (Breyer, J., dissenting).

¹⁰⁹ See, e.g., *People v. Pappalardo*, 576 N.Y.S.2d 1001 (Sup. Ct. Crim. N.Y. 1991) (noting that the close personal relationship between defendant and witness, while not sufficient in

there is a pre-existing relationship between the defendant and the declarant, the lower courts recognize that the defendant's actions need not be threatening in order to influence the declarant: cajolery can be as powerful a tool.¹¹⁰ Thus, wrongdoing may be established where defendant promised gifts of value or otherwise bribed the witness,¹¹¹ or where defendant played upon the witness's sympathy and pleaded with the witness not to testify.¹¹² Courts applying the forfeiture-by-wrongdoing rule often find that positive conduct is sufficient to establish forfeiture where the defendant and the witness have a preexisting relationship of trust, affection or authority.

Third, the actions that give rise to forfeiture may occur before the charged crime. It is not necessary that the crime be completed or charges filed. All of the Justices in *Giles* believed that the defendant's actions well in advance of the charged crime were relevant in assessing intent. The lower courts have not gone as far, but have recognized that the actions giving rise to forfeiture need not occur post-arrest or post-indictment.¹¹³

itself to establish "an unlawful involvement in a witness's refusal to testify," lends additional weight to the conclusion that defendant helped procure her unavailability), *United States v. Montague*, 421 F.3d 1099, 1104 (10th Cir. 2005) (defendant's prior relationship with the witness, his wife, helped inform the court's evaluation of the nature of defendant's post-incarceration communication with the witness and whether that conduct procured her unavailability), *Steele v. Taylor*, 684 F.2d 1193, 1197, 1203 (6th Cir. 1982) (finding forfeiture where defendant paid for the witness's lawyer and shared his counsel with her and noting that defendant had influence and control over the witness through his decade-long intimate relationship with her); *see also* *Mayes v. Sowders*, 621 F.2d 850, 856 n.4 (6th Cir. 1980) (finding that there was no evidence that the defendant procured his cousin's unavailability, but implying that the close personal and familial relationship between the defendant and the witness would be relevant to a forfeiture inquiry).

¹¹⁰ *See, e.g.*, *State v. Hallum*, 606 N.W.2d 351, 357-359 (Iowa 2000) (finding forfeiture on the basis of correspondence between a defendant and his brother where the defendant advised his brother not to discuss anything over the phone, wrote to him "hang in there," and concluded his letter with "Love ya, bro"); *see also* *Steele v. Taylor*, 684 F.2d 1193, 1198-99, 1203 (6th Cir. 1982) (applying the forfeiture by wrongdoing rule where the witness had been a prostitute for the defendant, eventually lived with him and had his child, and the defendant hired a lawyer for the witness, paid for the lawyer, and had his own counsel make arguments on her behalf so she would not have to testify).

¹¹¹ *See* *U.S. v. Scott*, 284 F.3d 758 (7th Cir. 2002) ("giving something of value to a potential witness could constitute wrongdoing").

¹¹² *See* *McClarin v. Smith*, No. 05-CV02478, 2007 WL 2323592, at *10 (E.D. N.Y. Aug. 10, 2007) (not reported) (admitting witness's grand jury testimony and applying the forfeiture by wrongdoing doctrine where defendant's "pleas for sympathy caused [witness] to alter his grand jury testimony"); *Commonwealth v. Henderson*, 747 N.E. 2d 659, 660-61 (Mass. 2001) (upholding defendant's conviction for willfully endeavoring to interfere with a witness where defendant sent sixty letters to his former girlfriend who was the victim of an assault by defendant, repeatedly begging and pleading with her to lie for defendant regarding the assault).

¹¹³ 5 MULLER & KIRKPATRICK, *FEDERAL EVIDENCE* § 8:134 (3d. ed 2007) (intent may exist well in advance of charges being filed); *United States v. Dhinsa*, 243 F.3d 635 (2d. Cir. 2001) (Forfeiture found where defendant killed 2 witnesses before charges filed; one had not spoken to the police but had confronted defendant about killing his brother defendant knew he had incriminating info); *U.S. v. Miller*, 116 F.3d 641, 667-69 (1997) ("We have never indicated that *Mastrangelo* did not apply to a defendant's procurement of the unavailability of the declarant unless there was an ongoing proceeding in which the declarant was scheduled to testify, and we see no reason to do so now.") *Cf.* *Myrna S.*

Fourth, it is not necessary to ask whether the declarant had independent motives not to testify. Although commentators have argued that if the declarant has independent reasons for refusing to testify, forfeiture should not apply,¹¹⁴ neither *Reynolds* nor *Giles* asked this question.¹¹⁵ The lower courts have recognized that declarant's purported reasons for their unavailability are often themselves the product of the defendant's influence¹¹⁶ or simply not credible.¹¹⁷

Raeder, *Comments on Child Abuse Litigation in a "Testimonial" World: The Intersection of Competency, Hearsay & Confrontation*, 82 IND. L. J. 1009, 1019 (2007) ("the original threats to the child should be presumed to affect the child's inability to testify at trial under a forfeiture rationale even though the demonstrated tampering occurred prior to disclosure"); Robert P. Mosteller, *Giles v. California: Avoiding Serious Damage to Crawford's Limited Revolution*, 3 LEWIS & CLARK L. REV. 675, 695 n. 76 (2009) (acknowledging "threats as part of the sex act" and elicited promises to keep abuse a secret may be sufficient for forfeiture in child abuse context).

¹¹⁴ See James F. Flanagan, *Forfeiture by Wrongdoing and Those Who Acquiesce in Witness Intimidation: A Reach Exceeding Its Grasp and Other Problems with Federal Rule of Evidence 804(b)(6)*, 51 DRAKE L. REV. 459, 486 (2003). Professor Flanagan argues that *United States v. Williamson*, 792 F. Supp. 805 (M.D. Ga. 1992), *vacated*, 512 U.S. 594 (1994), is a possible example of a case where a witness's independent reason "severs the link between the defendant's misconduct and the loss of the evidence." *Flanagan*, 51 DRAKE L. REV. at 486. In *Williamson*, the court rejected the prosecution's argument that defendant procured the witness's unavailability by paying for the witness's attorney's fees in part because the witness had independent reasons for asserting his Fifth Amendment privilege at trial. *Flanagan*, 51 DRAKE L. REV. at 486, n.165-66. The court found that the witness asserted the Fifth Amendment privilege because he had a pending appeal to suppress evidence on Fourth Amendment grounds, and had he offered self-incriminatory testimony, the benefits of the appeal would be nullified. *Id.* Thus, the witness's independent reasons caused him to assert the privilege. But, as Professor Flanagan notes, the prosecution could not establish that defendant's actions would have caused unavailability even in the absence of the witness's valid reason for refusing to testify. *Id.* at 486 n.167. The court held that the evidence was insufficient to demonstrate any agreement between defendant and the witness to keep silent or that the witness knew defendant was paying his legal fees. *Id.* Thus, this is not a case where defendant's independent reason for asserting the privilege destroyed causation; indeed, there was simply no causal link to destroy in the first instance. See also James F. Flanagan, *Confrontation, Equity, and the Misnamed Exception for "Forfeiture By Wrongdoing"*, 14 WM. & MARY BILL RTS. J. 1193, 1211 (2006).

¹¹⁵ One could argue that this is a point unique to these two cases, both because there was evidence, based on the hearsay itself, that the declarant's were willing to testify (in *Reynolds*, the declarant had previously testified against the defendant, and in *Giles*, the declarant had called the police against the defendant), and because the defendants made the declarants physically rather than psychologically unavailable. When the argument is that the defendants' actions caused the declarant to be unwilling (rather than unable) to testify, it may be more pertinent to ask whether the declarant was unwilling to testify for other reasons.

¹¹⁶ See *United States v. Balano*, 618 F.2d 624, 630 (10th Cir. 1980). (finding that witness's assertion that his earlier statements to police were made while under pressure and duress of the government and he simply wanted not to be involved were further evidence that the witness was scared of defendant). Courts also face similar causation issues where the witness avoids testimony by asserting a privilege, such as the witness's Fifth Amendment privilege against self-incrimination. When the evidence demonstrates that the defendant influenced or coerced the witness's decision, courts find defendant responsible for the witness's unavailability. See, e.g., *Cole v. United States*, 329 F.2d 437 (9th Cir. 1964); *United States v. Mayes*, 512 F.2d 637, 651 (6th Cir. 1975).

¹¹⁷ The courts are free to regard such reasons with skepticism, and many have done so. See, e.g., *United States v. Scott*, 284 F.3d 758 (7th 2002) (rejecting defendant's assertion that he refused to testify for religious reasons); *State v. Hallum*, 606 N.W.2d 351 (Iowa 2000)

Fifth, forfeiture is not limited to cases in which the hearsay statements were themselves under oath and subject to cross-examination; historical analysis¹¹⁸ and *Reynolds* suggested that this was so,¹¹⁹ but this was clearly rejected by a majority of the Court in *Giles*.

Reynolds and *Giles* are complementary. One might read *Reynolds* to suggest that clear evidence of intent must be provided, but, given *Giles*, it is more consistent to assume that the Court in *Reynolds* believed the strong facts of intent before it were sufficient rather than necessary. One might read *Giles* to suggest that clear evidence of causation must be provided (murdering a declarant clearly renders them unavailable), but, given *Reynolds*, it is more consistent to assume that *Giles* found the strong evidence of causation sufficient rather than necessary. Read together, the opinions suggest a flexible approach with respect to a finding that the defendant forfeited his right to cross-examine an unavailable declarant.

Flexibility with respect to applying forfeiture is justifiable for at least two reasons. First, proof of forfeiture becomes more difficult as the defendant's wrongdoing becomes more successful. If the defendant keeps the declarant off the stand altogether, then she cannot explain her absence. If the defendant successfully threatens the victim, she will be deterred from explaining to the court the reasons for her uncooperativeness.¹²⁰ If the defendant is particularly clever, and colludes with the declarant, then she will provide alternative explanations for her uncooperativeness which the defendant can point to as undermining causation.

Second, it is important to reiterate that forfeiture is an equitable principle: one should not be permitted to benefit from his own wrong. As a matter of fairness, if the defendant desired that the

(finding not credible witness's statement that he had not been pressured by defendant in any way and that he would refuse to testify even if defendant wanted him to do so); *Pappalardo*, 576 N.Y.S.2d 1001 (finding witness's claim of amnesia to be feigned and that defendant assisted the witness in contriving the plan to avoid testimony); *McClarin v. Smith*, 2007 WL 2323592 (E.D. N.Y. 2007) (rejecting witness's assertion that he did not feel threatened by defendant); *People v. Cotto*, 699 N.E. 2d 394, 39798 (Ct. App. N.Y. 1998) (finding not credible witness's explanation that he did not want to testify because he did not want to miss a parole hearing); *State v. Pierce*, 364 N.W.2d 801, 807 (Minn. 1985) (rejecting incarcerated witness's claim that he refused to testify because he feared he would be known as a snitch to other inmates, and not because of defendant's threats); *People v. Serrano*, 644 N.Y.S.2d 162, 162 (Sup. Ct. App. N.Y. 1996) (rejecting witness's claims that he was not intimidated by defendant); see also *Flanagan*, 51 *DRAKE L. REV.* at 485, n.168.

¹¹⁸ Thomas Y. Davies, *Selective Originalism: Sorting out which aspects of Giles's Forfeiture Exception to Confrontation were or were not "Established at the Time of the Founding,"* 13 *LEWIS & CLARK L. REV.* 605 (2009).

¹¹⁹ *Reynolds*, 98 U.S. at 161 ("The accused was present at the time the [former] testimony was given, and had full opportunity of cross-examination").

¹²⁰ See *Scott*, 284 F.3d at 764 ("it seems almost certain that, in a case involving coercion or threats, a witness who refuses to testify at trial will not testify to the actions procuring his or her unavailability"); see also *State v. Mechling*, 219 W.Va. 366, 381 (Ct. App. W. Va. 2006) ("If a victim is too scared to testify against the accused, for fear of retribution, the victim will probably also be too scared to testify in any pre-trial forfeiture proceeding).

declarant fail to testify, and took actions to fulfill that desire, then the defendant should not be heard to complain if the declarant does not testify. As a result, intent is more important than causality in assessing forfeiture.

Because forfeiture is applied on equitable grounds, without regard to the reliability of the hearsay, it need not operate independently as an exception to the rule against hearsay. That is, forfeiture may make it fair to admit testimonial hearsay from an unavailable declarant, but the statutory rules regarding hearsay and the defendant's due process rights may still apply to regulate the reliability of the hearsay.¹²¹ The forfeiture by wrongdoing hearsay exception in the Federal Rules of Evidence is not synonymous with Constitutional doctrine, because the hearsay exception is concerned with both equity and reliability.¹²²

Forfeiture by exploitation. We propose that criminal defendants forfeit their right to cross-examine a child witness if they exploited the child's reasonably foreseeable unavailability. Exploitation includes taking advantage of vulnerabilities, as well as creating or accentuating those vulnerabilities through one's actions. Child abusers exploit their victim's vulnerabilities and immaturity. Perpetrators pick vulnerable victims, escalate the abuse over time, and cajole and threaten children into continued silence.

States should amend their special hearsay exceptions for children's complaints of abuse. The statutes require that the court find indicia of reliability, and, when the child is unavailable, corroborative evidence of abuse. In order to comport with *Crawford* and *Giles*, the statutes could additionally require that if the child is unavailable and the statements are testimonial, that the court must find that the defendant exploited the child's foreseeable unavailability.¹²³

Proof of exploitation will entail an examination of the relationship between the perpetrator and the child. Parents and adult household members enjoy authority and private access, as do professionals who care for and interact with children. In extra-familial abuse, family members can provide information regarding

¹²¹ *Bryant*, 131 S.Ct at 1162 n. 13 ("the Due Process Clauses of the Fifth and Fourteenth Amendments may constitute a further bar to admission of, for example, unreliable evidence"). The plurality opinion in *Giles* rejected the dissent's argument that confrontation issues could be separated from hearsay issues, but only as a means of rejecting the argument that the dying declaration exception is consistent with the notion that knowledge-based intent is sufficient for forfeiture to occur. 547 U.S. at 364-65.

¹²² Concerns about reliability explain why the hearsay exception for forfeiture by wrongdoing contains a stringent causation requirement. See Fed. R.Evid. 804(b)(6). A clear causal connection between the defendant's actions and the declarant's failure to testify increases the reliability of the statement. For example, if the declarant doesn't want to testify because she is afraid of committing perjury, this is an alternative cause of her silence that undermines the reliability of her statements.

¹²³ NATIONAL CENTER FOR PROSECUTION OF CHILD ABUSE, *supra* at 369 ("a majority of states have a special child hearsay exception...Whether hearsay is offered under a residual or a child hearsay exception, the critical issue is usually whether the hearsay is sufficiently reliable to gain admission in evidence").

the public interactions between the child and the perpetrator. Child interviewers should ask the child about the pre-abuse relationship, the progression of abuse, the perpetrator's statements to the child about the abuse and the consequences of disclosure, the child's reasons for disclosing (and delaying disclosure), and the child's feelings about the effects of disclosure. Recipients of the child's disclosure can provide information about the context in which the disclosure occurred and the child's explanations, if any, for delays.

IV. THE DYNAMICS OF CHILD ABUSE

Understanding the dynamics of child abuse is helpful in applying the principles of forfeiture by wrongdoing to child witnesses. The dynamics of abuse will speak to both intent and causation. Intent is addressed from the perpetrator's perspective, and looks to the process of victim selection, seduction, and silencing. Causation is addressed from the child's perspective, and focuses on immaturity, filial dependency, self-blame, and secrecy.

There are several sources of information regarding the nature of child abuse, including interviews with admitted perpetrators, population surveys, and clinical samples drawn from medical contexts, social service investigations, criminal investigations, dependency court, and criminal court.¹²⁴

A popular conception of the molester is a stranger to the child who grabs the child off the street. The perpetrator's strategy for avoiding detection is to conceal his identity. He might threaten the child not to tell, but such a threat may carry little weight, because the child has no desire to protect the perpetrator, the perpetrator is unlikely to have continuing contact with the child, and by virtue of the violent abduction, the child does not feel complicit in the crime. The child may fail to disclose because of her immaturity or her

¹²⁴ Clinical studies have been reviewed in Kamala London et al., *Disclosure of Child Sexual Abuse: What Does the Research Tell us About the Ways that Children Tell?*, 11 PSYCHOL., PUB. POL'Y, & L. 194 (2005), Kamala London et al., *Review of the Contemporary Literature on How Children Report Sexual Abuse to Others: Findings, Methodological Issues, and Implication for Forensic Interviewers*, 16 MEMORY, SPECIAL ISSUE: NEW INSIGHTS INTO TRAUMA AND MEMORY, 29 (2008), Thomas D. Lyon, *Scientific Support for Expert Testimony on Child Sexual Abuse Accommodation*, in CRITICAL ISSUES IN CHILD SEXUAL ABUSE 107 (J.R. Conte ed. 2002), and Thomas D. Lyon, *False denials: Overcoming Methodological Biases in Abuse Disclosure Research*, in DISCLOSING ABUSE: DELAYS, DENIALS, RETRACTIONS AND INCOMPLETE ACCOUNTS 41 (M.E. Pipe, M. E. Lamb, Y. Orbach, and A.C. Cederborg eds., 2007). Population surveys were reviewed by London et al., *supra*, and Thomas D. Lyon, *Abuse disclosure: What Adults Can Tell*, in CHILDREN AS VICTIMS, WITNESSES, AND OFFENDERS: PSYCHOLOGICAL SCIENCE AND THE LAW 19 (Bottoms, B.L., Najdowski, C.J., & Goodman, G.S. eds., 2009). Research asking child sex offenders to describe their modus operandi dates back at least to the 1960s, PAUL H. GEBHARD ET AL., SEX OFFENDERS: AN ANALYSIS OF TYPES (1964), and a review published in 2009 surveyed the results of 19 studies. Benoit Leclerc, et al., *Examining the Modus Operandi of Sexual Offenders Against Children and its Practical Implications*, 14 AGGRESSION AND VIOLENT BEHAVIOR 5 (2009). An overview of all of the literature can be found in Thomas D. Lyon & Elizabeth Ahern, *Disclosure of child sexual abuse*, in THE APSAC HANDBOOK ON CHILD MALTREATMENT 233 (J.E.B. Myers ed., 3d. ed. 2011).

inherent sense that she was somehow to blame, but the stranger perpetrator has acted more out of impulse than cunning.

In contrast, in the typical case of child abuse, the perpetrator is a parent, a parent-figure, or a familiar and authoritative adult. The perpetrator selects his victim on the basis of immaturity, vulnerability and private access. The perpetrator befriends the child before he abuses the child, and introduces more serious sexual acts only gradually so as to maintain the child's trust and monitor the child's continuing compliance and secretiveness. Once abuse has begun, the perpetrator maintains secrecy through admonishments and occasional threats. The success of the perpetrator's approach is demonstrated by the child's failure to immediately disclose the abuse.

Victim choice: Exploitation of the vulnerable child.

Virtually all sexual abuse is perpetrated by someone who the child knows. In Smallbone and Wortley's survey of 182 child sex offenders, "only 6.5 percent of offenders had their first sexual contact with a stranger."¹²⁵ Population surveys confirm that, with the exception of non-contact offenses (such as exhibitionism), strangers are rarely the perpetrators.¹²⁶ Similarly, criminal samples are made up primarily of perpetrators familiar to the child, with the most common single type a parent or parent-figure.¹²⁷ Evans and Lyon examined

¹²⁵ STEPHEN W. SMALLBONE & RICHARD K. WORTLEY, *CHILD SEXUAL ABUSE: OFFENDER CHARACTERISTICS AND MODUS OPERANDI* (Australian Institute of Criminology, 2001).

¹²⁶ Jillian M. Fleming, Prevalence of Childhood Sexual Abuse in a Community Sample of Australian Women, 166 *MED. J. AUSTL.*, 65 (1997) (sexual abuse was defined as all experiences of sexual contact occurring before the age of 12 with a person five or more years older, irrespective of consent, and all experiences of sexual contact occurring between age 12 and 16 years with a person five or more years older that were not wanted or were distressing; 8% strangers); Daniel W. Smith, et al., Delay in Disclosure of Childhood Rape: Results From a National Survey, 24 *CHILD ABUSE & NEGLECT* 273 (2000) (genital penetration and "use or threat of force, as defined by the participant"; 10% strangers); Jessie Anderson et al., Prevalence of Childhood Sexual Abuse Experiences in a Community Sample of Women, 32 *J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY* 911 (1993) (included "exposure, spying, indecent suggestions and pornography"; 15% strangers); David Finkelhor, et al., Sexual Abuse in a National Survey of Adult Men and Women: Prevalence, Characteristics, and Risk Factors, 14 *CHILD ABUSE & NEGLECT* 19 (1990) (sexual abuse included exhibitionism and sexual exposure; 40% strangers); D. M. Fergusson et al., The Stability of Child Abuse Reports: A Longitudinal Study of the Reporting Behavior of Young Adults, 30 *PSYCHOL. MED.* 529, (2000) (sexual abuse included "noncontact episodes including indecent exposure, public masturbation by others, and unwanted sexual propositions or lewd suggestions"; 29% strangers).

¹²⁷ BARBARA E. SMITH ET AL., *THE PROSECUTION OF CHILD SEXUAL AND PHYSICAL ABUSE CASES: FINAL REPORT* (American Bar Association, 1993), at 86 ("The relationship between the defendant and the victim in our sample reflects figures comparable to other studies. Only 6% of the defendants were strangers to their victims. The most common relationship was that of parent, or a parental figure."); ELLEN GRAY, *UNEQUAL JUSTICE: THE PROSECUTION OF CHILD SEXUAL ABUSE* 83 (Free Press eds., 1993) ("The abusers were people known to the children, for the most part; only slightly fewer were actually family members (45.2%) than the proportion who were outside the family (54.8%)", id. At 85 ("They were strangers to the child 13.7% of the time"); DEBRA WHITCOMB ET AL., *EMOTIONAL EFFECTS OF TESTIFYING ON SEXUALLY ABUSED CHILDREN* 89 (U.S. Department of Justice, 1994) (A majority of perpetrators were related in some way to the victim (i.e., intrafamilial cases)). The largest categories were biological parents (14 percent), mothers' boyfriends (14 percent), and step-parents (13 percent). In only 3 percent of cases were perpetrators unknown to their victims.); LOUISE DEZWIREK SAS, *TIPPING THE BALANCE TO TELL THE*

transcripts of over 400 children testifying in felony sexual abuse prosecuted in Los Angeles County over a five year period, and found that the defendant was a stranger to the child only 13% of the time.¹²⁸ This is also true with respect to the production of child pornography; only 4% of images confiscated by the police were photographed by strangers to the child, whereas 37% were photographed by parents, stepparents, or other relatives.¹²⁹

Perpetrators often acknowledge that they choose victims on the basis of their vulnerability. Conte and colleagues found that offenders “claimed a special ability to identify vulnerable children.”¹³⁰ Vulnerability was defined both in terms of children’s status (e.g., living in a divorced home or being young) and in terms of emotional or psychological state (e.g., a needy child, a depressed or unhappy child.)¹³¹ 49% of the sex offenders interviewed by Elliott and colleagues stated that they targeted children who lacked self-confidence or self-esteem.¹³² Beauregard and colleagues noted that child sex offenders often targeted “a child with family problems, without supervision, always on the street and in need of help.”¹³³ Perpetrators also choose victims on the basis of their accessibility, and of course children living in the home or with whom perpetrators work are most accessible. Sullivan and Beech interviewed 41 perpetrators receiving treatment who molested children with whom

SECRET: PUBLIC DISCOVERY OF CHILD SEXUAL ABUSE (Child Witness Project, London Family Court Clinic. 1995), at 24 (“these children were typically abused by someone known to them. In fact one third of the children had known the abusers all their lives. More than one fifth of the abusers were fathers or father figures.”) *id.* at 26 (for all but 16 percent of the children, there had been an existing relationship with the abuser); Tina B. Goodman-Brown et al., *Why Children Tell: A Model of Children's Disclosure of Sexual Abuse*, 27 CHILD ABUSE & NEGLECT 525, 530 (2003) (“Approximately 47% of the children suffered intrafamilial abuse, which was defined as abuse by a parent, step-parent, grandparent, mother’s boyfriend, or other relative; the 52% of children who experienced extrafamilial abuse were victimized by such individuals as teachers, babysitters, neighbors, or in a few cases, strangers.”)

¹²⁸ Angela D. Evans & Thomas D. Lyon, *Assessing Children's Competency to Take the Oath in Court: The Influence of Question Type on Children's Accuracy*, L. & HUM. BEHAV. (forthcoming).

¹²⁹ Elaine Silverstrini, *Child Porn's Dirty Secret: Dads Often Behind Bars*, TAMPA BAY ONLINE, July 5, 2009, www2.tbo.com/content/2009/jul/05/na-child-porns-dirtysecret-dads-often-behind-bars/news-breaking/ (noting that The Exploited Child Division of the National Center for Missing and Exploited Children, which operates as a clearinghouse for law enforcement to share information about child pornography victims, has identified over 2,300 of the children featured in pornographic images and videos since 2003. Another 24% were photographed by neighbors or close family friends.) *See also* Janis Wolak et al., *Arrests for Child Pornography Production: Data at Two Time Points From a National Sample of U.S. Law Enforcement Agencies*, 16 CHILD MALTREATMENT, 184 (2011) (“Most CP appears to be produced by child sexual abusers who know and have intimate access to specific victims (e.g., family or household members; acquaintances such as neighbors, family friends, baby sitters).”)

¹³⁰ John R. Conte, et al., *What Sexual Offenders Tell Us About Prevention Strategies*, 13 CHILD ABUSE & NEGLECT 293, (1989).

¹³¹ Conte, *supra*, at 299.

¹³² Michele Elliott, et al., *Child Sexual Abuse Prevention: What Offenders Tell Us*, 19 CHILD ABUSE & NEGLECT 579, (1995).

¹³³ Eric Beauregard, et al., *A Descriptive Model of the Hunting Process of Serial Sex Offenders: A Rational Choice Perspective*, 22 J. FAM. VIOLENCE 449, 455 (2007).

they worked and found that 15% chose their profession *exclusively* to provide them access to victims; another 42% acknowledged that this partially motivated their job choice.¹³⁴

Grooming of the victim. Sex offenders emphasize the extent to which they seduce their victims over time rather than commit isolated assaults. Most child molestation typically includes attempts to obtain the assent and cooperation of victims. The first step for the sex offender is to befriend the child, typically before any kind of physical contact is attempted. Leclerc and colleagues' review noted that child sex offenders adopt strategies "that are similar to prosocial behaviors which consist of demonstrating love, attention and appreciation."¹³⁵ Both intrafamilial and extrafamilial sex offenders describe spending time with the child¹³⁶ and giving the child gifts,¹³⁷ sometimes introducing children to alcohol and pornography.¹³⁸ The first sexual contact often does not occur for a substantial period of time, particularly long given the speed with which children, particularly younger children, can form attachments to adults. In Smallbone and Wortley's study, 76% of the intrafamilial offenders, 28% of the extrafamilial offenders, and 39% of the mixed-type offenders knew the child for more than one year before initiating abuse.¹³⁹

The second step is to desensitize the child to sexual touch through progressively more invasive and sexual touch and talk. Kaufman and colleagues¹⁴⁰ found this to be the most often endorsed means of obtaining the child's compliance by both intrafamilial and extrafamilial child sex offenders.¹⁴¹ This approach has several purposes. The offender can test the child's willingness to acquiesce¹⁴² and the likelihood that the child will disclose.¹⁴³ If the child discloses

¹³⁴Joe Sullivan & Anthony Beech, *A comparative Study of Demographic Data Relating to Intra- and Extra-Familial Child Sexual Abusers and Professional Perpetrators*, 10 J. SEXUAL AGGRESSION 39 (2004).

¹³⁵ Leclerc et al., *supra*, at 8.

¹³⁶ JOHN R. CHRISTIANSEN & REED H. BLAKE, THE GROOMING PROCESS IN FATHER-DAUGHTER INCEST, IN *THE INCEST PERPETRATOR: THE FAMILY MEMBER NO ONE WANTS TO TREAT* (Anne L. Horton et al. eds., 1990); Smallbone, *supra*.

¹³⁷ Lee Eric Budin & Charles Felzen Johnson, *Sex Abuse Prevention Programs: Offenders' Attitudes About Their Efficacy*, 13 CHILD ABUSE & NEGLECT 77, (1989).

Christiansen, *supra* Keith Kaufman, et al., *Factors Influencing Sexual Offenders' Modus Operandi: An Examination of Victim-Offender Relatedness and Age*, 3 CHILD MALTREATMENT 349, (1998).

¹³⁸ Even perpetrators who offend against strangers endorse strategies short of brute force; Beauregard and colleagues described the "hunting process" of 69 serial sex offenders who offended against strangers, and found that "[t]hree methods are used by sexual offenders specifically against children: seduction/persuasion (13%), money/gift (16%), and games (9%). These methods help offenders make contact with the victims slowly and to gradually estimate their chance of succeeding in getting the victim involved in sexual activities" Beauregard, *supra* at 456.

¹³⁹ Smallbone, *supra*

¹⁴⁰ Kaufman, *supra*

¹⁴¹ Reuben A. Lang & Roy R. Frenzel, *How Sex Offenders Lure Children*, 1 ANNALS OF SEX RESEARCH 303 (1988).

¹⁴² Christiansen, *supra*

¹⁴³ Kaufman, *supra* note 139

at an early stage of the process, the offender can claim that the touch was merely affectionate, accidental, or otherwise non-sexual.¹⁴⁴ As the abuse progresses, the offender can assure the child of the harmlessness and morality of the actions.¹⁴⁵

When the sexual abuser is the child's parent, the extra attention paid to the child not only has the effect of making the child feel special, but isolates the child and the offending parent from the other family members. Christiansen and Blake found that "[p]otential victims become alienated from the mothers because these daughters are placed by their fathers in their mothers' traditional role of confidante, intimate friend, and sex partner. Alienation from siblings occurs because of the privileges and special favors potential victims receive."¹⁴⁶

Third, the offender initiates overtly sexual acts. This need not involve violent force. In Fleming's population survey, only 7% of victims recalled actual violence, whereas 64% recalled verbal threats (including threats of violence), and 72% stated that some form of coercion was used.¹⁴⁷ In Hershkowitz' large study of sexual abuse cases investigated in Israel, children reported coercion in 30% of the cases, and threats in only 10%.¹⁴⁸ Much of the persuasive power comes from the simple status of the perpetrator as an adult. Kaufman and colleagues pointed out that adults' "greater physical sizes, statuses afforded by their age (i.e., "When adults tell you to do something, you listen"), and greater perceived credibility may reduce the need for explicit threats to gain victim compliance in abusive sexual activity."¹⁴⁹ They found that when comparing adolescent to adult offenders, adults endorsed fewer strategies for obtaining compliance, and in particular were less likely to have threatened the child with a weapon.

When offenders do endorse strategies for inducing compliance, they mention a mixture of bribes and threats, and the strategies are for the most part similar between intrafamilial and extrafamilial offenders.¹⁵⁰ Kaufman and colleagues found that giving gifts was the most common form of bribery, and that the most common threat, particularly among intrafamilial offenders, was to prey on the child's helplessness by threatening to "tell on them about having sex with [the offender] or by making them feel as if there was nothing they could do to stop it."¹⁵¹ Researchers have speculated that the efficacy of such a threat is founded on the desensitization process:

¹⁴⁴ Lang, *supra*

¹⁴⁵ Christiansen, *supra*

¹⁴⁶ Christiansen, *supra*, at 90

¹⁴⁷ Fleming, *supra*. In Finkelhor et al, 1990, men reported force in 15%, women in 18%, but abuse included non-contact offenses. Finkelhor, *supra*

¹⁴⁸ Irit Hershkowitz, *Delayed Disclosure of Alleged Child Sexual Abuse Victims in Israel*, 76 AM. J. OF ORTHOPSYCHIATRY, 444 (2006).

¹⁴⁹ Kaufman, *supra* at 90.

¹⁵⁰ Kaufman, *supra*; Lang, *supra*

¹⁵¹ Kaufman, *supra* at 355.

“victims' repeated acquiescence early in the grooming process (e.g., to nonsexual touch) may lead victims to believe that they have granted permission for more intrusive sexual contact.”¹⁵²

However, perpetrators may resort to force if gentler methods of obtaining compliance fail. In Lang and Frenzel's sample, two-thirds of the sex offenders “frightened the children in some way,” and physical force was used in about the same proportion as bribery.¹⁵³ Most of the offenders in Elliott et al. claimed that if the child resisted, they would stop and try to initiate contact later (61%), but a substantial minority (39%) stated that they would then resort to threats or actual violence in order to complete the act.¹⁵⁴ Perpetrators may also understate their use of force, in an attempt to minimize the seriousness of their acts. In Christiansen and Blake's sample of fathers who abused their daughters, less than one-fourth acknowledged using threats or physical punishment, but almost half of the victims (45%) claimed they had.¹⁵⁵

With respect to criminal cases, prosecutors may be more willing to charge when force is involved, as this is likely to be more convincing to jurors. Nevertheless, in criminal samples abuse without the use of force also predominates. Smith and Elstein, for example, emphasized that “in the vast majority of cases, the sexual abuse was imposed on the child by the defendant simply by using his authority, or stature, as an adult.”¹⁵⁶ In Sas and Cunningham's sample of children who testified in sexual abuse prosecutions, 40% did not even realize that the sexual act was wrong when it first occurred.¹⁵⁷

Ensuring the child does not disclose. Once the offender's acts are overtly sexual, the offender must confront the possibility that the child will disclose the abuse. The percentage of offenders who report specifically warning the child not to tell varies widely across the studies. In Budin and Johnson, 25% acknowledged threats not to disclose.¹⁵⁸ In Elliott et al., 33% acknowledged telling the child not to tell.¹⁵⁹ In Lang and Frenzel, 40% of extrafamilial offenders acknowledged telling the child not to tell, whereas 85% of incest offenders did so.¹⁶⁰ Of course, these may be underestimates. Kaufman and colleagues compared what child sex offenders admitted in interviews to what their therapists recalled from offenders' records

¹⁵² Kaufman, *supra* at 356; *see also* Conte, *supra*

¹⁵³ Lang, *supra* at 311

¹⁵⁴ Elliott, *supra*

¹⁵⁵ Christiansen, *supra*

¹⁵⁶ Smith et al., *supra* at 89-90. The authors found that “cases the defendant actually overpowered (or took other steps) to inflict the abuse or to further weaken the child into submission” in only 12% of the cases (p. 90), and used bribes in only 8% of the cases. *Id.* at 92. *Cf.* Whitcomb, *supra* at 91 (53% no force, 33% mild force, 5% violent force, 8% threat of force).

¹⁵⁷ Sas, *supra* at 26.

¹⁵⁸ Budin, *supra*

¹⁵⁹ Elliott, *supra*

¹⁶⁰ Lang, *supra*

(and prior admissions) and found that the sex offenders consistently underreported their use of threats both to induce compliance and to induce secrecy.¹⁶¹ These percentages also vary in criminal samples, ranging from about a fourth¹⁶² to half of the cases.¹⁶³

When they do acknowledge discussing disclosure with the child, perpetrators report a wide variety of inducements to secrecy. Offenders often refer to serious consequences from disclosure. Sixty-one percent of the offenders in Smallbone and Wortley threatened that they would go to jail or get in trouble.¹⁶⁴ Forty-three percent of the incest offenders in Lang and Frenzel threatened that the family would split up.¹⁶⁵ Twenty-four percent of the offenders in Elliott et al. used anger and the threat of physical force.¹⁶⁶

Offenders often describe the use of positive inducements or the ways in which disclosure will deprive children of the benefits of the abusive relationship. Kaufman and colleagues reported that offenders most often endorsed strategies involving giving or withdrawing benefits, in which offenders would give children special rewards or privileges, tell children that they would no longer love them or spend time with them if they disclosed, or tell children that their caregiver(s) would no longer love them.¹⁶⁷ Similarly, Smallbone and Wortley found that offenders endorsed giving children special rewards or privileges (21%) and relied on children's fear that they would lose the offenders' affection (36%).¹⁶⁸ In Elliott et al., 20% of offenders endorsed threatening the loss of love or stated that the child was to blame.¹⁶⁹ Lang and Frenzel found that these sorts of threats were more common among incest offenders than among extrafamilial offenders, in particular expressing love for the child, giving the child special favors, and avoiding punishing the child, perhaps because the threats implied the use of parental authority and control.¹⁷⁰

Similar types of threats are reported in the criminal samples. Smith and Elstein found that “[W]arnings ranged from pleas that the abuser would get into trouble if the child told (or that the abuser would be sent away and the child would never see them again—a powerful message to a young child whose abuser is also a ‘beloved’ parent), to threats that the child would be blamed for the abuse

¹⁶¹ Kaufman, *supra*

¹⁶² Smith et al., *supra* at 93 (“In over one fourth (27%) of the cases, the defendant specifically warned the child not to tell about the sexual abuse”); Gray, *supra* at 90 (“The victim was told by the perpetrator not to tell anyone about the abuse, and threatened with consequences if she did tell, in almost 33% of the cases”).

¹⁶³ Sas, *supra* at 26 (children asked about first episode: “in half the cases the abuser had warned them not to tell”).

¹⁶⁴ Smallbone, *supra*

¹⁶⁵ Lang, *supra*

¹⁶⁶ Elliott, *supra*

¹⁶⁷ Kaufman, *supra*

¹⁶⁸ Smallbone, *supra*

¹⁶⁹ Elliott, *supra*

¹⁷⁰ Lang, *supra*

(especially troubling were children who were told that the defendant's intimate—the child's mother—would blame the child for “having sex” with the defendant and would thus turn against him or her), to ominous warnings that the defendant would hurt or kill the child (or someone he or she loved) if they revealed the abuse.”¹⁷¹

Threats are not always necessary to silence the child. The child may intuit the negative consequences of telling without any disclosure. If the child blames herself for complying with the abuse, then she will feel complicit and this can deter disclosure. The child may also be aware of the dangers of telling given the perpetrator's history. Sas and Cunningham found that in about half the cases, the child had been exposed to domestic violence,¹⁷² and found that “overt threats were not necessary if the man had a history of violence within the home.”¹⁷³

The modus operandi of child molesters demonstrates how perpetrators both exploit and nurture children's vulnerabilities. Their purpose is to molest without the danger that the child will disclose the abuse. Hence, in the typical case of sexual abuse, the perpetrator's purpose is to silence the child as a means of ensuring continued access to and sexual exploitation of the child.

The efficacy of exploitation: Secrecy. Perpetrator's success in choosing and grooming victims who will not complain of their abuse is evinced by the high rates of non-disclosure among abuse victims. If the child fails to report the abuse when it first occurs, it is likely to occur again.¹⁷⁴ Over 2/3rds of perpetrators report abusing the same victim over time.¹⁷⁵ Charges of repeated abuse are also the norm in criminal samples,¹⁷⁶ and charges provide a conservative measure of whether abuse was repeated, because prosecutors often charge only what they are most confident they can prove, and specifying individual acts is often difficult for child witnesses.¹⁷⁷

Perpetrators typically report having had a number of victims whose abuse was never brought to the attention of the authorities.¹⁷⁸

¹⁷¹ Smith et al., *supra*; See also Sas, *supra* at 91-92 (reporting threats to hurt the child or a third-party, harm the mother emotionally, withdraw privileges, and warnings that the abuser would be harmed by the disclosure or that the child would no longer be loved by the mother).

¹⁷² Sas, *supra* at 24 (46% of prosecution sample had been exposed to domestic violence of mother by intimate partner).

¹⁷³ Sas, *supra* at 122. One child who denied being threatened answered “No, but I knew what he was capable of.” *Id.*

¹⁷⁴ Sas, *supra* at 28 (when disclosure was delayed, abuse reoccurred in 70% of the cases).

¹⁷⁵ Elliott, *supra*; Smallbone *supra*

¹⁷⁶ Gray, *supra* at 90 (single act charged in 39% of cases); Whitcomb, *supra* at 91 (single act charged in 43% of cases).

¹⁷⁷ Lindsay Wandrey et al., *Maltreated Children's Ability to Estimate Temporal Location and Numerosity of Placement Changes and Court Visits*. Psychol., Pub. Pol., and L. (forthcoming).

¹⁷⁸ Gene G. Abel et al., *Self-Reported Sex Crimes of Nonincarcerated Paraphiliacs*, 2 J. INTERPERSONAL VIOLENCE 3 (1987).

Population surveys reveal that most delayed disclosing abuse more than a year,¹⁷⁹ a large percentage had never told anyone before the survey,¹⁸⁰ and only about 10% report that their abuse was reported to authorities.¹⁸¹ Obviously, because disclosure is the primary means by which abuse is discovered, abuse that is never disclosed to authorities will rarely if ever find its way into clinical samples or criminal case samples of abuse. However, the extent to which perpetrators succeed in silencing their victims in clinical and criminal samples can be assessed by examining delays in disclosure. Clinical samples confirm that delays are common.¹⁸² In criminal samples, delays are common as well. In Sas and Cunningham's sample, 2/3rd of the child witnesses reported having delayed reporting more than 48 hours after abuse, and 1/3rd delayed more than a year after the first time abuse occurred.¹⁸³

With respect to the factors that predict delay, the most common factor is the relationship between the perpetrator and the child. The closer the relationship, the longer the delay. This is true in population surveys,¹⁸⁴ clinical samples,¹⁸⁵ and criminal samples.¹⁸⁶ The relationship also affects the likelihood that the child will be inconsistent in her reports, ultimately recanting the allegation of

¹⁷⁹ Finkelhor, *supra* (57% of men and 59% of women delayed more than one year); Fleming, *supra* 1997 (83% did not disclose within 1 year); Smith et al., *supra* (48% did not disclose within 5 years).

¹⁸⁰ Lyon (2007), *supra* tbl 2.1 (13% to 60% had never told anyone).

¹⁸¹ John P. Martin et al., *Asking About Child Sexual Abuse: Methodological Implications of a Two Stage Survey*, 17 CHILD ABUSE AND NEGLECT 383 (1993); Diana E. Russell, *The Incidence and Prevalence of Intrafamilial and Extrafamilial Sexual Abuse of Female Children*, 7 CHILD ABUSE & NEGLECT 133, (1983); Smith et al., *supra*.

¹⁸² Reviews by London (2005), *supra*; Lyon (2007), *supra*; Mary L. Paine & David J. Hansen, *Factors Influencing Children to Self-Disclose Sexual Abuse*, 22 CLINICAL PSYCHOL. REV., 271 (2002).

¹⁸³ Sas, *supra* at 26, 29. Goodman-Brown and colleagues reported that only 15% of the child witnesses delayed reporting for more than six months, but they measured delay from the last time the child was abused rather than from the first time, which means that delay was underestimated for children whose experienced repeated abuse. Goodman-Brown, *supra* at 533.

¹⁸⁴ Four of the five representative surveys that tested for the effects of relationships on disclosure found that the relationship mattered, with closer relationships leading to lower rates of reported disclosure. Anderson, *supra*; Steven M. Kogan, *Disclosing Unwanted Sexual Experiences: Results from a National Sample of Adolescent Women*, 24 CHILD ABUSE AND NEGLECT 147 (2004); Smith et al., *supra*; Gail E. Wyatt & Michael Newcomb, *Internal and External Mediators of Women's Sexual Abuse in Childhood*, 58 J. CONSULTING & CLINIC. PSYCHOL. 758 (1990); but see Fleming, *supra* (finding no relation). Moreover, a study examining the same sample as Smith et al. found that reporting to the police was more likely when the perpetrator was a stranger. Rochelle F. Hanson et al. *Factors Related to the Reporting of Childhood Rape*, 23 CHILD ABUSE & NEGLECT 559 (1999). Three of these studies utilized a multivariate design (Kogan, *supra*; Smith et al., *supra*; Wyatt, *supra*), which enabled the researchers to control for possible confounding by interactions between relationship and other characteristics of abuse that might affect reporting.

¹⁸⁵ See review in London (2008), *supra*. This modifies the view of the authors' earlier review of the literature. See London (2005), *supra*.

¹⁸⁶ Sas *supra* at 27-30.

abuse.¹⁸⁷ Indeed, when asked, children endorse different rates of disclosure against parents and against strangers. By four years of age, children predict that children will disclose the transgressions of their parents less often than the transgressions of strangers, and by six years of age, children will endorse this difference as a norm (when asked whether children “should” disclose). By six years of age, children make distinctions among the recipients of their disclosures, particularly disfavoring reporting of parental transgressions to the police.¹⁸⁸ Research on transgressions in the lab also support the proposition that children are protective of their parents; children are less forthcoming against parents who have transgressed.¹⁸⁹

A close relationship between the perpetrator and the child increases the likelihood that the mother will not be supportive of the child’s allegations.¹⁹⁰ Of course, the closer the perpetrator is to the child, the closer he is likely to be to the mother: the child’s father or stepfather is, unless the allegations arise after divorce or separation, the mother’s husband. If the mother is unsupportive, the child is less likely to disclose in the first place,¹⁹¹ more likely to delay reporting,¹⁹² and more likely to recant his or her allegations.¹⁹³

The means by which abuse is accomplished also affect delays in disclosure. In their sample of criminal cases, Sas and Cunningham found that delay was more likely if the child experienced pre-abuse grooming and “had been subjected to subtle and non-aggressive techniques to secure compliance with the sexual act”¹⁹⁴ Clinical studies also find that manipulation is more likely than coercion to lead to a delay in disclosure.¹⁹⁵

The relationship between overt threats and delays in disclosure is less clear. One problem is that researchers do not always distinguish between threats as a means of accomplishing

¹⁸⁷ Lindsay Malloy et al., *Filial Dependency and Recantation of Child Sexual Abuse Allegations*, 46 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 162 (2007).

¹⁸⁸ Thomas D. Lyon et al., *Children’s Reasoning about Disclosing Adult Transgressions: Effects of Maltreatment, Child Age, and Adult Identity*, 81 CHILD DEV. 1714 (2010).

¹⁸⁹ Tye, *supra*.

¹⁹⁰ Mark D. Everson et al., *Maternal Support Following Disclosure of Incest*, 59 AM. J. ORTHOPSYCHIATRY 197, 200 (1989) (“[M] others were significantly more supportive of their children if the offender were an ex-spouse than if he were someone with whom the women had a current relationship.”)

¹⁹¹ Louanne Lawson & Mark Chaffin, *False Negatives in Sexual Abuse Interviews*, 7 J. INTERPERSONAL VIOLENCE 532 (1992) (of children with clear medical evidence of sexual abuse, most whose parents were willing to believe that their children might have been sexually abused did disclose (63%) whereas only a small proportion of the children whose parents refused to accept this possibility disclosed (17%)).

¹⁹² Irit Hershkowitz et al., *Exploring the Disclosure of Child Sexual Abuse with Alleged Victims and Their Parents*, 31 CHILD ABUSE & NEGLECT, 111 (2007).

¹⁹³ Malloy, *supra*.

¹⁹⁴ Sas, *supra* at 27. Conversely, immediate disclosure was likely if “force was used to gain compliance with the sexual act.”

¹⁹⁵ Hershkowitz, *supra* at 446. Sauzier did not analyze percentages statistically, but appeared that immediate disclosures were more common when perpetrator used force than when he used manipulation. Maria Sauzier, *Disclosure of Child Sexual Abuse: For Better or For Worse*, 12 PSYCHIATRIC CLIN. NORTH AM. 455 (1989).

abuse and threats warning against disclosure after abuse is complete.¹⁹⁶ The latter are specifically targeted at silencing the child, and are likely more effective because the nature of the threat includes harms that may befall the child because of his or her perceived complicity in the abuse. Second, as noted above, threats are only one of many means by which perpetrators silence children, and it is likely that perpetrators use threats less often when other forces are effective in maintaining secrecy. Third, threats can only be documented based on childrens' reports (or perpetrator admissions), which may lead to misestimation. Nevertheless, some evidence suggests threats delay disclosure. In her large clinical sample, Hershkowitz found that threats increased the likelihood that disclosure was delayed.¹⁹⁷ The evidence from criminal samples is mixed. Sas and Cunningham found that "threats were far more common" among children who delayed reporting.¹⁹⁸ Gray did not find a relation between threats and non-disclosure, although she failed to look at delays, which is a more sensitive measure.¹⁹⁹ In another criminal sample, Goodman-Brown found that fear of harm to self or the perpetrator did not predict delays in disclosure, but fear of harm to others did.²⁰⁰

The more manipulative forms of abuse are likely to increase children's perceptions of self-blame. If the child fails to resist, she is more likely to believe that she consented. If she delays in reporting, she is more likely to believe that subsequent acts of abuse were consensual, or at least that her failure to disclose is responsible for their reoccurrence. The child may intuit these beliefs, and the perpetrator is likely to encourage them explicitly, because this both minimizes the perpetrator's own responsibility for the abuse, and helps to maintain secrecy. Hershkowitz found that children were more likely to delay disclosing if they were cooperative, rather than resistant or passive.²⁰¹ The younger the child, the more likely the self-blame,²⁰² and children abused within the family exhibit more self-blame than children abused by someone outside the family²⁰³ Self-blame has been found to delay disclosure.²⁰⁴

¹⁹⁶ London (2005), *supra* at 202.

¹⁹⁷ Hershkowitz, *supra*

¹⁹⁸ Sas, *supra* at 122.

¹⁹⁹ Gray, *supra* at 90-91.

²⁰⁰ Goodman-Brown, *supra* at 535. Whether the child feared harm or not was measured dichotomously, and delays were measured from last act of abuse rather than first, which, as noted above, is a more appropriate measure of delay when abuse is repeated.

²⁰¹ Hershkowitz, *supra*.

²⁰² Ann Hazzard et al., *Predicting Symptomatology and Self-Blame Among Child Sex Abuse Victims* 19 CHILD ABUSE & NEGLECT 707 (1995).

²⁰³ Kathleen A. Kendall-Tackett et al., *Impact of Sexual Abuse on Children: A Review and Synthesis of Recent Empirical Studies*, 113 PSYCHOL. BULLETIN 164 (1993); Jodi A. Quas et al., *Predictors of Attributions of Self-blame and Internalizing Behavior Problems in Sexually Abused Children*, 44 J. OF CHILD PSYCHOL. & PSYCHIATRY 723 (2003).

²⁰⁴ Goodman-Brown, *supra* at 534 (children who perceived more responsibility took longer to disclose).

When asked why they delayed disclosing or never disclosed, victims report many of the factors discussed above. In Anderson's population survey, "When asked what had prevented disclosure, 65% of the victims gave these reasons: expected to be blamed (29% of cases), embarrassment (25%), not wanting to upset anyone (24%), expected disbelief (23%), not bothered by abuse (18%), wished to protect the abuser (14%), fear of abuser (11%), and wanting to obey adults (3%)." In Fleming's population survey, "When the women were asked what prevented disclosure, by far the most common reason given was embarrassment or shame (47/80 [46%]), followed by the belief that the other person would not be able to help them (23/80 [23%]), or would somehow blame or punish them for the abuse (19/80 [18%])." In Sas's criminal sample, "[i]n order of frequency, their responses were: fear of harm to self or others; fear of bad consequences for self (e.g., rejection by parent); concern for family and to protect them from disruption; fear of disbelief; never thought about telling; embarrassment/stigma; concern for bad consequences for abuser; lack of someone trusted to tell, and altruism: enduring abuse to protect other children from abuser."²⁰⁵

Experimental work on children's secrecy is a useful supplement to the research on abuse, because the truth is known and the interactions between adults and children can be manipulated. Of course, the situations tested in the lab are innocuous compared to abuse, and therefore the magnitude of the effects can be questioned, but causality can be clearly established. A large body of experimental evidence documents children's ready willingness to keep transgressions a secret and the effects of admonishments on their reports.²⁰⁶ For example, in a study by Wilson and Pipe involving five-year-olds, a magician performed a number of tricks for the child and then accidentally spilled ink on "magic gloves" that the child was wearing.²⁰⁷ The magician hid the gloves, "saying if they were discovered she (the magician) would be reprimanded and that therefore they should not tell anyone about the inkspill."²⁰⁸ An interviewer then questioned the child, first ten days after the event and then two months after. Initially, the interviewer asked the child to relate everything that the magician did. Ultimately, the interviewer asked the child whether the child knew anything about a

²⁰⁵ Sas, *supra* at 30-31.

²⁰⁶ Bette Bottoms et al., *Understanding Children's Use of Secrecy in the Context of Eyewitness Reports*, 26 L. & HUM. BEHAV. 285 (2002); Kay Bussey & Ellen Grimbeek, *Disclosure Processes: Issues for Child Sexual Abuse Victims*, in DISCLOSURE PROCESSES IN CHILDREN AND ADOLESCENTS 166 (K. J. Rotenberg ed., 1995); Stephen Ceci & Michelle Leichtman, "I Know that You Know that I Know that You Broke the Toy": A Brief Report of Recursive Awareness Among 3-year-olds, in COGNITIVE AND SOCIAL FACTORS IN EARLY DECEPTION 1 (S. J. Ceci, M. Leichtman, & M. Putnick eds., 1992); Margaret-Ellen Pipe & J. Clare Wilson, *Cues and Secrets: Influences on Children's Event Reports*, 30 DEVELOP. PSYCHOL. 515 (1994). Talwar, Lee, Bala, & Lindsay, 2004.

²⁰⁷ J. Clare Wilson & Margaret-Ellen Pipe, *The Effects of Cues on Young Children's Recall of Real Events*, 18 N.Z.J. PSYCHOL. 65, 66 (1989).

²⁰⁸ *Id.* at 66-67.

pair of stained gloves the interviewer had found.²⁰⁹ None of the children spontaneously mentioned the gloves after 10 days, and 75% failed to do so after two months.²¹⁰ Twenty-five percent denied knowing anything about the gloves at both interviews when directly asked, and another 33% denied knowing anything at one of the two interviews.²¹¹ Pipe and Wilson subsequently found similar rates of nondisclosure among six-year-olds and less reluctance to disclose among ten-year-olds.²¹²

Lyon and colleagues examined 4- to 7-year-old maltreated children's susceptibility to make false claims in order to avoid getting in trouble.²¹³ After an experimenter excused herself to obtain some papers, an adult "instigator" greeted the child and engaged the child in play. In one of the conditions they played a game in which they guessed which fist the instigator had hidden a coin, and then played with a large colorful house built out of Lego blocks. At the end of play the instigator told some of the children that "we might get in trouble if anybody finds out we played with the toy" and coached the child to claim that they only played the coin game. When subsequently asked direct questions about their play with the house, children who had played and were coached denied doing so 80% of the time. Even when they had not been coached, they did so 50% of the time, apparently intuiting that a direct question was in some way accusatory.²¹⁴

Many of the same dynamics in sexual abuse operate with respect to child physical abuse and exposure to domestic violence. Virtually all physical abuse allegations involve parents.²¹⁵ Domestic violence by definition involves assaults by parents or intimate partners of parents. Abuse is justified by perpetrators as discipline, and is thus characterized as attributable to the failings of the child or the abused parent. The perpetrator thus takes advantage of the victims' shame and guilt. Underreporting of physical abuse is comparable to that of sexual abuse.²¹⁶

²⁰⁹ *Id.* at 67.

²¹⁰ *Id.* at 68.

²¹¹ *Id.*

²¹² Pipe & Wilson, *supra* at, 518-19. Most six-year-olds failed to mention the gloves in their free recall (75% at two weeks, 81% at two months), and over 30% failed to reveal what happened after the specific question was asked (40% at two weeks, 32% at two months). *See id.* at 521, tbl.3. The 10- year-olds were less inclined to keep the incident a secret, but nevertheless over 30% failed to mention the gloves in free recall (34% at two weeks, 44% at two months), and 16% did not reveal when specifically asked (at both interviews).

²¹³ Thomas D. Lyon et al., *Coaching, Truth Induction, and Young Maltreated Children's False Allegations and False Denials*, 79 CHILD DEVELOP. 914 (2008).

²¹⁴ The study found that if children were asked to promise to tell the truth, they were significantly more likely to do so. *Id.*

²¹⁵ Hershkowitz, *supra* (95% of physical abuse inflicted by parents).

²¹⁶ Hershkowitz, *supra* (lower rate of disclosure in physical abuse); Irit Hershkowitz & Aline Elul, *The Effects of Investigative Utterances on Israeli Children's Reports of Physical Abuse*, 3 APPLIED DEVELOP. SCIENCE 28 (1999) (greater reluctance to disclose). Although the research often finds lower rates of disclosure of physical abuse than of sexual abuse, this may be an artifact of suspicion and substantiation bias. To the extent that physical

The fact that most children do not disclose their abuse, and that the vast majority of abuse is never reported to authorities, demonstrates the efficacy of the methods used by abusers. The molester reasonably anticipates that the means by which he accomplishes abuse ensures that the child will not speak out against him.

Methodological concerns. One might assume that in order to understand the prosecution of abuse, it is best to focus on prosecution samples. However, if the goal is to identify from the perpetrator's perspective what is reasonably foreseeable when he abuses a child, one needs to understand abuse in general rather than abuse that is prosecuted. As one moves from samples drawn from clinical intake to samples drawn from court samples, the children become less representative of abused children in general. Examining prosecution samples understates the difficulties that child victims have in coming forward. Prosecutors weed out the cases that are most fit for forfeiture treatment. In a number of jurisdictions most substantiated cases of sexual abuse are never referred for prosecution. Prosecutors are less likely to move forward when the child is young, exhibits reluctance or inconsistency in reporting, and the family is unsupportive. Cases are often dismissed before they get to trial, and the likelihood of dismissal is related to the same factors. As a result, cases that go to trial typically involve children who successfully take the stand and maintain their allegation.²¹⁷

Nevertheless, testifying still constitutes a major hurdle for child witnesses. In their study of criminal trials, Goodman and colleagues found that children's greatest fear was of seeing the defendant in court.²¹⁸ Goodman and colleagues conducted a mock trial in which 4- to 8-year-olds were asked to testify; Despite their heroic efforts to make the experiment as comfortable as possible for the children, 25% of the children "refused to testify, either by outright refusal or by appearing distressed so that the RA judged that the child should not continue."²¹⁹

abuse is often detected and substantiated by visible bruising, it is likely that a greater percentage of children questioned about physical abuse had never previously disclosed.

²¹⁷ Gail S. Goodman et al., *Testifying in Criminal Court: Emotional Effects on Child Sexual Assault Victims*, 57 MONOGRAPHS SOC. RES. CHILD DEV. 1 (1992); Kathleen Coulborn Faller & James Henry, *Child Sexual Abuse: A Case Study in Community Collaboration*, 24 CHILD ABUSE & NEGLECT 1215 (2000).

²¹⁸ Goodman et al., *supra*.

²¹⁹ Holly K. Orcutt et al., *Detecting Deception in Children's Testimony: Factfinders' Abilities to Reach the Truth in Open Court and Closed-Circuit Trials*, 25 L. & HUM. BEHAV. 339 (2001). The authors note the difficulty of ensuring that a large number of children would be willing to testify. "Such pilot testing revealed the necessity of employing staff who could establish rapport quickly and well with children, the chance for children to tour the courtroom and answer questions on the witness stand before being asked to testify, the opportunity for children to meet and have a friendly exchange with the prosecutor and judge before the trial, a chance for children to adjust to the courtroom and answer simple questions posed by the judge before the jury entered, and maintenance of an emotionally supportive atmosphere by the judge and attorneys toward the children. The critical

Other methodological concerns surround the difficulties of ascertaining whether abuse occurred. We have attempted to avoid some of the methodological problems by consulting a wide variety of studies. To the extent that there are convergent findings across the different studies, methodological concerns are alleviated. The different approaches used in studying the dynamics of sexual abuse have advantages and disadvantages. Studies in which the researchers interview perpetrators benefit from the fact that the abuse almost certainly occurred, and that one can directly inquire into the intent behind perpetrator's actions. The disadvantages are the uncertain representativeness of the perpetrators (perpetrators who are detected or who confess may look different), and that perpetrators may exaggerate or minimize aspects of their actions; it seems particularly likely that perpetrators will attempt to minimize the extent to which they used force or coercion to achieve their aims.

A central problem with studies in which victims are questioned is that identification of abuse is usually dependent on the victims' statements. In most research samples, there is no conclusive proof that abuse did or did not occur. This increases the problem of both false positives and false negatives. False positives will occur if the victim is either lying or falsely believes that abuse occurred. False negatives will occur if the victim cannot or will not disclose the abuse.²²⁰

Population surveys avoid some problems, particularly with respect to false positives. As noted above, population surveys consistently find that of those respondents who report having been sexually abused as children, only about 10% report that their abuse was ever reported to the authorities.²²¹ This reduces the likelihood of false positives, because overzealous parents and investigative authorities are the most commonly cited cause of false allegations. Similarly, only about 2% report that their memory of abuse was elicited with the support of a therapist,²²² another possible source of false reports. Surveys also reduce the likelihood of false negatives. Unlike clinical samples, which enlist participants who already self-identified as former victims, population surveys are potentially able

importance of the children's parents staying in the courtroom when the children testified also became apparent, a privilege often denied actual child witnesses." *Id.* at 348.

²²⁰ False positives and false negatives may also affect the apparent demographics of perpetrators. Children may be more likely to make true or false claims against certain groups. For example, they might be less willing to make true allegations against parents and more willing to make false allegations against strangers. This would inflate the apparent prevalence of stranger abuse. Adult questioners might be more inclined to elicit true or false claims against certain groups. For example, ex-spouses might be more suspicious of each others. This would inflate the apparent prevalence of parental abuse.

²²¹ Judy Martin, et al., *Asking About Child Sexual Abuse: Methodological implications of a Two Stage Survey*, 17 CHILD ABUSE & NEGLECT 383 (1993). Russell, *supra*; Smith et al., *supra*.

²²² Sharon C. Wilsnack et al., *Self-reports of Forgetting and Remembering Childhood Sexual Abuse in a Nationally Representative Sample of US Women*, 26 CHILD ABUSE & NEGLECT 139, (2002).

to identify former victims who have never previously disclosed their abuse.

However, the problem of false negatives is not solved by surveys. There is good evidence that many prior victims are reluctant to disclose to surveyors. First, substantiated abuse is often subsequently denied by survey respondents.²²³ Second, more persistent questioning elicits more reports of abuse.²²⁴ Third, respondents surveyed repeatedly are often inconsistent in acknowledging that abuse occurred.²²⁵ Surveys may also understate childhood reluctance to disclose. If reluctant children who fail to report true abuse grow up to be reluctant adults, then the adults who acknowledge abuse in population surveys are disproportionately those who acknowledged abuse as children. Hence, survey reluctance is likely to inflate the extent to which victims report having disclosed their abuse.²²⁶

Clinical samples are the most common, and probably most often cited source of information about the nature of abuse. These studies benefit from the fact that abuse will be relatively

²²³ Jochen Hardt & Michael Rutter, *Validity of Adult Retrospective Reports of Adverse Childhood Experiences: Review of the Evidence*, 45 J. CHILD PSYCHOL. AND PSYCHIATRY 260 (2004). Hardt and Rutter (2004) concluded that "the universal finding [is] that, even with well-documented serious abuse or neglect, about a third of individuals do not report its occurrence when specifically asked about it in adult life." *Id.* at 240.

²²⁴ Rebecca M. Bolen & Maria Scannapieco, *Prevalence of Child Sexual Abuse: A Corrective Metanalysis*, 73 SOCIAL SERVICE REVIEW 281 (1999); Wilsnack and colleagues found that the percentage of respondents reporting abuse doubled (from 15 to 31 %) when they asked a greater number of specific questions about sexually abusive experiences. Wilsnack et al., *supra*.

²²⁵ Richard P.W. Fry et al., *Interviewing for Sexual Abuse: Reliability and Effect of Interviewer Gender*, 20 CHILD ABUSE & NEGLECT 725 (1996). Fry and colleagues (1996) interviewed female gynecological clinic patients complaining of chronic pelvic pain at two time periods, 3 months apart. The authors found that 26% of the abuse mentioned at the first interview was not mentioned at the second interview (41/155) and that 16% of the abuse mentioned at the second interview was not mentioned at the first interview (22/136). Although one might suspect that women omitted abuse that was relatively trivial and, therefore, less memorable, the authors found that the "effect is even more striking when the reports of severe (contact) abuse are examined" *Id.* at 727; Robin McGee, et al., *The Measurement of Maltreatment: A Comparison of Approaches*, 19 CHILD ABUSE & NEGLECT 233 (1995); McGee and colleagues questioned adolescents from the open caseload of a child protection agency who were substantiated as sexually abused and found that 19% (12/63) denied sexual abuse when individually questioned by two researchers. In their population survey of 18-year-olds, Fergusson and colleagues (1996) found relatively low prevalence rates of abuse compared to other surveys and recognized the danger that their young respondents were not ready to disclose. Fergusson et al. (1996), *supra*. Three years later, Fergusson and colleagues questioned the same individuals when they were 21. Remarkably, among the respondents who reported sexual abuse at 21, 45% had failed to report abuse at 18 (37/83). Conversely, among the respondents who reported sexual abuse at 18 years of age, more than half (54%) failed to report abuse at age 21 (54/100). Fergusson et al. (2000), *supra*.

²²⁶ Representativeness is another issue with surveys. To the extent that the subjects are appropriately selected, they are representative of the public at large. If the survey is not solely about sexual abuse (requiring emphasis on abuse in the consent process), and the response rate is high, then self-selection problems are minimized. Convenience sample surveys share an additional representativeness disadvantage; if the sample is college students, then the survey ignores the potentially different experiences of adults who do not attend college.

contemporaneous with the collection of data, and that extensive information can be collected about the abuse from multiple sources. However, clinical samples often suffer from the most serious methodological problems. There is the problem of false positives, possibly attributable to adult influence, overzealous investigation, and, among older children, deliberate falsification. False negatives are also a problem; most children questioned about suspected abuse have previously disclosed abuse, and substantiation of abuse is highly dependent upon disclosure.

False positives and negatives may also affect how forthcoming children appear to be about abuse. If investigators are willing to substantiate claims based on soft signs of abuse without a disclosure from the child, then children's reluctance to disclose will be exaggerated, because one will see a low rate of disclosure among substantiated cases. On the other hand, reliance on disclosure as a means of detecting abuse will inflate disclosure rates and understate children's reluctance. Two problems of this type are called suspicion bias and substantiation bias. Suspicion bias occurs when disclosure is the reason abuse is initially suspected. If disclosure increases suspicions of abuse, the percentage of children disclosing abuse in samples suspected of having been sexually abused will be inflated. Substantiation bias occurs when disclosure is a reason why abuse is substantiated by authorities. If disclosure increases the likelihood that abuse will be substantiated, then the percentage of disclosure in substantiated samples of abuse will be inflated. Both suspicion bias and substantiation bias are likely if disclosure is the primary evidence of abuse.

One solution to the false positive problem is to identify cases in which there is external evidence of abuse; one can have more confidence in the truth of allegations if the perpetrator confesses or if there is conclusive medical evidence of abuse. This might also reduce the false negative problem because one need not rely on the child's disclosure in such cases to substantiate abuse. However, if abuse was initially suspected *because* of the child's disclosure, then suspicion bias remains. If children are only examined for medical signs of abuse when they have disclosed, or if adults are only questioned by the police following a child's disclosure, then the rates of disclosure among medically substantiated cases or cases with confessions will be inflated. Lyon reviewed several decades of research examining disclosure rates among children with gonorrhea, most of whom had been diagnosed before being questioned about sexual abuse. Less than half of the children disclosed sexual abuse when first questioned.²²⁷ Similarly low rates of disclosure have been found in the few studies examining cases in which evidence of sexual abuse surfaced before the child's disclosure.²²⁸ Hence, if one solves for the

²²⁷ Lyon, *supra*.

²²⁸ Lawson and Chaffin found that fifty-seven percent of children with a sexually transmitted disease failed to disclose abuse when questioned. Louanne Lawson & Mark

false positive and suspicion bias problems, it is clear that abused children are very reluctant to disclose abuse.

V. FORFEITURE BY EXPLOITATION IN THE COURTS

Although the Supreme Court has been silent with respect to applying *Crawford* to cases involving child witnesses, it has shown some appreciation of the dynamics of abuse. The Court has noted that “a child’s feelings of vulnerability and guilt and his or her unwillingness to come forward are particularly acute when the abuser is a parent.”²²⁹ Citing some of the research reviewed here, the Court has found that “[u]nderreporting is a common problem with respect to child sexual abuse.... one of the most commonly cited reasons for nondisclosure is fear of negative consequences for the perpetrator, a concern that has special force where the abuser is a family member...”²³⁰

Although the lower courts have sometimes been amenable to the arguments underlying forfeiture by exploitation, they have tread carefully because of continuing uncertainties over the scope of forfeiture doctrine. The typical case of forfeiture by wrongdoing involves ham-fisted silencing of witnesses through murder and overt threats of violence.²³¹ These cases raise only a few of the issues that arise in child abuse prosecutions. Most of the cases cited above in which appellate courts reversed convictions for the admission of testimonial hearsay from unavailable child witnesses did not even consider the issue of forfeiture.

A notable exception is *State v. Waddell*, the case discussed in the introduction. The reader will recall that J.M.J., a 7 year old girl, accused Waddell, her next door neighbor, of intercourse, sodomy, and other sexual acts. The state anticipated the girl’s difficulty in testifying, and did what it could to either present her at trial or lay

Chaffin, *False Negatives in Sexual Abuse Disclosure Interviews: Incidence and Influence of Caretaker’s Belief in Abuse in Cases of Accidental Abuse Discovery by Diagnosis of STD*, 7 J. INTERPERSONAL VIOLENCE 532, 537 (1992). Muram and his colleagues found that forty-nine percent of children with medical evidence strongly indicative of sexual abuse failed to disclose. David Muram et al., *Genital Abnormalities in Female Siblings and Friends of Child Victims of Sexual Abuse*, 15 CHILD ABUSE & NEGLECT 105, 108 tb1.2 (1991).

²²⁹ *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987).

²³⁰ *Kennedy v. Louisiana*, 554 U.S. 407, 444 (2008). See also *State v. Sheppard*, 484 A.2d 1330, 1333, 1344 (Sup. Ct. N.J.1984) (discussing intrafamilial abuse, “[the child] will have been exposed to both pleasant and abusive associations with the accused. . . Anger against the relative is opposed by feelings of care, not only for him but also for other family members”).

²³¹ See, e.g., *United States v. Emery*, 186 F.3d 921, 926 (8th Cir. 1999); *United States v. Dhinsa*, 243 F.3d 635 (2d. Cir. 2001); *United States v. Stewart*, 485 F.3d 666 (2d. Cir. 2007); *United States v. Mastrangelo*, 693 F.2d 269 (2d. Cir. 1982); *Hodges v. Florida*, 506 F.3d 1337 (11th Cir. 2007); *United States v. Emery*, 186 F.3d 921 (8th Cir. 1999); *United States v. Gray*, 405 F.3d 227 (4th Cir. 2005); *United States v. Houlihan*, 92 F.3d 1271 (1st Cir. 1996); *United States v. White*, 838 F.Supp. 618 (D.D.C. 1993); *Devonshire v. United States*, 691 A.2d 165 (D.D.C. 1997); *United States v. Thompson*, 286 F.3d 950 (7th Cir. 2002); *United States v. Rivera*, 412 F.3d 562 (4th Cir. 2005); *State v. Ivy*, 188 S.W.3d 132 (Tenn. 2006).

the groundwork for admission of her videotaped interview. Before trial, the state had filed “several motions designed to provide a careful structure for her courtroom appearance.”²³² Shortly before the trial a psychotherapist who spoke to J.M.J. found that she “tried to avoid talking about the abuse,” but was willing to draw a picture depicting genital touching.²³³

The state then made a motion to find J.M.J. unavailable to testify, which was denied. “During the hearing on her availability...J.M.J. told defense counsel that she was scared, but said she was not afraid that anyone in the room would do anything to her. She stated she remembered what happened, but she did not want to talk about it.”²³⁴ As a result, “J.M.J. was required to appear at trial, but refused to talk about the events involving Waddell.”²³⁵

The appellate court found that the facts of the case did not justify a forfeiture finding. It emphasized that “in forfeiture cases involving threats or coercion, the threats or coercion occurred after the events giving rise to the criminal charges,”²³⁶ and noted that “there was no evidence Waddell had any contact with J.M.J. after his detention.”²³⁷ The arbitrary temporal limitation prevented the court from considering the ways in which Waddell had exploited the child.

Had the court felt comfortable assessing the relationship between the defendant and J.M.J., and the means by which he accomplished the abuse, it could have reached a different conclusion regarding her failure at the availability hearing to testify to her fears and her ultimate refusal to testify. As the reader will recall, Waddell was J.M.J.’s next door neighbor, and J.M.J. “played frequently in Waddell’s yard and with his pets. She also occasionally went inside Waddell’s trailer.”²³⁸ According to Waddell, she would come into her trailer unannounced, they had watched television together and she had used his bathroom.²³⁹ He testified that J.M.J. had been mad at him for failing to get her a Christmas present and for not buying her a new pet turtle when her old turtle died.²⁴⁰ J.M.J. was also acquainted with his daughter and granddaughter, and she visited them at his trailer (while he was in jail awaiting trial). When J.M.J. first disclosed to her grandmother, she said ‘I still want to play with the puppies, but Kenny touched me in my privates.’²⁴¹ She also told two other adults that she hadn’t told because she wanted to continue seeing the puppies.²⁴²

²³² 2006 WL 1379576 at *5.

²³³ *Id.* at *3.

²³⁴ *Id.* at *9.

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.* at *4.

²⁴⁰ *Id.* at *5.

²⁴¹ *Id.* at *2.

²⁴² *Id.* at *2 (school counselor), *3 (day care provider).

In subsequent interviews, J.M.J. described more serious worries. According to the daycare provider, J.M.J. said that “Waddell put a knife to her forehead or throat and threatened to kill her if she told anyone or did not come back.” In the videotaped interview:

J.M.J. stated that the first time Waddell touched her, it continued until she slapped him and pulled his hands off; then she ran to her grandmother's house. J.M.J. described an incident where Waddell had a knife in his hand and said he would kill her unless she stayed.... J.M.J. said several times that she screamed loudly. After the touchings, Waddell let J.M.J. get dressed and run home. Later in the interview, J.M.J. said she had been outside playing with Waddell's dogs when he grabbed her and forced her inside the house to commit these acts. She screamed. He also grabbed her when she took over Girl Scout cookies. When asked whether Waddell touched her with the knife in his hand, J.M.J. said, “No.” At the conclusion of the interview, however, J.M.J. spontaneously said Waddell had two knives in one hand and held them to her face. J.M.J. said Waddell would kill her if she did not stay with him.²⁴³

After J.M.J.'s initial disclosure, according to the grandmother, J.M.J. did not want to go outside because “She was afraid he might be outside and know she told. J.M.J. did not want to even see Waddell's trailer, so [her grandmother] covered up the windows on that side of her house.”²⁴⁴

J.M.J.'s fears were no less relevant to a forfeiture determination because they were attributable to actions taken by the defendant during the course of repeated abuse. By the same token, J.M.J.'s youthful vulnerability should not count against a finding of forfeiture; Waddell's exploitation of the child was as deliberate and as wrongful as any defendant's actions taken to silence a witness.

Other courts have similarly missed opportunities to develop forfeiture by wrongdoing doctrine for child witnesses. In one of the few cases to consider forfeiture in a child sexual abuse prosecution, the Illinois Supreme Court rejected the state's forfeiture argument in *In re Rolandis G.* The defendant was charged with forcing a 6-year-old boy, Von, to perform fellatio. Von was able to take the stand and identify the defendant in court, and acknowledged that he knew him from the neighborhood, but when asked about the day in question “resolutely refused to respond.” Von had originally disclosed to his mother, and repeated the accusation when questioned by a police officer, and again on videotape at a child advocacy center. Von disclosed that the defendant had made the boy ‘pinky swear’ not to tell anyone about the abuse.

²⁴³ *Id.* at *2.

²⁴⁴ *Id.*

As we have argued, in child abuse cases the claim is that the defendant takes advantage of and nurtures the child's prospective unavailability in order to successfully commit (and recommit) the crime. The Illinois Supreme Court appeared to validate this approach, noting that "sexual abusers sometimes select children as their victims because children are generally more vulnerable to threats and coercion due to their age and immaturity."²⁴⁵ However, the court then rejected forfeiture on the grounds that "there is no indication that when respondent sexually assaulted Von, his assault was motivated in any way by a desire to prevent Von from bearing witness against him at trial." This assumes that forfeiture in child sexual abuse must parallel the argument in *Giles* that the crime itself might be motivated by the intent to silence the victim. Yet *Giles* also acknowledged the significance of the pre-crime relationship between the defendant and the victim, which can provide evidence of wrongdoing other than the crime itself. The state court also acknowledged the relevance of the pinky-swear, but held "there is nothing in the record to indicate that when respondent extracted the promise from Von, he did so in contemplation of some future trial."²⁴⁶ Yet *Giles* referred to the defendants' potential efforts to deter the victim from "resorting to outside help." It would be odd to hold that a defendant's actions were not intended to deter reporting to the police because the defendant hoped that the victim would not report the abuse to anyone.

In other respects, the facts of *Rolandis* were simply not conducive to an appreciation of the way in which child abusers seek out and molest their victims over time. In *Rolandis* the perpetrator was an 11-year-old neighborhood boy who "forced [Von] into a nearby wooded area and threatened him with a stick if he did not do what Rolandis wanted."²⁴⁷ Within minutes of coming home from the assault with Rolandis, and ignoring Rolandis' pleas to come back outside, Von disclosed the abuse to his mother. True, Von told his mother that because of the pinky swear, he "did not want to tell anyone else what Rolandis had done." But within 10 minutes he disclosed to a police officer. Even armed with an understanding of the dynamics of abuse, a court could reasonably conclude that there was limited evidence that the way in which Rolandis chose his victim and accomplished the abuse effectively silenced the boy.

If a child is abused on a single occasion and immediately discloses abuse despite threats not to do so, a court can reasonably doubt that the defendant's actions caused the child's subsequent unavailability. This limitation on forfeiture by exploitation should

²⁴⁵ In re Rolandis G., 232 Ill.2d 13, 42 (Ill. 2008). The Colorado Supreme Court has also noted (in a post-*Giles* case) that "the manner in which [the defendant] chose his victim" is a valid consideration in forfeiture; however, in the case before it the prosecution did not introduce any evidence of intent, solely arguing that the fact of abuse and the fact that the child was traumatized were sufficient. *People v. Moreno*, 160 P.3d 242, 247 (2007).

²⁴⁶ *Rolandis*, 232 Ill.2d at 42.

²⁴⁷ *Id.* at 18.

allay concerns such as those expressed by the Connecticut Supreme Court in *State v. Jarzbeck* (a pre-*Giles* case).²⁴⁸ Despite evidence of repeated abuse and threats by the defendant, the victim's father, the court worried that "[t]he constitutional right would have little force...if we were to find an implied waiver of that right in every instance where the accused, in order to silence his victim, uttered threats during the commission of the crime for which he is on trial."²⁴⁹

Surprisingly, the courts have not clearly articulated the concern that the causal connection between threats and unavailability is broken by intervening testimonial statements. This worry, however, may explain the New York Court of Appeal's uncertainty about forfeiture in *People v. Johnson*.²⁵⁰ In *Johnson*, the defendant was a 52 year old pastor convicted of intercourse and sodomy with a 12-year-old girl, one of his parishioners. The abuse was discovered when the mother found sexually explicit letters from the girl to the defendant. At her mother's urging, the child placed a pretextual call to the defendant that was recorded by the police. The child also testified about the abuse before the grand jury, but "[w]hen called at trial...she had 'nothing to say' and otherwise refused to testify."²⁵¹ In the recorded conversation, the defendant asked the child to lie so that he would not go to jail.²⁵² The court acknowledged that his statements could "support an inference of domination or improper influence, providing the requisite link to the girl's eventual refusal to testify at trial."²⁵³ However, mentioning the fact that the child had both reported the abuse to the police and testified before a grand jury, the court ordered a hearing so that the "defendant would have had an opportunity to challenge the People's evidence by raising

²⁴⁸ 529 A.2d 1245, 1253 (Conn. 1987). The defendant had been found guilty of misdemeanor child abuse and given probation. The alleged abuse of his 4-year-old daughter came to light when an 11-year-old cousin witnessed the child lying on her younger brother in a bed "rubbing up and down." 529 A.2d at 1247. Although the victim initially tried to "cover up" their activity, she then acknowledged that she and her brother had been playing a game that her father had taught her, and that her father had told her to keep the game a secret or else she "would never see him again." *Id.* She gave similar accounts to her aunt, her mother, her maternal grandmother, and a social worker. *Id.* In her videotaped testimony, which was the subject of the confrontation clause claim, she described how she played a game called "roll around" naked with her father, that her buttocks had gotten dirty and she had to take a bath "[s]o Grammy [wouldn't] know" and that her "father had told her that he would hit her if she told anyone about the game." *Id.*

²⁴⁹ *Id.* at 1253. The court emphasized that in the forfeiture cases cited by the State, "the defendant was suspected of scheming to obstruct justice by tampering with a witness after the crime in question had occurred, the judicial proceedings against him had commenced, and the witness allegedly subjected to intimidation had given pretrial testimony incriminating the defendant." *Id.* at 1253. This last concern, as noted above, is not tenable in light of *Giles* recognition that pre-crime actions could evince intent to silence.

²⁵⁰ 711 N.E.2d 967 (N.Y. 1999).

²⁵¹ *Id.* at 968.

²⁵² *Id.* at 969.

²⁵³ *Id.*

questions as to defendant's role in securing the victim's unavailability at trial"²⁵⁴

Commentators have claimed that *any* disclosure of the abuse breaks the causal link between any threats pre-disclosure and the victim's failure to testify.²⁵⁵ However, if there is a close relationship between the defendant and the victim, the abuse continues over time, and the child delays reporting, then the victim's ultimate failure to testify can fairly be attributed to the defendant. The efficacy of the defendant's actions are demonstrated by the delays in reporting. The child's disclosure likely reflects a fragile resolve; the same factors that increase delays in reporting increase the likelihood that the child's report will be inconsistent over time; recantations are higher when the perpetrator is closer to the child and the child is younger. Furthermore, although legal doctrine since *Crawford* treats the child's testimonial hearsay as equivalent to testimony, this formal equivalence says nothing about the psychological difference between disclosing abuse to a police officer in an interviewing room and testifying to abuse in an open courtroom in front of the defendant.

It is difficult to find cases in which threats at the time of the crime give rise to forfeiture, but this is surely attributable to adults' understanding of legal procedure. When adults report crimes in the fact of threats, they likely understand that reporting to the police can ultimately lead to testifying in court against the defendant. If they are unwilling to testify, they will simply fail to report, or refuse to cooperate with the police. In *Ware v. Harry*,²⁵⁶ a post-*Giles* case, an eyewitness who described the crime and named the defendant spoke several times with the police. However, the police officers who interviewed the witness reported that she was "visibly frightened," and she repeatedly told them that she was afraid to testify.²⁵⁷ The court found forfeiture on the basis of threats that were made at the time of the crime.²⁵⁸

Children have a less sophisticated understanding of the legal process. They are unlikely to recognize that by talking to the police, they are initiating a process that will not be complete unless they are

²⁵⁴ *Id.*

²⁵⁵ Robert P. Mosteller, *Giles v. California: Avoiding Serious Damage to Crawford's Limited Revolution*, 13 LEWIS & CLARK L. REV. 675, 694 n.77 (2009) (defendants can argue that "forfeiture is illogical because the child was obviously not intimidated from reporting by the perpetrator's threat [and thus] there is no reason to believe the victim failed to testify because of that ineffectual threat"); Clifford S. Fishman, *The Child Declarant, The Confrontation Clause, and the Forfeiture Doctrine*, 16 WIDENER L. REV. 279, 298 ("the defense can argue that, even assuming the defendant had threatened or cajoled the child not to report the abuse, ultimately the child did report it, or there would be no case to prosecute. Thus, those threats or blandishments, in the end, were ineffective, and therefore could not have "procured" the child's subsequent inability to testify").

²⁵⁶ 636 F.Supp.2d 574 (E.D. Mich. 2008).

²⁵⁷ *Id.* at 586.

²⁵⁸ *Id.* (Defendant "had threatened those who had witnessed the killing with death if they talked about the incident. Specifically, petitioner told the witnesses "if it gets out I know who to go to" and "I know everybody in this house right now ... [i]f this shit go any further y'all next").

capable of taking the stand and testifying against the defendant in the defendant's presence. Children's limited understanding of legal process has led some to argue that children's statements to the police should not be classified as "testimonial."²⁵⁹ However, children understand the role of the police in arresting and incarcerating criminals; they know that the police put people in jail. What they often fail to comprehend is the complicated process by which an arrest leads to conviction. Researchers have demonstrated that children exhibit an early appreciation of the power of the police. Moore and colleagues found that "after the President, kindergartners view the policeman as the next most influential governmental figure."²⁶⁰ Lyon and colleagues found that even the youngest children they tested (4-year-olds) distinguished between reporting transgressions to the police and to teachers, and by six children distinguished between reporting transgressions to the police and parents (preferring parents as recipients).²⁶¹ It is because they do *not* understand the judicial process that young children are likely to believe that the police can summarily throw criminals in jail. Therefore, children's statements to the police could be considered "testimonial," at the same time that their willingness to talk to the police says little about their willingness to testify.²⁶²

VI. OBJECTIONS TO THE CHILD'S COMPETENCY AT TRIAL

A different situation presents itself when the child fails to testify at trial due to incompetency rather than fear. In child abuse cases, defendants sometimes successfully object that child witnesses are incompetent to testify,²⁶³ typically on the grounds that the child does not understand the meaning of "truth" and "lie" and the importance of telling the truth.²⁶⁴ A defendant's exercise of legitimate trial objections is not wrongdoing.²⁶⁵ However, is unfair to allow the

²⁵⁹ Victor I. Vieth, *Keeping the Balance True: Admitting Child Hearsay in the Wake of Crawford v. Washington*, 6 APRI Update 1 (2004).

²⁶⁰ STANLEY W. MOORE ET AL., *THE CHILD'S POLITICAL WORLD: A LONGITUDINAL PERSPECTIVE* 51 (Praeger eds., 1985).

²⁶¹ Thomas D. Lyon et al., *Children's Reasoning About Disclosing Adult Transgressions: Effects of Maltreatment, Child Age, and Adult Identity*, 81 CHILD DEVELOP. 1714 (2010).

²⁶² With respect to the classification of their statements as testimonial, they are probably less familiar with the role that non-law-enforcement personnel play in the process. Hence, unless they are informed of police involvement, they may not understand that their statements to child advocacy center interviewers, medical personnel, and social workers are functionally equivalent to statements to the police. For this reason, there is still room to argue that if one solely adopts the declarant's perspective, children's complaints of abuse are often non-testimonial. This view, however, has not prevailed among the lower courts.

²⁶³ *Supra* text accompanying notes.

²⁶⁴ Lyon, 2011, *supra*.

²⁶⁵ *Steele v. Taylor*, 684 F.2d 1193, 1201 (6th Cir. 1982) (defining wrongdoing as "any significant interference" with the disclosure of relevant information at a public trial "*other than by exercising a legal right to object at the trial itself*"). See also *U.S. v. Reeves*, 61 M.J. 108, 111 (U.S. Ct. App. Armed Forces 2005) ("A wrongful act is one done without legal justification or with some sinister purpose"); *Washington v. Crawford*, 54 P.3d 656, 660 (2002) ("misconduct is not apparent when the defendant invokes a statutory privilege").

defendant to keep the child off the stand, and then object to the child's hearsay on the grounds that he was unable to cross-examine the child.

Imagine that a defendant is accused of assaulting a blind person. If the defendant objected at trial that his confrontation rights were denied because the victim could not face him at trial, this would be a non-starter.²⁶⁶ The Court would respond that the defendant should not complain of an incapacity that the state did not cause. It would not matter whether the defendant had deliberately selected the victim because of her blindness, but if this were true, the argument that the defendant should not complain would certainly be even stronger.

Allowing defendants to object to children's competency as witnesses and then complain of their failure to testify seems particularly unfair given the futility of questioning young children about their understanding of truth and lies in order to assess their honesty. It is simply too easy to underestimate children's understanding of the importance of telling the truth. Children are much better at identifying statements as truth or lie than they are at providing even the simplest definitions of 'truth' and 'lie' (such as 'a lie is not the truth') or explaining the difference between the words, yet they are often asked the more difficult questions in court.²⁶⁷ Children who are quite adept at assessing whether statements are the truth or not may fail to identify false statements as lies.²⁶⁸ They appear reluctant to label false statements lies, because of their awareness of the badness of lying. Children are better able to explain the negative consequences of lying when presented with a hypothetical child than when asked what would happen to themselves if they lied,²⁶⁹ but are virtually always asked about themselves in court.²⁷⁰

One might argue that children's apparent incompetency can be attributed to the state, because it often the prosecutors who, with little understanding of child development, ask the difficult

²⁶⁶ In *Coy v. Iowa*, 487 U.S. 1012 (1988), in which the Court held that defendants have a right to confront their accusers face to face (so that a screen could not be erected between the witness and the defendant), the Court did not take seriously the dissent's argument that this would raise problems for blind witnesses.

²⁶⁷ Thomas D. Lyon & Karen J. Saywitz, *Young Maltreated Children's Competence to Take the Oath*, 3 APPLIED DEVELOP. SCIENCE 16 (1999); Evans & Lyon, *supra*.

²⁶⁸ Thomas D. Lyon et al. *Young Children's Competency to Take the Oath: Effects of Task, Maltreatment, and Age*, 34 L. & HUM. BEHAV. 141 (2010). *But see* Evans & Lyon, *supra*, (not finding differences in accuracy in response to questions about truth versus lie when questioned in court).

²⁶⁹ Thomas D. Lyon et al., *Reducing Maltreated Children's Reluctance to Answer Hypothetical Oath-Taking Competency Questions*, 25 L. & HUM. BEHAV., 81 (2001). Young children appear to treat hypothetical questions ('What would happen to you if you lied?') as suggestions, and, again because of their acute awareness of the badness of lying, reject the premises rather than entertain the hypothetical outcomes.

²⁷⁰ Evans & Lyon, *supra*.

questions.²⁷¹ However, even the most sensitive tests for assessing children's understanding of "truth" and "lie" underestimate children's capacity to answer questions honestly. Even 2-year-olds adhere to a principle that one ought to say true things - they reliably reject statements that are clearly false²⁷² - well before they are able to articulate an understanding of the concept 'true statement' and 'false statement'.²⁷³ Indeed, recent research suggests that children with an incipient understanding of truth and lies are *better* able to make false statements.²⁷⁴ In other words, it is more difficult for the child who does not know the difference between 'truth' and 'lie' to tell a lie.²⁷⁵ The better procedure is to abandon the competency inquiry and simply ask the child to promise to tell the truth, which increases honesty,²⁷⁶ even among children who fail truth-lie competency tasks.²⁷⁷

The defendant should choose between objecting to the child's competency and complaining that he is unable to cross-examine the child. Defendant's voluntary choice to make a valid objection may result in a waiver of constitutional rights. For example, a defendant waives his Fifth Amendment privilege against self-incrimination as to certain matters by choosing to voluntarily testify as to those matters. Similarly, a defendant may waive a speedy trial objection by asking for a trial continuance to better prepare his defense, or by making a motion that delays trial.

The Fifth Amendment provides that a defendant has a privilege against self-incrimination.²⁷⁸ As part of that right, a defendant cannot be compelled either by the prosecution or by his

²⁷¹ Evans & Lyon, *supra* (although defense attorneys ask larger percentage of difficult questions, substantial percentage asked by prosecutors).

²⁷² Peter Hummer et al., *On the Origins of Denial Negation*, 20 J. CHILD LANG. 607 (1993); Roy D. Pea, *Origins of Verbal Logic: Spontaneous Denials by Two- and Three-Year Olds*, 9 J. CHILD LANG. 597 (1982).

²⁷³ Thomas D. Lyon et al., *Right and Righteous: Children's Incipient Understanding of True and False Statements*, J. COGNITION & DEVELOP. (forthcoming, 2012).

²⁷⁴ Elizabeth C. Ahern et al., *Young Children's Emerging Ability to Make False Statements*, DEVELOP. PSYCHOL. (forthcoming).

²⁷⁵ This finding should not be surprising, because both the understanding of truth and lies and the ability to lie are related to children's cognitive development. Indeed, adults are probably the best liars, and they are of course quite capable of defining "truth" and "lie."

²⁷⁶ Thomas D. Lyon & Joyce S. Dorado, *Truth Induction in Young Maltreated Children: The Effects of Oath-Taking and Reassurance on True and False Disclosures*, 32 CHILD ABUSE & NEGLECT 738 (2008); Lyon et al. (2008), *supra*. Victoria Talwar et al., *Children's Conceptual Knowledge of Lying and its Relation to Their Actual Behaviors: Implications for Court Competence Examinations*, 26 L. & HUM. BEHAV. 395 (2002); Victoria Talwar et al., *Children's Lie-Telling to Conceal a Parent's Transgression: Legal Implications*, 28 L. & HUM. BEHAV. 411 (2004).

²⁷⁷ Lyon et al. (2008), *supra*.

²⁷⁸ The full text of Fifth Amendment of the U.S. Constitution is as follows: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

own counsel to testify at trial, although he has the right to do so.²⁷⁹ When the defendant chooses to exercise this right, however, by testifying in his own defense, the defendant waives his right to assert the privilege against self-incrimination as to the subject of his testimony.²⁸⁰ As the Supreme Court in *Brown v. United States* explained: “If [the defendant] takes the stand and testifies in his own defense his credibility may be impeached and his testimony assailed like that of any other witness, and the breadth of his waiver is determined by the scope of relevant cross-examination.”²⁸¹ Thus, where the defendant voluntarily decides to testify, his willingness to testify as to some matters on direct examination waives his Fifth Amendment privilege against self-incrimination as to the details surrounding those matters.²⁸² Some courts have construed this rule even more broadly, finding that the accused’s “voluntary offer of testimony upon any fact is a waiver as to all other relevant facts, because of the necessary connection between all.”²⁸³

The Supreme Court has explained the waiver rule with regard to the Fifth Amendment privilege in terms of the defendant’s voluntary and tactical choice. In *Brown*, the Court reasoned: “Such a witness has the choice, after weighing the advantage of the privilege against self-incrimination against the advantage of putting forward his version of the facts and his reliability as a witness, not to testify at all.”²⁸⁴ It is a choice free from government compulsion and made absent any wrongdoing by the prosecution. But exercising this choice comes at a cost—the defendant must waive constitutional rights inconsistent with that choice. “He cannot reasonably claim that the Fifth Amendment gives him not only this choice, but if he elects to testify, an immunity from cross-examination on matters he himself put in dispute.”²⁸⁵

One might object that this argument was raised and rejected in *Crawford*. The defendant exercised his statutory marital privilege to prevent his wife from testifying, and then successfully raised a Confrontation Clause objection.²⁸⁶ The Washington Supreme Court expressly addressed the waiver argument in *Crawford*. There, the prosecution argued that defendant could be found to have waived his confrontation rights at trial by asserting the statutory marital

²⁷⁹ See *Brown v. U.S.*, 356 U.S. 148, 154-55 (1958).

²⁸⁰ CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE § 15.02, 365 (4th ed. 2000).

²⁸¹ *Id.* at 154-55.

²⁸² *Mitchell v. United States*, 526 U.S. 314, 322 (1999); *Rogers v. United States*, 340 U.S. 367, 372 (1950).

²⁸³ *Johnson v. United States*, 318 U.S. 189, 195 (1943), quoting 8 WIGMORE, EVIDENCE § 2276(2) (3d ed. 1940).

²⁸⁴ *Brown v. United States*, 356 U.S. at 155.

²⁸⁵ *Id.* at 155-56.

²⁸⁶ *Crawford*, 541 U.S. at 42. The lower court case decided by the Washington Supreme Court includes additional facts explaining that it was Michael Crawford, and not his wife Sylvia, who invoked the marital privilege to preclude Sylvia from taking the stand. *Washington v. Crawford*, 54 P.3d 656, 658 (2002).

privilege, which prevented his wife's testimony.²⁸⁷ The court rejected this argument, finding that "forcing a defendant to choose between the marital privilege and confronting his spouse presents an untenable Hobson's choice."²⁸⁸ In support of its ruling, the court cited to two prior Washington Supreme Court cases, *State v. Michielli* and *State v. Price*, from which the court gleaned that it "has not required a defendant to waive one right to preserve another."²⁸⁹ The prosecution did not challenge this holding upon review; thus, the Supreme Court remained silent on the issue.²⁹⁰

Neither of the cases cited by the Washington Supreme Court support its ruling on the waiver issue. In *State v. Michielli*, the prosecutor charged defendant with one count of second degree theft in a July 1993 indictment.²⁹¹ Trial was set for November 1, 1993. In late October 1993, just three business days before trial, the prosecution amended the indictment to add four additional charges.²⁹² The additional charges were based entirely on the same facts and information the prosecution had available to it prior to July 1993; thus, the only reason for delaying the amendment appeared to be to harass the defendant.²⁹³ Defendant's attorney was unprepared to go to trial on the four new charges, and defendant was forced to ask for a continuance. Defendant then moved to dismiss the new charges, which was granted.²⁹⁴ On appeal, the Washington Supreme Court upheld the dismissal of the new charges under a court rule allowing dismissal if a defendant could show (1) arbitrary action or government misconduct, and (2) prejudice to defendant's rights.²⁹⁵ On the issue of prejudice, the court found that defendant "*was forced* to waive his speedy trial right and ask for a continuance to prepare for the surprise charges brought three business days before the trial."²⁹⁶ The court explained that the prosecutor's unjustified delay gave "[d]efendant the choice of going to trial unprepared, or waiving his right to a speedy trial and asking for a continuance."²⁹⁷ Thus, prejudice was shown because *the negligent conduct of the State forced* defendant into a Hobson's choice.

State v. Price presents a different factual situation. In *Price*, the defendants argued that their right to a speedy trial was violated because the case had not proceeded to trial within the statutory

²⁸⁷ *Washington v. Crawford*, 54 P.3d at 658-660.

²⁸⁸ *Id.* at 660.

²⁸⁹ *Id.*

²⁹⁰ *Crawford*, 541 U.S. at 42 (stating with regard to waiver issue, "we express no opinion on these matters.").

²⁹¹ 132 P.2d 587, 589 (Wash. 1997).

²⁹² *Id.*

²⁹³ *Id.* at 594.

²⁹⁴ *Id.* at 584.

²⁹⁵ *Id.* at 592.

²⁹⁶ *Id.* at 595.

²⁹⁷ *Id.*

ninety-day speedy trial period.²⁹⁸ The start of the trial surpassed the ninety-day period by 15 days. Thus, the court inquired whether 15 or more days were properly excluded from the calculation of the speedy trial period.²⁹⁹ Under ordinary circumstances, the court noted, where the defendant requests a continuance to adequately prepare its case, the period of the continuance is excluded from the calculation.³⁰⁰ Here, the Price defendants had moved for, and the court granted, an 18-day continuance so defendants could obtain handwriting exemplars from a state witness. The defendants argued, however, that this continuance should not be excluded from the period because defendants were forced to move for a continuance when the state filed an amended indictment a month before trial, injecting new witnesses into the case.³⁰¹ In addressing this argument, the court reasoned as follows:

We agree that if *the State inexcusably fails to act with diligence*, and material facts are thereby not disclosed to a defendant until shortly before a crucial stage in the litigation, it is possible either a defendant's right to a speedy trial, or his right to be represented by counsel who has had sufficient opportunity to adequately prepare a material part of his defense, may be prejudiced. ***Such unexcused conduct by the State cannot force a defendant to choose between these rights.*** The defendant, however, must prove . . . that [the State's lack of diligence] will compel him to choose between prejudicing either of these rights.³⁰²

Applying this rule to the facts of Price, the court found defendants could not show a lack of diligence by the State. The new witnesses detailed in the amended indictment had contacted the State just a short time before the amendment. Thus, the prosecution could not have amended the indictment earlier in the case.³⁰³ In the absence of any fault by the State, the 18 day continuance was properly excluded from the statutory period and the right to a speedy trial was not violated.³⁰⁴

In both *Michielli* and *Price*, the defendants made a choice to exercise their Sixth Amendment right to prepare a defense, and in so doing, waived their rights to a speedy trial (or their rights to object to the lack thereof). The same rights are at issue in both cases, and the same choices were made. But the divergent holdings in *Michielli* and *Price* turn entirely on *why* such a choice was made—that is, whether the defendant was forced into the decision by the negligent or

²⁹⁸ 620 P.2d 994 (Wash. 1980). The Sixth Amendment to the United States Constitution reads in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." U.S. CONST. amend VI.

²⁹⁹ *Price*, 620 P.2d at 996.

³⁰⁰ *Id.*

³⁰¹ *Id.*

³⁰² *Id.*

³⁰³ *Id.*

³⁰⁴ *Id.*

wrongful conduct of the state. Where the prosecution's negligence forced the defendant's hand, requiring defendant to choose between competing constitutional rights, no waiver was found. But where such negligence was lacking, the general rule of speedy trial jurisprudence controlled—that is, a defendant who voluntarily requested a continuance in order to better prepare for trial, chose to exercise his Sixth Amendment right to prepare a defense, and in so doing, waived any objection to the lack of a speedy trial due to that delay.³⁰⁵ More fundamentally, the rule could be stated as followed: Where the defendant voluntarily chooses to exercise a constitutional right, in absence of wrongful conduct by the prosecution, he waives other constitutional rights inconsistent with that choice.

The Washington Supreme Court failed to consider this critical distinction in its decision in *Crawford*. The court never examined why Crawford was faced with the decision of choosing to exercise either his statutory marital privilege or his confrontation rights, or whether the state could be held responsible for such a choice. Like the defendant in *Price*, Michael Crawford was not forced by a wrongful act of the prosecution to choose among inconsistent constitutional rights. To the contrary, the prosecution in *Crawford* was willing to call Crawford's wife to the stand and to make her available for testimony.³⁰⁶

The Sixth Amendment speedy trial jurisprudence and the case law addressing the Fifth Amendment privilege against self-incrimination demonstrate that a defendant can be required to choose between competing rights. Where the defendant's choice is not compelled by the negligence or wrongful conduct of the State, the decision to exercise one right will result in a waiver of another inconsistent right. When the defendant is faced with the choice of either exercising his confrontation rights to examine an available witness or asserting a privilege or competency objection to prevent the witness's testimony, the same logic should apply. In this circumstance, the defendant's choice is not the result of the prosecution's negligence. The prosecution has made the witness available for confrontation, and the witness's availability is now in the defendant's control.³⁰⁷ Should he decide that it is advantageous

³⁰⁵ *Id.* The Federal Speedy Trial Act, 18 U.S.C.A. §3161 et. seq. (1974), allows for periods of delay resulting from a continuance to be excluded from the calculation of the speedy trial time limit if the continuance serves the end of justice. 18 U.S.C.A. §3161 (h)(7)(A). One of the factors to be considered is whether the failure to grant the continuance would “deny the defendant reasonable time to obtain counsel, would unreasonably deny the defendant or the Government continuity or counsel, or would deny counsel for the defendant . . . the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.” 18 U.S.C.A. §3161 (h)(7)(B)(iv).

³⁰⁶ See *Washington v. Crawford*, 54 P.3d 656, 658 (Wash. 2002).

³⁰⁷ See Dale A. Nance, *Rethinking Confrontation after Crawford*, 2 INTERNATIONAL COMMENT. ON EVID., (2004), available at SSRN: <http://ssrn.com/abstract=603543> (arguing that in *Crawford* the State had no control over the accused's ability to cross-examine his wife, rather “control clearly rested with the accused, who had chosen to exercise a state-law marital privilege to prevent his wife from testifying).

to prevent the witness's testimony through the exercise of a privilege or by way of a competency challenge, his voluntary conduct clearly indicates that he does not want to confront the witness. He should be held accountable for this choice, and the prosecution should be allowed to present out of court statements of the witness without confrontation.

VII. CONCLUSION

The dynamics of child abuse reveal how abusers exploit their victim's vulnerabilities, making it unlikely that the victim will ever take the stand. Abusers silence children, and then complain when children are unable to speak out at trial. The youthfulness of many child abuse victims make it easy for the defense to object to the child's testimony on competency grounds. Abusers complain that children shouldn't testify, but then complain when they aren't allowed. Our proposal takes account of the dynamics of child abuse and the vulnerability of child abuse victims, and offers an approach that is both fair and consistent with Supreme Court doctrine.

Adopting these views of forfeiture and waiver will not make it easy to prosecute child sexual abuse. Jurors intuit the frailties of child witnesses that researchers have emphasized; younger children are more likely to be suggestible, older children are better at lying.³⁰⁸ Although some jurors appear excessively willing to accept young children's claims, comparable proportions are unduly skeptical.³⁰⁹ Jurors expect to see medical evidence of sexual abuse,³¹⁰ but even penile-vaginal penetration and sodomy usually do not leave physical signs.³¹¹ Even when there is medical evidence, it rarely points to a specific perpetrator, making the child's identification essential.³¹² If the child discloses abuse with little emotion, which is typical, the jurors will be skeptical, expecting to see tears.³¹³ And if the child reports that she didn't resist, which is also typical, the jurors are less likely to convict.³¹⁴ If the child is 11 or older, male jurors will see consent as a good defense, and if they are told not to consider

³⁰⁸ Jody A. Quas et al., *Do Jurors "Know" What Isn't So About Child Witnesses?*, 29 L. & HUM. BEHAV. 425 (2005).

³⁰⁹ *Id.*

³¹⁰ Susan Morison & Edith Greene, *Juror and Expert Knowledge of Child Sexual Abuse*, 16 CHILD ABUSE & NEGLECT, 595, 607-08 (1992).

³¹¹ Astrid Heger et al., *Children Referred For Possible Sexual Abuse: Medical Findings In 2384 Children*, 26 CHILD ABUSE & NEGLECT 645, 652 (2002).

³¹² *Wright*, 497 U.S. at 824 ("Corroboration of a child's allegations of sexual abuse by medical evidence of abuse, for example, sheds no light on the reliability of the child's allegations regarding the identity of the abuser").

³¹³ Pamela C. Regan & Sheri J. Baker, *The Impact of Child Witness Demeanor on Perceived Credibility and Trial Outcome in Sexual Abuse Cases*, 13 J. FAM. VIOLENCE 187 (1998); Barbara Wood et al., *Semistructured Child Sexual Abuse Interviews: Interview And Child Characteristics Related to Credibility of Disclosure*, 20 CHILD ABUSE & NEGLECT 81, 88 (1996).

³¹⁴ Unpublished data examining 5 years of felony child sexual abuse trials in Los Angeles County (on file with author).

consent, they are even more likely to do so.³¹⁵ Prosecution of child physical abuse is usually facilitated by documented physical injury. However, the perpetrator must be identified, and the injuries must be proven intentional. Because of the privacy afforded people in their homes, the only potential witnesses are often family members. If the father is accused, then the defense is likely to be that the mother was to blame, and vice versa. Prosecution of domestic violence is notoriously difficult because the adult victims—typically the mother—are themselves often (if not usually) uncooperative.³¹⁶ If the mother refuses to cooperate, it is likely that the child will be similarly unavailable.

This proposal will not lead to a flood of child abuse prosecutions without the victim. Prosecutors believe that jurors want to see the child in court,³¹⁷ an intuition that is supported by research suggesting that jurors are more inclined to believe child witnesses when they see them in person.³¹⁸ There is no evidence that prior to *Crawford*, prosecutors routinely went to trial without putting the child witness on the stand. Evans and Lyon examined five years of felony sexual abuse cases in Los Angeles County tried before *Crawford*, and found that prosecutors relied on child hearsay only 3% of the time.³¹⁹ Rather, our proposal makes it possible to proceed in the relatively rare cases in which there is a substantial amount of corroborative evidence, but the child's statements are necessary to convince a jury beyond any reasonable doubt.

The proposed elements of a forfeiture finding encourage a more complete interview with the child. The interviewer should explore the pre-abuse relationship of the perpetrator and the child, the progression of abuse over time, the child's feelings about the abuse and its aftermath, any threats, bribes, or other inducements used by the perpetrator, and the child's disclosure history. All of these facts are relevant to the determination of whether the defendant exploited the child's foreseeable unavailability. On the other hand, a finding that objecting to the child's competency waives a confrontation claim should discourage extensive questioning of children's understanding of the meaning and morality of lying. Not only is such questioning likely to be non-diagnostic of children's true understanding, because of the developmental insensitivity of the

³¹⁵ PETER K. ISQUITH ET AL., *BLAMING THE CHILD: ATTRIBUTION OF RESPONSIBILITY TO VICTIMS OF CHILD SEXUAL ABUSE*, IN *CHILD VICTIMS, CHILD WITNESSES: UNDERSTANDING & IMPROVING TESTIMONY* 203, 223 (G.S. Goodman & B. L. Bottoms eds., 1993).

³¹⁶ Tom Lininger, *Evidentiary Issues in Federal Prosecutions of Violence Against Women*, 36 IND. L. REV. 687, 709 n. 76 (2003).

³¹⁷ John E.B. Myers et al., *Jurors' Perceptions of Hearsay in Child Sexual Abuse Cases*, 5 PSYCHOL. PUB. POLY & L. 388, 411 (1999) ("prosecutors are reluctant to take child sexual abuse cases to trial unless the victim is available to testify").

³¹⁸ Goodman et al., *supra* at 261 ("across studies, when innovations do affect case outcome, either directly or indirectly, the effects appear to be mainly in terms of innovation use being associated with fewer rather than more guilty outcomes").

³¹⁹ Evans & Lyon, *supra*

questions, but it bears little relation to the likelihood that the child will testify honestly or accurately.

Our proposal encourages careful documentation of children's reports soon after the child's first statements about abuse. Many of the cases in which child abuse convictions were overturned because of *Crawford* involved videotaped interviews that had been assessed for their reliability pursuant to special hearsay exceptions for children's complaints of abuse. By limiting defendant's confrontation rights to "testimonial" hearsay, the Court has discouraged videotaping of a formal interview with the input and cooperation of all potential players, including social services and law enforcement. Hearsay is more likely to be classified as testimonial if it is carefully documented, if it is structured questioning, and if it is conducted by agents of the government. However, all of these are elements of a forensic interview, and enhance both reliability and the ability to assess reliability.³²⁰ Videotaping enables subsequent viewers to assess the exact words used by the interviewer and by the child.³²¹ When the interview is conducted well, the videotape will reveal appropriate instructions and rapport building, the use of open-ended questions, non-contingent encouragement, and the child's free narrative of the alleged event. When the interview is conducted poorly, the videotape will reveal the interviewer's bias, coercion, and suggestiveness, on the one hand, and the child's confusion, acquiescence, and misinterpretation on the other. Videotaping also facilitates a reduction in repeated interviewing, because the interview can be shared by the different agencies (and the different players within the agencies) involved in the child's case, including social services, the police, and attorneys in dependency court, family court, and criminal court.³²² Repeated interviewing increases the risk that the child's story will be distorted by suggestions and confabulation that becomes incorporated in the child's narrative, making the child's trial testimony a pale comparison to the original report.

The Supreme Court has refused to review a series of Confrontation Clause cases dealing with child witnesses,³²³ leading the lower courts (and commentators) to come up with a variety of approaches, most of which entail narrowing the definition of what constitutes testimonial hearsay.³²⁴ Our proposal accepts the

³²⁰ Myrna Raeder, Comments on Child Abuse Litigation in a "Testimonial" World: The Intersection of Competency, Hearsay, and Confrontation, 82 Ind. L.J. 1009, 1009 (2007).

³²¹ LUCY BERLINER & ROXANNE LIEB, CHILD SEXUAL ABUSE INVESTIGATIONS: TESTING DOCUMENTATION METHODS (Washington State Institute for Public Policy eds., 2002); Michael E. Lamb et al., *Accuracy of Investigators' Verbatim Notes of Their Forensic Interviews with Alleged Child Abuse Victims*, 24 L. & HUM. BEHAV. 699 (2000).

³²² CALIFORNIA ATTORNEY GENERAL'S OFFICE, CHILD VICTIM WITNESS INVESTIGATIVE PILOT PROJECTS: RESEARCH AND EVALUATION FINAL REPORT (1994).

³²³ See *supra* note.

³²⁴ See *Commonwealth v. Allshouse*, 2012 WL 164838 (Pa. 2012) (reviewing cases). Richard Friedman, whose work was a source of inspiration for *Crawford*, has argued that very young children's statements might be considered non-testimonial. Richard Friedman,

proposition that defendants have a right to confront declarants whose words are gathered in anticipation of prosecution, but it recognizes the reality of child abuse: defendants subvert justice not only through overt threats and violent acts, but also through exploitation and manipulation of our most vulnerable citizens.

Grappling With the Meaning of "Testimonial," 71 BROOK. L. REV. 241, 272 ("some very young children should be considered incapable of being witnesses for Confrontation Clause purposes. Their understanding is so undeveloped that their words ought to be considered more like the bark of a bloodhound than like the testimony of an adult witness"). Most commentators have similarly argued for a narrower definition of "testimonial" when children's statements are considered, usually on the grounds that children don't understand the implications of their statements. See Andrew W. Eichner, Note, *Preserving Innocence: Protecting Child Victims in the Post-Crawford Legal System*, 38 AM. J. CRIM. L. 101 (2010) (children's statements should be judged non-testimonial); Kimberly Y. Chin, Note, *"Minute and Separate": Considering the Admissibility of Videotaped Forensic Interviews in Child Sexual Abuse Cases After Crawford and Davis*, 30 B.C. THIRD WORLD L.J. 67 (2010) (children's statements should be non-testimonial except for those naming the perpetrator); Andrew Darcy, Note, *State v. Buda: The New Jersey Supreme Court, the Confrontation Clause, and "Testimonial" Competence*, 40 SETON HALL L. REV. 1169 (2010) (children's statements should be judged non-testimonial); Jonathan Scher, Note, *Out-of-Court Statements by Victims of Child Sexual Abuse to Multidisciplinary Teams: A Confrontation Clause Analysis*, 47 FAMILY CT. REV. 167 (2009) (children's statements should be judged non-testimonial); Christopher Cannon Funk, Note, *The Reasonable Child Declarant After Davis v. Washington*, 61 STAN. L. REV. 923 (2009) (children's statements should be judged non-testimonial). But see Robert P. Mosteller, *Testing the Testimonial Concept and Exceptions to Confrontation: "A Little Child Shall Lead Them,"* 82 IND. L.J. 917 (2007) (arguing that statements should be defined as testimonial from the perspective of the interviewer, not the child); Tom Lininger, *Kids Say the Darndest Things: The Prosecutorial Use of Hearsay Statements by Children*, 82 IND. L.J. 999 (2007) (statement should be testimonial if interviewer anticipated trial use). Cf. Christopher C. Kendall, Note, *Ongoing Emergency in Incest Cases: Forensic Interviewing Post-Davis*, 10 WHITTIER J. CHILD & FAM. ADVOC. 157 (2010) (children's statements should fall under the exigency exception when they report intra-familial abuse). We have identified only one article focusing on forfeiture in the child abuse context. The author clearly disagrees with the position adopted here. Clifford S. Fishman, *The Child Declarant, The Confrontation Clause, and the Forfeiture Doctrine*, 16 WIDENER L. REV. 279 (2010) (rejecting arguments that pre-crime actions or exploitation of child's vulnerability should be basis for forfeiture). The view of forfeiture advocated here is most analogous to the position taken by Deborah Tuerkheimer with respect to domestic violence. See, e.g., Deborah Tuerkheimer, *Forfeiture after Giles: The Relevance of "Domestic Violence Context,"* 13 LEWIS & CLARK L. REV. 711 (2009).