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Presuming Innocence: Expanding the Confrontation Clause Analysis to Protect Children and Defendants in Child Sexual Abuse Prosecutions

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Note

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In an otherwise quiet courtroom, a prosecutor presses a button on a remote control and presents his witness: a young child on the television screen who is unwittingly testifying in a court of law.[1] The jurors hear three-year-old T.B. answer extensive questions from a child protection worker who recorded the interview months earlier.[2] T.B. gives the name of the defendant, Orlando Bobadilla.[3] He says that Bobadilla touched his "booty" and verifies that his booty is his buttocks.[4] When the tape finishes, silence again consumes the courtroom as twenty-three-year-old Bobadilla is left without recourse in front of the jury—his opportunity to question T.B. had just been turned off with the television.[5]

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1. This introduction is taken from the Minnesota Supreme Court case, *State v. Bobadilla* (*Bobadilla II*), 709 N.W.2d 243, 247–48 (Minn. 2006), which reversed the Minnesota Court of Appeals, State v. Bobadilla (*Bobadilla I*), 690 N.W.2d 345, 349–50 (Minn. Ct. App. 2004), but which was recently discredited upon federal habeas review. Bobadilla v. Carlson (*Bobadilla III*), 570 F. Supp. 2d 1098, 1100 (D. Minn. 2008) (granting an order of habeas corpus relief for Orlando Bobadilla).

2. *Bobadilla III*, 570 F. Supp. 2d at 1101.

3. *Id.*

4. *Id.*; *Bobadilla II*, 709 N.W.2d at 247.

5. *Bobadilla II*, 709 N.W.2d at 246. At trial, Orlando Bobadilla was unable to cross-examine his accuser. After the videotape of T.B.'s statements, he was afforded an opportunity to cross-examine the interviewer who took the stand to provide foundation for the video. *Id.* at 248.

Such a story is not unique in child sexual abuse cases. While defendants face long-term prison sentences[6] and ostracism during child sexual abuse trials,[7] alleged child victims may not appear in court to testify.[8] Judges will often find that children are incompetent to testify, as in T.B.'s case, because children can be stunned into silence on the witness stand or fail to understand basic notions of the truth.[9] Prosecutors must thus rely heavily on hearsay exceptions to admit a child victim's out-of-court statements at trial.[10]

Two Supreme Court cases, *Crawford v. Washington*[11] and *Davis v. Washington*[12] bolstered the Confrontation Clause analysis for admitting hearsay at criminal trials.[13] If a witness

6. Criminal sexual misconduct is often a felony, sentenced by terms of decades. *See, e.g.*, MINN. STAT. § 609.342 (2006) (punishing criminal sexual conduct in the first degree, including sexual contact with persons under the age of thirteen, with up to thirty years in prison). In some states, child sexual abuse carries sentences comparable to murder. *See* MICH. COMP. LAWS § 750.520b (2007) (punishing criminal sexual conduct, which includes sexual penetration with a person under thirteen years of age, by imprisonment for life or for any terms of years, with exceptions); *Man Draws 145-Year Sentence for Sexual Abuse of 7-Year-Old*, FORT BEND NOW, Feb. 13, 2006, http://www.fortbendnow.com/printer_friendly/9432.

7. Persons accused and convicted of crimes suffer from broken social ties during their incarceration regardless of the crime. *See, e.g.*, Joseph Murray, *The Effects of Imprisonment on Families and Children of Prisoners*, *in* THE EFFECTS OF IMPRISONMENT 442, 442 (Alison Liebling & Shadd Maruna eds., 2005) ("Loss of outside relationships is considered the most painful aspect of confinement for prisoners."). Child sexual abusers are even more frequently shunned as outcasts. *E.g.*, Robert Blecker, *Haven or Hell? Inside Lorton's Central Prison: Experiences of Punishment Justified*, 42 STAN. L. REV. 1149, 1172 (1990). Because child molesters are considered social pariahs, they are often exposed to in-prison violence. *Id.*

8. Children may be found unavailable to testify if they are incompetent because of mental capacity or age, an inability to discern the truth, or an inability to convey testimony to the jury. *See, e.g.*, Robert P. Mosteller, *Testing the Testimonial Concept and Exceptions to Confrontation: "A Little Child Shall Lead Them*," 82 IND. L.J. 917, 921–22 (2007).

9. *Bobadilla II*, 709 N.W.2d at 248. For more discussion on the effects of trial on children, see Gail D. Cecchettini-Whaley, Note, *Children as Witnesses After* Maryland v. Craig, 65 S. CAL. L. REV. 1993, 2005 (1992). *See also* Myrna Raeder, *Remember the Ladies and the Children Too*, 71 BROOK. L. REV. 311, 376 (2005) (discussing how trial may retraumatize abused children).

10. *See, e.g.*, John H. Gleason, Crawford v. Washington *and the Limits on Admitting Hearsay in Criminal Trials*, 93 ILL. B.J. 408, 411 (2005) ("For years, prosecutors have relied on evidence of hearsay statements, especially in child-abuse and domestic-abuse cases.").

11. 541 U.S. 36 (2004).

12. 547 U.S. 813 (2006).

13. *Davis*, 547 U.S. at 821; *Crawford*, 541 U.S. at 59.

is unavailable to testify in court, prosecutors may only admit so-called testimonial hearsay if the defendant had a prior opportunity to cross-examine the declarant.[14] *Davis* characterized this testimonial hearsay as statements made during non-emergency questioning where the primary purpose of the questioning is to "potentially establish facts or events for prosecution."[15]

This primary purpose test poses significant problems in child sexual abuse cases. Most states require that child abuse investigations combine the efforts of police, psychologists, social workers, nurses, and doctors.[16] Child advocacy centers, many functioning with funding from local prosecutor's offices or the Department of Justice, are the hub of such investigations.[17] Replete with child-friendly rooms, anatomical dolls, and age-appropriate questioning, these centers purport to help children through their difficult situations and gather evidence for trial.[18]

Because of these multiple purposes of child advocacy centers,[19] courts have struggled with how to treat statements produced during child advocacy centers' forensic interviews, where trained specialists elicit a child's story, oftentimes in front of a video camera.[20] Some courts have determined that the psychological or medical services trump the advocacy centers' prosecu-

14. *Crawford*, 541 U.S. at 59.

15. *Davis*, 547 U.S. at 822.

16. *See, e.g.*, MINN. STAT. § 626.556 (2006) (mandating cross-reporting and joint investigations of child abuse allegations by law enforcement and child welfare agencies). All fifty states mandate some type of reporting. Elizabeth J. Stevens, *Deputy-Doctors: The Medical Treatment Exception After* Davis v. Washington, 43 CAL. W. L. REV. 451, 477 (2007); *see also*, Mosteller, *supra* note 8, at 952 (discussing the mandatory reporting laws and requirements).

17. *See* Nancy Chandler, *Children's Advocacy Centers: Making a Difference One Child at a Time*, 28 HAMLINE J. PUB. L. & POL'Y 315, 330 (2006).

18. For an example of a child advocacy center's goals and services, see CornerHouse, Forensic Interview Services, http://www.cornerhousemn.org/forensic.html (last visited Dec. 1, 2008). The National Children's Advocacy Center also provides a general example of a child advocacy center. *See* The National Children's Advocacy Center, The CAC Model, http://www.nationalcac.org/professionals/model/cac_model.html (last visited Dec. 1, 2008) [hereinafter NCAC, *The CAC Model*].

19. *See, e.g.*, Mosteller, *supra* note 8, at 965–75 (discussing the multiple purposes behind making and gathering statements in child-abuse situations).

20. *See* State v. Hooper, No. 31025, 2006 WL 2328233, at *5 (Idaho Ct. App. Aug. 11, 2006); State v. Henderson, 160 P.3d 776, 778 (Kan. 2007); State v. Krasky, 736 N.W.2d 636, 640 (Minn. 2007); State v. Justus, 205 S.W.3d 872, 877 (Mo. 2006); State v. Blue, 717 N.W.2d 558, 560 (N.D. 2006); State v. Mack, 101 P.3d 349, 349 (Or. 2004).

torial goals, while others have disagreed.[21] In fact, Bobadilla had to wait through several state court appeals before a federal district court decided that his Sixth Amendment right to confrontation had been violated, granting him habeas corpus relief.[22] Unfortunately, this was after the court had sentenced him to 144 months in prison.[23]

This Note explores the prosecutorial use of children's statements made during forensic child advocacy interviews. Part I provides a background of the Supreme Court's interpretation of the Confrontation Clause, child sexual abuse prosecution, child advocacy centers, and select state cases on this issue. Part II argues that child advocacy centers have many purposes, but where there is direct prosecutorial involvement in the interviews and no alternative-theory testing of the child, statements obtained in such interviews violate a defendant's confrontation rights when used at trial absent the declarant's testimony. Part III proposes that the Confrontation Clause analysis should expand to include presumptions that will guide courts in determining whether such statements should be admissible. This solution not only protects the integrity of the Sixth Amendment but also recognizes the unique difficulties of child sexual abuse prosecutions.

I. THE CONFRONTATION CLAUSE, CHILD ADVOCACY CENTERS, AND STATE COURT RULINGS ON FORENSIC INTERVIEW STATEMENTS

The Sixth Amendment of the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ."[24] There has been significant development in the Confrontation Clause analysis that deals with accusatory hearsay.

21. *Compare Henderson*, 160 P.3d at 786 (emphasizing the importance of law enforcement and criminal prosecution), *with Krasky*, 736 N.W.2d at 642 (finding that the purpose of section 626.556 of the Minnesota Statutes is not to prosecute criminals or collect evidence for trial but to protect children whose health or welfare may be jeopardized).

22. The Minnesota Court of Appeals first decided that Bobadilla's confrontation rights had been violated, *Bobadilla I*, 690 N.W.2d 345, 349–50 (Minn. Ct. App. 2004), but the state supreme court reversed. *Bobadilla II*, 709 N.W.2d 243, 257 (Minn. 2006). The federal district court that granted habeas relief to Bobadilla found that Minnesota engaged in an "[u]nreasonable [a]pplication" of the law. *Bobadilla III*, 570 F. Supp. 2d 1098, 1107 (D. Minn. 2008).

23. *Bobadilla II*, 709 N.W.2d at 246.

24. U.S. CONST. amend. VI. This right applies to states through the Fourteenth Amendment. Pointer v. Texas, 380 U.S. 400, 403 (1965).

Child abuse cases often involve a child who cannot testify, and child advocacy centers purport to fix this problem by conducting pretrial forensic interviews.[25] But courts have recently struggled with how to treat the statements obtained in those interviews.

A. HEARSAY AND THE RIGHT TO CONFRONT WITNESSES

The right to confront witnesses is the right to cross-examine them—a fundamental principle, vital to discerning the truth at trial.[26] Face-to-face confrontation in particular—where a defendant cross-examines a witness in court—is considered essential for a fair trial. Facing a witness allows jurors to judge a witness's demeanor. The uncertainty in a witness's voice, and the perspiration on his brow, are supposed to reveal something about a witness's story that an audio or video tape, written record, or repetition by a third party cannot.[27]

It has not been clear, however, whether the Confrontation Clause's right to confrontation also applies to a witness's out-of-court statements, or hearsay.[28] Because of its unreliability, hearsay is generally barred from trial unless the statement falls under an exception.[29] The Supreme Court previously held that the Confrontation Clause was satisfied when the hearsay was sufficiently reliable,[30] but two Supreme Court cases, *Crawford* and *Davis*, recognized that the core concern of the Sixth Amendment is procedural. It does not matter that hearsay statements are reliable, but rather that the defendant is able to

25. *See* Chandler, *supra* note 17, at 332 (discussing forensic interviewing).

26. *See* Perry v. Leeke, 488 U.S. 272, 283 (1989).

27. *See, e.g.*, Maryland v. Craig, 497 U.S. 836, 845 (1990) ("The primary object of the [Confrontation Clause] was to prevent depositions or *ex parte* affidavits . . . being used against the prisoner in lieu of . . . cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." (quoting Mattox v. United States, 56 U.S. 237, 242–43 (1895))).

28. *See* Crawford v. Washington, 541 U.S. 36, 42–43 (2004) ("The Constitution's text does not alone resolve this case. One could plausibly read 'witness against' a defendant to mean those who actually testify at trial . . . .").

29. *See* FED. R. EVID. 803. Commonly used hearsay exceptions are statements made for purposes of medical diagnosis, present sense impressions, and excited utterances. *Id.* 803(1), (2), & (4).

30. Ohio v. Roberts, 448 U.S. 56, 66 (1980).

cross-examine all witnesses who "bear testimony" both in and out of court.[31]

1. Supreme Court Determinations: From Reliable to Testimonial Hearsay

Under *Ohio v. Roberts*, courts could admit hearsay at trial through discretionary standards.[32] As long as a statement bore sufficient "indicia of reliability," meaning that it fell within a "firmly rooted hearsay exception" or had "particularized guarantees of trustworthiness," the Sixth Amendment did not prohibit the admission of the testimony.[33] In *Crawford*, however, the Court argued that the reliability standard of *Roberts* was an "amorphous, if not entirely subjective concept"[34] because it allowed judges to individually devise which factors were trustworthy, without affording the defendant his fundamental right to confront the testimony against him.[35]

The Court noted that the Confrontation Clause arose from a concern for the civil law practice of using *ex parte* interviews (or interrogations held in the absence of the accused) to prosecute defendants.[36] Common law initially borrowed these aspects of civil law[37] until the infamously corrupt trial of Sir Walter Raleigh.[38] The evidence against Raleigh was the *ex parte* testimony of his alleged accomplice who saved himself by implicating Raleigh in a private pretrial hearing.[39] The trial judge refused to let Raleigh confront the witness, and despite Raleigh's pleas to have his accuser called "before [his] face," the judge ultimately sentenced Raleigh to death.[40]

To prevent such injuries to justice and to protect the rights of the accused, cross-examination developed through a series of statutory reforms and practices that are reflected in the Sixth Amendment.[41] In *Crawford*, the Court found that the "unpardonable vice" of the reliability standard in *Roberts* was that

31. Davis v. Washington, 547 U.S. 813, 823 (2006); *Crawford*, 541 U.S. at 51.
32. *Roberts*, 448 U.S. at 66.
33. *Id.*
34. *Crawford*, 541 U.S. at 63.
35. *Id.*
36. *Id.* at 50.
37. *Id.* at 43.
38. *Id.* at 44.
39. *Id.*
40. *Id.*
41. *Id.*

courts were admitting *ex parte* statements which the Confrontation Clause intended to exclude.[42] Confrontation was the only indicium of reliability that satisfied the Sixth Amendment, regardless of the admissibility of statements under famed hearsay exceptions.[43]

Not all out-of-court statements invoke the Sixth Amendment, however.[44] Because the Confrontation Clause historically concerned accusatory statements—that is, *testimonial* statements "made for the purpose of establishing or proving some fact"[45]—the Sixth Amendment protects defendants from testimonial hearsay where there was no prior opportunity to cross-examine a witness who is unavailable to testify in court.[46] Out-of-court statements that are nontestimonial are admissible, provided they fall under a hearsay exception.[47]

2. Definitions of Testimonial Hearsay

As it stands, there is no simple definition of "testimonial." In *Crawford*, the Court identified a "core class" of testimonial hearsay that includes *ex parte* testimony or its "functional equivalent."[48] This class includes statements such as those "that declarants would reasonably expect to be used prosecutorially, . . . extrajudicial statements contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions" and statements that, under the circumstances, would lead an objective witness to believe that his statement would be "available for use at a later trial."[49] The Court applied this analysis in *Crawford* and *Davis* by looking at the case-specific circumstances at issue.[50]

To the Court, the level of government involvement in the production of the statements,[51] the formality of the interview,[52]

42. *Id*. at 63.

43. *See id.* at 69. One exception is dying declarations. *Id.* at 56 n.6. The Court indicated that "the existence of that exception as a general rule of criminal hearsay law cannot be disputed." *Id.*

44. *Id*. at 51.

45. *Id.*

46. *Id*. at 58.

47. *Id*. at 56.

48. *Id*. at 51–52.

49. *Id.*

50. *See* Davis v. Washington, 547 U.S. 813, 817–21 (2006); *Crawford*, 541 U.S. at 66–67.

51. *See Davis*, 547 U.S. at 822–24.

52. *See id.* at 827, 831 n.5; *Crawford*, 541 U.S. at 51–52.

and the elapsed time between the alleged crime and the challenged statements were of particular concern for Confrontation Clause analysis.[53] When the testimony is produced through the "involvement of government officers . . . with an eye toward trial," there is a "unique potential for prosecutorial abuse," as demonstrated in Sir Walter Raleigh's trial.[54] While *Crawford* set forth the basic framework for defining testimonial statements, it did not discuss statements that fell short of its clear-cut example: a woman's statements made while in police custody.[55]

A few years after *Crawford*, the Court further distinguished testimonial and nontestimonial hearsay in two consolidated cases, *Davis v. Washington* and *Hammon v. Indiana*.[56] The Court held that statements are nontestimonial where the circumstances objectively indicate that police or their agents[57] are responding to an ongoing emergency.[58] Statements are testimonial when circumstances objectively indicate that there is no emergency, and the interrogation's "primary purpose [is to] establish or prove past events potentially relevant to later criminal prosecution."[59] An "interrogation" is colloquially defined, meaning that interviews conducted by government agents are also subject to the testimonial framework.[60]

There is some debate as to whether this framework should measure the declarant's expectations. *Davis* set forth an objective-observer test by emphasizing the objective purpose of an interrogation, but a footnote suggests that the declarant's expectation in answering the questions is still important to the constitutional analysis.[61] Many courts and scholars, however, have either found that the objective observer test is correct "historically, doctrinally, and as a matter of policy,"[62] or have

53. *See Davis*, 547 U.S. at 830.

54. *Crawford*, 541 U.S. at 56 n.6.

55. *Id.* at 65.

56. *Davis*, 547 U.S. at 813.

57. *Id.* 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. For purposes of this opinion (and without deciding the point), we consider their acts to be acts of the police.").

58. *Id.* at 822.

59. *Id.*

60. *Crawford*, 541 U.S. at 53 n.4.

61. *Davis*, 547 U.S. at 823 n.1 ("[I]t is in the final analysis of the declarant's statements, not the interrogator's questions, that the Confrontation Clause requires us to evaluate.").

62. Mosteller, *supra* note 8, at 984; *see also* Myrna Raeder, *Comments on*

placed little emphasis on the declarant's expectations in the testimonial analysis.[63]

Davis concluded that, where an alleged victim identified her abuser in response to a 911 operator's immediate inquiries, the statements were nontestimonial and admissible.[64] The Court stated that the victim was describing an ongoing emergency in response to impromptu questioning by the operator, which was necessary to assist in her emergency.[65] By contrast, the victim in *Hammon* gave handwritten statements directly to the police after they arrived at her house,[66] and the statements were found to be inadmissible as testimonial hearsay.[67] Although officers arrived a mere four minutes after the call, the victim was in a separate room from the defendant when she provided the statements, and the statements described past events in response to police inquiries.[68]

Read together, *Crawford* and *Davis* establish that testimonial hearsay will not be admissible where the witness is unavailable to testify at trial and the defendant has not had a prior opportunity to cross-examine the declarant. What is testimonial depends on circumstances objectively indicating the interview's primary purpose.

B. CHILD SEXUAL ABUSE CASES AND ADVOCACY CENTERS

Crawford and *Davis* pose problems for child abuse cases when children do not testify at trial, and such situations are commonplace.[69] Most states have statutes determining that

Child Abuse Litigation in a "Testimonial" World: The Intersection of Competency, Hearsay, and Confrontation, 82 IND. L.J. 1009, 1012 (2007) (concluding that *Davis* accords with the objective-observer test).

63. *See* State v. Henderson, 160 P.3d 776, 785 (Kan. 2007) ("A young victim's awareness, or lack thereof, that her statement would be used to prosecute, is not dispositive of whether her statement is testimonial."); State v. Justus, 205 S.W.3d 872, 880 (Mo. 2006) (noting that a child could realize his statements would be used to prosecute an alleged offender).

64. *Davis*, 547 U.S. at 828–29. The Court noted that the operator's inquiries could have evolved into eliciting testimonial statements once the inquiries were no longer serving the emergency. *Id.* Trial courts were to strike these statements through motions *in limine*. *Id*. at 829.

65. *Id*. at 828.

66. *Id*. at 832.

67. *Id*. at 830.

68. *Id*.

69. *See* Mosteller, *supra* note 8, at 920–22 (discussing how widespread the problem is because courts have discretionary power to find children incompetent to testify and arguing that courts should encourage confrontation).

children under a certain age will be found incompetent to testify if they lack the capacity to understand basic notions of the truth, or are simply too terrified to testify.[70] When the Supreme Court established the reliability test in *Roberts*, child advocacy centers were developing around the country[71] and states enacted statutes guaranteeing the trustworthiness of a child's statements given at advocacy centers.[72] The statutes either explicitly stated that such statements were reliable,[73] or they delineated in detail the steps of a joint investigation, including the type of questioning that interviewers needed to ask, thus securing that a given statement would be reliable.[74]

Child sexual abuse cases can be difficult to prosecute.[75] The shame that abused children feel often silences them, and victims can recant their stories.[76] Child advocacy centers developed in the 1980s in an effort to empower children to come forward and stop the cycle of abuse.[77] Working as a team, prosecu-

70. *See, e.g.*, MINN. STAT. § 595.02(1)(m) (2006). At least forty states have "tender years" statutes which determine competency with reference to age. Snowden v. State, 846 A.2d 36, 39 n.7 (Md. Ct. Spec. App. 2004).

71. Advocacy centers began developing in the mid-1980s. *See, e.g.*, The National Children's Advocacy Center, History, http://www.nationalcac.org/ncac/history.html (last visited Dec. 1, 2008) [hereinafter NCAC, *History*] (describing the history of the National Children's Advocacy Center). The Supreme Court heard *Ohio v. Roberts* on November 26, 1979. 448 U.S. 56 (1980).

72. *See* State v. Snowden, 867 A.2d 314, 320 (Md. 2005) ("Following *Roberts*, many States enacted statutes allowing the admission into evidence of certain hearsay statements in criminal trials."); *see also* T.P. v. State, 911 So. 2d 1117, 1122 (Ala. Crim. App. 2004) (discussing how Alabama revamped legislation that would predicate an unavailable child witness's statements).

73. *See* Cynthia J. Hennings, *Accommodating Child Abuse Victims: Special Hearsay Exceptions in Sexual Offense Prosecutions*, 16 OHIO N.U. L. REV. 663, 672 n.57 (listing statutes adopted by twenty-four states to ensure the reliability of child statements in child sex abuse cases).

74. At that time, some statutes required corroborating evidence before the admission of hearsay. *See* Nora A. Uehlein, Annotation, *Witnesses: Child Competency Statutes*, 60 A.L.R. 4th 369, 468 (1988).

75. *See* Lynn McLain, *Children are Losing Maryland's "Tender Years" War*, 27 U. BALT. L. REV. 21, 29 (1997) (noting that one difficulty in prosecution is that the abused children are often the only witnesses); Erin Thompson, Comment, *Child Sex Abuse Victims: How Will Their Stories Be Heard After* Crawford v. Washington*?*, 27 CAMPBELL L. REV. 279, 290 (2005) ("The prosecution of child sex crimes becomes increasingly difficult because young children lose memory, traumatized children block memory, and victims blame themselves.").

76. *See, e.g.*, McLain, *supra* note 75, at 28 (discussing the reticence or intimidation an abused child might feel before coming forward).

77. The country's leading child advocacy center was established in 1985 by a district attorney in Huntsville, Alabama. *See* NCAC, *History*, *supra* note 71.

tors, social workers, nurses and physicians attempt to holistically tackle cases.[78] Today, over six hundred child advocacy centers are operating in the United States—at least one in every state.[79]

Child advocacy centers follow a model that is structured to minimize trauma for children alleging abuse.[80] Many advocacy centers emphasize that their primary goal is to serve the needs of children,[81] which is obvious in the centers' brightly painted walls, baskets of dolls, and shelves of therapeutic coloring books.[82] The ambiance, however, does not dilute the centers' other purpose: to produce and preserve evidence for the prosecution of the alleged offenders.[83]

Child advocacy centers conduct forensic interviews which use open-ended and developmentally appropriate questioning techniques.[84] The rooms are generally equipped with cameras or two-way mirrors that allow an investigative team to monitor and record the interviews.[85] After the interview, the child usually undergoes a medical examination performed by a phy-

78. *See id.*; CornerHouse, Forensic Interview Services, *supra* note 18 (explaining the coordinated efforts of law enforcement, child protection and prosecutors in assessing and investigating allegations of child abuse).

79. *See* NCAC, *History*, *supra* note 71 (stating that child abuse professionals from all fifty states have been trained by NCAC).

80. *See id.* Many child advocacy centers follow a "RATAC" protocol. *See, e.g.*, CornerHouse, Forensic Interview Services, *supra* note 18. The RATAC protocol stands for rapport, anatomy identification, touch inquiry, abuse scenario, and closure. For a more detailed look at the protocol, see AM. PROSECUTOR RES. INST., FINDING WORDS: HALF A NATION BY 2010, at 2, 5–7 (2003), http://www.ndaa.org/pdf/finding_words_2003.pdf.

81. *See, e.g.*, Alan Riquelmy & Lily Gordon, *Local Authorities Team Up to Fight Child Sex Crimes*, COLUMBUS LEDGER-ENQUIRER, June 10, 2007 ("'The primary purpose of the child advocacy center is to see the needs of a child are always put first . . . .'" (quoting child advocate Angela Crabtree)).

82. *See* CornerHouse, Forensic Interview Services, *supra* note 18.

83. *See, e.g.*, NCAC, *The CAC Model*, *supra* note 18 (stating that a benefit to child advocacy centers is "increased successful prosecutions").

84. *See* Emily Gurnon, *New Ways of Interviewing Lessen Trauma for Children: Past Errors Have Helped Improve Techniques to Detect Sexual Abuse*, ST. PAUL PIONEER PRESS, Apr. 22, 2007, at A1; CornerHouse, Forensic Interview Services, *supra* note 18; NCAC, *The CAC Model*, *supra* note 18.

85. *See* Sarah Mishkin, *Trauma Eased Through Efficiency*, ST. PETERSBURG TIMES, July 27, 2007, at 1 (reporting that an investigative team of police, child protection services, and a guardian ad litem monitor interviews through closed-circuit television); Riquelmy & Gordon, *supra* note 81 (reporting that interview rooms at a Georgia child advocacy center have hidden cameras monitored by "a district attorney, a police officer and a Georgia Department of Family and Children's Services worker").

sician or nurse.[86] If the investigation produces enough evidence to build a case, prosecutors will use the evidence at trial.[87] The forensic interviewer and medical examiner will testify to the information gathered during the interview and examination and the videotaped interview may be entered into evidence.[88]

C. STATE COURTS RESPOND: CHILD ADVOCACY INTERVIEWS AND HEARSAY STATEMENTS AFTER *CRAWFORD* AND *DAVIS*

Clearly, the importance of prosecuting child abusers is deeply felt in society. Hundreds of thousands of children are sexually abused each year.[89] Sexually abused children suffer from anxiety and depression, and are at a greater risk of engaging in alcohol or drug abuse as adults.[90] For more than twenty years, child advocacy centers have collected children's statements and put them before juries. It is no wonder that there may be a "general reticence" to find a child's statements testimonial.[91]

After *Crawford* and *Davis*, states have focused their testimonial inquiries on the so-called primary purpose of the investigation that generates the challenged statements:[92] if the primary purpose of the interviews is not prosecutorial, then a child's statements are not testimonial.[93] Since joint investiga-

86. *See, e.g.*, CornerHouse, Forensic Medical Examinations, http://www.cornerhousemn.org/medicalexams.html (last visited Dec. 1, 2008).

87. *See, e.g.*, Riquelmy & Gordon, *supra* note 81 (noting that interviews at a child advocacy center enable law enforcement, the district attorney, and other agencies to form a "team" that helps build a case and bring it to trial).

88. For examples of this occurrence, see State v. Krasky, 736 N.W.2d 636, 643 (Minn. 2007); *Bobadilla II*, 709 N.W.2d 243, 255–56 (Minn. 2006). *See also* Robert P. Mosteller, Crawford v. Washington: *Encouraging and Ensuring the Confrontation of Witnesses*, 39 U. RICH. L. REV. 511, 606 (2005) (discussing the practice of eliciting testimony from doctors). Some states have, however, ruled that this violates defendants' confrontation rights. *See, e.g.*, State v. Henderson, 160 P.3d 776, 782 (Kan. 2007) (finding that a trial court's admission of a videotaped interview of a three-year-old accuser violated the Confrontation Clause).

89. The exact numbers are difficult to compute because of victim recantations and unreported incidents. The National Children's Advocacy Center, however, estimates that it helps more than 250,000 children annually. NCAC, *History*, *supra* note 71.

90. *See* Thompson, *supra* note 75.

91. Mosteller, *supra* note 8, at 978.

92. *See Henderson*, 160 P.3d at 787 (discussing the primary purpose of a videotaped interview); *Krasky*, 736 N.W.2d at 641 (arguing that the primary purpose of a forensic interview of an alleged child sexual abuse victim is to ensure the general welfare of the child).

93. *See Henderson*, 160 P.3d at 787; *Krasky*, 736 N.W.2d at 641.

tions statutes were created to protect children, Minnesota, for example, found in *State v. Krasky* that the primary purpose of the interview conducted pursuant to the joint investigation statute was to ensure the child's welfare and so the court admitted the statements from the interview as nontestimonial.[94] But other courts have rejected this argument.[95]

Krasky involved a child's videotaped statements made at a child advocacy center.[96] The Minnesota Supreme Court held that the statements were admissible as nontestimonial hearsay, even though the last contact the alleged victim had with the defendant was eighteen months before the interview.[97] The state considered it "significant" that the interview was conducted "in accord with a statutory scheme"[98] that was enacted to protect the health and welfare of children.[99] Disregarding the fact that the interview had taken place at the behest of law enforcement and was conducted and videotaped in the presence of police officers, the court found that the actual purpose of the interview was to ensure child welfare. According to the Minnesota Supreme Court, this was because child advocacy centers help to protect a child's health and safety.[100] The court thus reasoned that under *Crawford* and *Davis*, statements produced at the advocacy center could not violate the defendant's confrontation rights because the primary purpose of the interview is to protect a child's welfare, not to put a predator behind bars.[101]

Kansas and Missouri, on the other hand, determined that statements resulting from such interviews are testimonial.[102] As in *Krasky*, the interviews took place some time after the alleged events and the statements were videotaped in front of law enforcement officers.[103] Following the standard confrontation framework, the totality of circumstances—including the formality of the interview and level of government involvement—showed that while the safety of the child was a concern, the

94. 736 N.W.2d at 641–42.

95. *See Henderson*, 160 P.3d at 782–92; State v. Snowden, 867 A.2d 314, 316 (Md. 2005).

96. 736 N.W.2d at 638–39.

97. *Id.* at 638 & n.1.

98. *Id.* at 641 (quoting *Bobadilla II*, 709 N.W.2d 243, 254 (Minn. 2006)).

99. *Id.*; *see* MINN. STAT. § 626.556, subdivs. 1, 10(a) (2006).

100. *Krasky*, 736 N.W.2d at 641.

101. *Id.*

102. State v. Henderson, 160 P.3d 776, 792 (Kan. 2007); State v. Justus, 205 S.W.3d 872, 874 (Mo. 2006).

103. *Henderson*, 160 P.3d at 778–79, 789; *Justus*, 205 S.W.3d at 881.

main effect of the investigation was to elicit the child's testimony, just as a prosecutor would from a standing witness.[104] Because no cross-examination of the accuser occurred at the center, the court found that the statements must be barred from evidence when the child is incompetent to testify.[105]

These cases exemplify the problem with *Davis*'s primary purpose test. Facing similar facts, state courts have remarkably arrived at opposite conclusions regarding a defendant's constitutional right. This is because child advocacy centers have many missions: promoting a child's health and welfare, securing the child's safety, and gathering evidence to be used in prosecution. No one mission is above the rest, but as argued below, this should not erode certain testimonial aspects of the child advocacy interviews.

II. NOTWITHSTANDING THEIR MANY PURPOSES, CHILD ADVOCACY CENTERS PRODUCE TESTIMONIAL HEARSAY

The Confrontation Clause bars the admission of testimonial hearsay where there was no opportunity to cross-examine those statements. Because there are prosecutorial purposes to the forensic interviews at child advocacy centers, and because they are not conducted during an emergency, a child's statements during such interviews should be scrutinized to determine whether they are testimonial. The extent of direct government involvement in the questioning, the monetary prosecutorial incentives, and the lack of adversarial-like testing are factors in determining whether these statements are testimonial, irrespective of the multiple purposes of the forensic interviews conducted at child advocacy centers.

A. THE MANY MISSIONS OF CHILD ADVOCACY CENTERS, INCLUDING PROSECUTION

The National Children's Advocacy Center—a model child advocacy center which trains other child advocacy specialists—defines child advocacy centers as "child-focused, community-oriented, facility-based program[s] in which representatives from many disciplines meet to discuss and make decisions about investigation, treatment and prosecution of child abuse

104. *Henderson*, 160 P.3d at 790; *Justus*, 205 S.W.3d at 880–81.
105. *Henderson*, 160 P.3d at 792; *Justus*, 205 S.W.3d at 881.

cases."[106] It identifies four main objectives for the forensic evaluation of a child. The first objective is to determine "the likelihood of abuse."[107] The second is to "gather . . . facts necessary for child protection and law enforcement . . . ."[108] The third is to allow a child to recount his story in a "non-threatening environment."[109] And the fourth is "to make treatment recommendations."[110] Child welfare is integral to child advocacy centers by both providing "needed mental health treatment and other services to children and families" and "coordinating and tracking investigative, prosecutorial, child protection and treatment efforts" so that sexually abused children are not forgotten.[111]

1. The Psychological and Medical Purposes

Unlike many adult victims, abused children need other people to assess their situation to make sure they are no longer in harm's way, and child advocacy centers attempt to provide this service.[112] Interviewers inquire into whether the child is still in contact with the person who is hurting him.[113] Questions about the past events assist the doctors in alleviating the current medical condition of the child.[114]

The benefits of the child advocacy model are apparent when considering the hysteria that can surround child sexual abuse cases. In the 1980s, there was an increase in the number of child sexual abuse cases, particularly involving child-molestation rings.[115] The lure of capturing sexual predators

106. The National Children's Advocacy Center, What Is a Child Advocacy Center?, http://www.nationalcac.org/ncac/what_is_cac.html (last visited Dec. 1, 2008).

107. The National Children's Advocacy Center, Extended Forensic Evaluations, http://www.nationalcac.org/professionals/model/forensic_eval.html (last visited Dec. 1, 2008).

108. *Id.*

109. *Id.*

110. *Id.*

111. *E.g.*, NCAC, *The CAC Model*, *supra* note 18.

112. *See, e.g.*, CornerHouse, Forensic Interview Services, *supra* note 18 (describing a local child advocacy center's mission as trying "to maintain the highest quality intervention system for children alleged to be victims of abuse and violence").

113. *See* Mosteller, *supra* note 8, at 951, 953–54.

114. *Id.* at 951.

115. Lola Vollen & Dave Eggers, *A Culture of Fear: A Series of Child Abuse Cases in the Mid-1980s Caused Mass Hysteria*, *in* SURVIVING JUSTICE: AMERICA'S WRONGFULLY CONVICTED AND EXONERATED 186 (Vollen & Eggers eds., 2005).

caused some prosecutors to pursue cases that "def[ied] logic."[116] Upon repeated questioning by prosecutors, social workers, and law enforcement, uncorroborated stories of sexual abuse developed into tales of satanic killings, cannibalism, and never-to-be-found underground tunnels and castles.[117]

At that time, little had been studied about child susceptibility to false memories and many coercive interview techniques led to predator "witch hunts."[118] The McMartin Preschool case is one such example. The case involved several defendants, took over six years, and cost more than $15 million.[119] The accused parties spent a total of nine years behind bars while facing "patently absurd" charges[120] involving witches, warlocks, and satanic rituals.[121] Other cases include the Wee-Care Nursery School teacher, Kelly Michaels, who according to her child-accusers forced students to eat excrement,[122] and Dale Akiki, a disfigured Sunday school teacher, who children claimed had killed animals and drank their blood before engaging in sex rituals.[123] In Jordan, Minnesota, one prosecutor charged twenty-four people with molesting thirty-seven children who had alleged that the adults had orgies with them during which children were stabbed, shot, and beheaded.[124] None of these charges, it turns out, were true.[125]

116. Jonathan Kaminsky, *Devil's Advocate: What Would a Lawyer Do to Clear His Client of Child Sexual Abuse Charges?*, CITY PAGES (Minneapolis, Minn.), July 11, 2007, at 15.

117. *See, e.g.*, TERENCE W. CAMPBELL, SMOKE AND MIRRORS: THE DEVASTATING EFFECT OF FALSE SEXUAL ABUSE CLAIMS 4–14 (1998) (detailing the charges of various sexual abuse cases).

118. *See* John Stoll, *If a Five-Year-Old Says You Did It, You Did It*, *in* SURVIVING JUSTICE, *supra* note 115, at 179–85; Jacob V. Lamar, Jr. & J. Madeline Nash, *Disturbing End of a Nightmare*, TIME, Feb. 25, 1985, at 22 (describing a case from Jordan, Minnesota where twenty-four adults were charged with molesting thirty-seven children as a "witch-hunt").

119. CAMPBELL, *supra* note 117, at 4.

120. *Id.*

121. PAUL EBERLE & SHIRLEY EBERLE, THE ABUSE OF INNOCENCE: THE MCMARTIN PRESCHOOL TRIAL 20, 27–28 (1993).

122. CAMPBELL, *supra* note 117, at 14.

123. Frontline, Innocence Lost the Plea: Other Well-Known Cases, http://www.pbs.org/wgbh/pages/frontline/shows/innocence/etc/other.html (last visited Dec. 1, 2008).

124. No children, however, were ever reported missing and no bodies were ever found. Kaminsky, *supra* note 116, at 15.

125. Five of the seven defendants in the McMartin Preschool case were found not guilty, and the jury could not reach a unanimous decision for the remaining two defendants. CAMPBELL, *supra* note 117, at 4. Dale Akiki was acquitted on all charges and later brought suit against prosecutors for libel

How could this happen? By the time any of these children actually testified at trial they had repeatedly met with social workers, therapists, police, prosecutors, and doctors, and the stories they ultimately presented were not their own.[126] Interviewers often used suggestive questions[127] and many of the meetings were undocumented, providing no opportunity to check their veracity.[128] While some defendants were acquitted,[129] exonerated,[130] or had their cases dismissed[131] the

and emotional distress. Frontline, *supra* note 123. Kelly Michaels's conviction was overturned eight years after the case's inception. CAMPBELL, *supra* note 117, at 19. As for the cases in Jordan, Minnesota, one defendant pleaded guilty, two were acquitted, and the remaining twenty-one charges were voluntarily dropped. Maryland v. Craig, 497 U.S. 836, 868–69 (1990) (Scalia, J., dissenting). An investigation by the Minnesota Attorney General found no credible evidence to substantiate the allegations. *Id.*

126. *See Craig*, 497 U.S. at 869; CAMPBELL, *supra* note 117, at 64–80 (discussing coercive interview techniques and the results of repetitive meetings); Kaminsky, *supra* note 116, at 18.

127. *See, e.g.*, CAMPBELL, *supra* note 117, at 64–68 (providing extensive examples of the various way questioners repetitively assumed conclusions during forensic interviews, despite children refuting them). Interviewers not only used leading questions, but they often disregarded indications that a child had not been abused. *Id.* During one interview for the Kelly Michaels case, the interviewer proceeded as follows:

> *Interviewer*: Did Kelly have public [sic] hair?
> *Child*: Nah, I know cause it's grown ups . . . I know about that.
> *Interviewer*: So I guess that means you saw her private parts, huh? Did Kelly ask the kids to look at her private parts, or to kiss her private part or…
> *Child*: I didn't really do that. . . I didn't even do it.
> *Interviewer*: But she made you.
> *Child*: She made me. She made me . . . But I couldn't do it . . . So I didn't really do it. I didn't do it.
> *Interviewer*: Did it smell good?
> *Child*: Shhh.
> *Interviewer*: Her private parts?
> *Child*: I don't know.
> *Interviewer*: Did it taste good? Did it taste like chocolate?

Id. at 64–65.

128. *See, e.g.*, Frontline, *supra* note 123.

129. CAMPBELL, *supra* note 117, at 4 (noting the acquittal of the *McMartin* defendants).

130. *See, e.g.*, Stoll, *supra* note 118, at 197–99 (providing an essay of a man who spent nineteen years in prison before being exonerated of molesting his son and other children).

131. *See, e.g.*, *Minnesota Says Abuse Case Was Improperly Conducted*, N.Y. TIMES, Feb. 13, 1985, at A16 (noting that child sexual abuse charges against twenty-one defendants had been dropped in light of prosecutorial misconduct).

charges brought against them were at an irreparable cost to the state and their individual lives.[132]

Child advocacy centers purport to have corrected certain problems that occurred in these situations.[133] Training sessions teach multidisciplinary teams the fundamentals of child development, suggestibility, and corroborating a child's story.[134] Instead of routing the child through interviews with the police, then the social worker, then the psychologist, and then again with a police officer, the child may go to one place where he feels safe and protected.[135] The interviewer is supposed to ask nonleading questions, and a video camera is to capture the alleged victim's testimony closer to the time of the event in question than the trial, thus minimizing the possibility of exaggerated stories.[136] While this format resolves some of the concerns about false accusations, today's child advocacy centers still have many flaws. The most notable are the lack of adversarial testing of the child alleging abuse and the very strong prosecutorial ties to the centers.

2. The Prosecutorial Purpose

Regardless of other goals, child advocacy centers have a clear prosecutorial purpose. *Davis* expressed a specific concern over the involvement of "government officers" in an interview because of the potential for prosecutorial abuse,[137] which had already been well documented in child sexual abuse cases like the McMartin Preschool case.[138] While the scope of the defini-

132. *See, e.g.*, CAMPBELL, *supra* note 117, at 4 (detailing the cost of the *McMartin* case). False accusations also have damaging effects on children. *See, e.g.*, Maggie Jones, *Who Was Abused?*, N.Y. TIMES MAG., Sept. 19, 2004, at 78. One boy, who accused his mother of abuse, wrote in a poem: "She didn't do it. I was forced to lie. Here I go to cry, cry, cry." *Id.* at 80.

133. *See* Gurnon, *supra* note 84; Childhelp, Advocacy Centers, http://www.childhelp.org/about/programs-and-services/childhelp-national-child-abuse-hotline-1-800-4-a-child/advocacy-centers (last visited Dec. 1, 2008) (listing child advocacy centers' advantages).

134. AM. PROSECUTOR RES. INST., *supra* note 80.

135. *See, e.g.*, *Bobadilla II*, 709 N.W.2d 243, 255 (Minn. 2006) ("Avoiding multiple interviews is a critical concern when dealing with children not only because the interviews are often traumatic for the child, but also because multiple interviews increase the chance that the children will be confused by unnecessarily suggestive questions.").

136. *See* Gurnon, *supra* note 84; Childhelp, Advocacy Centers, *supra* note 133.

137. Davis v. Washington, 547 U.S. 813, 824 (2006).

138. *See* CAMPBELL, *supra* note 117; Vollen & Eggers, *supra* note 115; CAPTURING THE FRIEDMANS (HBO Documentary 2003) (documenting one family's

tion of a government officer was once seemingly limited to law enforcement, perhaps excluding child advocacy interviewers from the prosecutorial analysis, *Davis* noted that a 911 operator was, at the very least, an "agent[] of law enforcement"[139] and her questioning was indistinguishable from police interrogations for purposes of the Sixth Amendment.[140]

Similarly, while the interviewers at child advocacy centers are usually specially trained nurses, social workers, or physicians—not police officers or 911 operators[141]—forensic work is integral to their jobs.[142] Though they do not wear badges, the interviewers are acting on behalf of the prosecuting government.[143] Child advocacy centers have even received monetary incentives to prosecute alleged abusers.[144] The Department of Justice and local prosecutors' offices give large grants to centers, sometimes totaling millions of dollars.[145]

More important, the questions in the interviews are purposely structured to elicit the child's accusatory statements.[146] In order to "help prosecutors build stronger cases and put more abusers behind bars," the centers have streamlined evidence-gathering, and prosecutors or police may have an immediate say in how the interview is conducted.[147] Videotaped recordings

journey through sexual abuse charges); *Frontline*: *Innocence Lost the Plea* (PBS television broadcast May 27, 1997).

139. *Davis*, 547 U.S. at 823 n.2.

140. *Id.* at 838.

141. *See* Gurnon, *supra* note 84; Childhelp, Advocacy Centers, *supra* note 133; CornerHouse, Forensic Interview Services, *supra* note 18.

142. *See* AM. PROSECUTOR RES. INST., *supra* note 80; CornerHouse, Forensic Interview Services, *supra* note 18. Even if interviewers and examiners are not government agents, the Court has suggested that statements may be testimonial if they are made to "neutral" parties. As *Crawford* noted, the framers would have been "astounded to learn that *ex parte* testimony could be admitted . . . because it was elicited by 'neutral' government officers." Crawford v. Washington, 541 U.S. 36, 66 (2004).

143. *See* State v. Snowden, 867 A.2d 314, 326 (Md. 2005) (noting that the social worker's role as the interviewer was "little different from the role of a police officer in a routine police interrogation"); State v. Mack, 101 P.3d 349, 352 (Or. 2004) (finding that a social worker was serving as a "proxy for the police").

144. *See, e.g.*, Kaminsky, *supra* note 116, at 16.

145. *See, e.g.*, *id.* at 18 (noting that grants from the Department of Justice have given one child advocacy center $1.7 million since 1999).

146. *See, e.g.*, AM. PROSECUTOR RES. INST., *supra* note 80; CornerHouse, Forensic Interview Services, *supra* note 18 (describing Cornerhouse Interagency Child Abuse Evaluation and Training Center's processes for assessing and investigating reported instances of child abuse).

147. Mishkin, *supra* note 85 (quoting a child advocacy center social work-

are either shown to juries, or they may be used to help prosecutors in their investigations.

By acting on police referrals, providing prosecution with collected evidence, and in receiving financial support from the same coffers as prosecutors, child advocacy centers have a prosecutorial nature.[148] The reality that forensic interviews may have multiple purposes cannot simply expunge the prosecutorial force behind the centers. A medical examination purpose, or safety purpose or psychological purpose is simply not a "talisman for a nontestimonial determination,"[149] but neither does the prosecutorial nature obliterate the centers' other vital tasks.

B. A TESTIMONIAL INDICATION: THE NONEMERGENCY SITUATION

As required by *Davis*, in order for statements to be testimonial, not only must they have a prosecutorial purpose, but the circumstances must objectively indicate that there is not an ongoing emergency. While *Davis* "muddies its analysis in a footnote"[150] which declares that the Confrontation Clause concerns a declarant's expectation in making the statement,[151] the objective purpose of statements from a child's perspective would be fruitless, if not impossible to determine, because children may lack capacity to understand the consequences of their statements.[152] State courts seem to agree that the objec-

er).

148. *See* T.P. v. State, 911 So.2d 1117, 1123 (Ala. Crim. App. 2004) (finding that because the child's statements arose out of an interview with social workers and police officer working as a criminal investigation team, the interview was similar to a police investigation); *Mack*, 101 P.3d at 352 (finding that the caseworker conducting the interview "was serving as a proxy for the police"). *But see* State v. Vigil, 127 P.3d 916, 923–24 (Colo. 2006) ("The fact that the doctor was a member of a child protection team does not, in and of itself, make him a government official absent a more direct and controlling police presence . . . .").

149. Mosteller, *supra* note 8, at 957. Many courts have also agreed. *See* United States v. Bordeaux, 400 F.3d 548, 555–59 (8th Cir. 2005) (addressing the issues inherent to "forensic interviews" with respect to the Confrontation Clause); State v. Snowden, 867 A.2d 314, 320–33 (Md. 2005) (discussing the admissibility of *ex parte* testimony); *Mack*, 101 P.3d at 349 (determining the question of whether statements made by a child to a Department of Human Services caseworker were admissible).

150. Raeder, *supra* note 62, at 1012–13.

151. Davis v. Washington, 547 U.S. 813, 822 n.1 (2006).

152. *See, e.g.*, Raeder, *supra* note 62, at 1012 (discussing the viability of an assumption that "the stress of the event . . . defeat[s] the [child's] ability to

tive purpose of the interviews counts for Sixth Amendment analysis.[153] At most, a victim's awareness that his statements would later be used to prosecute the alleged perpetrator should be "but one factor" for courts to consider in light of *Davis* and *Crawford*.[154]

Analyzing the centers from an objective-observer point of view instead, one can see that the forensic interviewers are typically not questioning children in response to an ongoing emergency. Child advocacy centers are not in emergency rooms—they are separate from hospitals and police stations; and most of the interviews are conducted at least several hours, if not years, after the alleged abuse.[155] Children are likely very far away from their alleged abuser, and many interviewers engage the child by using forensic dolls or children's books before the interview so that the child is not only calm, but comfortable.[156] To compare, the Supreme Court found that the victim in *Hammon* made testimonial statements in a nonemergency situation where she was in a separate room from the defendant—but in the same house—and where the 911 call had been placed only four minutes prior to her statements.[157]

The circumstances most commonly associated with interviews at child advocacy centers indicate that the statements from those interviews are made under nonemergency conditions. While it may be true that child sexual abuse is an omnipresent emergency—that society's sirens should sound so long as predators are loose—so is the notion that a defendant's constitutional right to confrontation is being violated.

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lie").

153. *See* State v. Hooper, No. 31025, 2006 WL 2328233 (Idaho Ct. App. Aug. 11 2006); *Snowden*, 867 A.2d at 324; Mosteller, *supra* note 8, at 984 ("The primary focus in *Crawford* was on the method by which government officials elicited out-of-court statements for use in criminal trials, not on the declarant's intent or purpose in making the statement."); Raeder, *supra* note 62, at 1012 ("I believe the Supreme Court, like the majority of appellate courts, would reject interpreting the objective observer standard from the perspective of a child of similar age.").

154. State v. Henderson, 160 P.3d 776, 785 (Kan. 2007).

155. For example, the interview in *State v. Krasky* occurred eighteen months after any possible contact with the defendant. 736 N.W.2d 636, 638 n.1 (Minn. 2007). The interview in *Henderson* was a few weeks afterwards. *Henderson*, 160 P.3d at 778.

156. *See, e.g.*, AM. PROSECUTOR RES. INST., *supra* note 80 (discussing the program's various interviewing procedures); CornerHouse, Forensic Interview Services, *supra* note 18.

157. Hammon v. Indiana, 547 U.S. 813, 813 (2006).

C. CIRCUMSTANCES THAT PRODUCE TESTIMONIAL HEARSAY: PROSECUTORIAL CONNECTIONS AND NO ADVERSARIAL TESTING

Finally, despite child advocacy centers' many purposes, certain circumstances make the statements from their forensic interviews testimonial. As established, these interviews do have prosecutorial goals and they are conducted in non-emergency situations. When prosecutors and police are directly involved in questioning the child, when there is monetary incentive to prosecute, or when there is no adversarial-like testing of the child, the function of the interviews turns primarily prosecutorial, and the statements become testimonial.

1. A Prosecutorial Examination

As previously discussed, the right to confrontation arose out of anxiety over *ex parte* examinations which could implicate defendants without affording the opportunity to cross-examine the accusers. Child advocacy interviews can resemble *ex parte* hearings because of heavy prosecutorial involvement. Many joint investigation statutes require interviewers to work with police officers and prosecutors,[158] and interviewers sometimes meet with the prosecution team even before meeting the child.[159] Similarly, because officers are often notified of alleged abuse before the child advocacy centers, they refer victims and their families to the centers, and sometimes even drive them there.[160] The interviewer may only then be briefed on the case by the officer or given a police report.[161]

During the interview, police officers and prosecutors can monitor the child's statements and directly manipulate the interview.[162] Prosecutors and police may be in the interview

158. *See* MINN. STAT. § 626.556 (2006) (requiring interagency coordination); State v. Buda, 912 A.2d 735, 743 (N.J. Super. Ct. App. Div. 2006) (discussing how child advocacy workers are "charged with taking action, using court proceedings, to protect the best interests of the child" and must report all suspected abuse to the county prosecutor (citing N.J. STAT. ANN. §§ 9:6–8.36a (2006); N.J. ADMIN. CODE 10:129-1 (2006))).

159. *See* State v. Vigil, 127 P.3d 916, 935–36 (Colo. 2006) (retelling how, before the doctor conducted the forensic exam, an officer spoke with him about the background of her sexual assault investigation); *Buda*, 912 A.2d at 743 (noting that a child-advocacy worker talked with the prosecutor's investigator before interviewing a child).

160. *Vigil*, 127 P.3d at 935–36.

161. *See* State v. Snowden, 867 A.2d 314, 326 (Md. 2005).

162. For examples of this occurrence, see State v. Henderson, 160 P.3d 776, 787 (Kan. 2007); State v. Mack, 101 P.3d 349, 349–50 (Or. 2004) (discussing the presence of law enforcement during the forensic interview).

room, as was the case for *Bobadilla*,[163] or they may watch from behind a two-way mirror[164] or via closed-circuit television.[165] After asking initial questions, interviewers may leave the meeting, consult with the prosecutor, and then return to the child for more questioning in case the prosecutor thinks something was missed.[166] Though there is an intermediary person between the prosecutor's question and the victim in this situation, it is as if the direct examination of the accuser has begun, but no one invited the defendant, or the jurors. By directly involving prosecutors in eliciting a child's testimony, the multiple purposes of the interview fade into a primary prosecutorial function, causing the statements to become testimonial. Prosecutors, after all, can only protect a child's health or safety by locking up the alleged abuser.

2. The Lack of Adversarial Testing

Crawford and *Davis* expressed concern with interviews that were "weaker substitute[s]" for live testimony because the Confrontation Clause demands that the accused be able to test the veracity of his accuser's statements.[167] Child advocacy interviews appear to fall into this category. Although the interviews are formal, as with any trial examination, there is little to no investigation into the truth of the allegations.

Child advocacy interviews follow a protocol to "ascertain[] whether abuse [has] occurred."[168] Despite attempts to "steer[] clear of leading questions,"[169] investigative inquiries establish a background story.[170] In *State v. Justus*,[171] for example, the interviewer "reminded [the victim] that she had said earlier that she did not like her daddy and that he had kissed her 'pee-

163. *Bobadilla III*, 570 F. Supp. 2d 1098, 1101 (D. Minn. 2008).

164. *See, e.g.*, *In Re* Rolandis G., 817 N.E.2d 183, 188 (Ill. App. Ct. 2004).

165. Mishkin, *supra* note 85.

166. *See, e.g.*, Gurnon, *supra* note 84 (describing how an observer, such as a police officer, "can call the interviewer from the adjoining room to ask . . . another line of questioning").

167. Davis v. Washington, 547 U.S. 813, 827 (2006) (citing United States v. Inadi, 475 U.S. 387, 394 (1986)).

168. *Bobadilla II*, 709 N.W.2d 243, 247 (Minn. 2006).

169. Kaminsky, *supra* note 116.

170. *See Bobadilla II*, 709 N.W.2d at 247 (noting that the child-protection worker began the interview that was meant to be open-ended by asking "[h]as anybody hurt your body" and reaffirming the child's answer when he named the perpetrator).

171. 205 S.W.3d 872, 876 (Mo. 2006).

pee'"—though there was no verifiable evidence that the child had, in fact, made that statement.[172]

Even if questions are not leading, "the Framers were no more willing to exempt from cross-examination volunteered testimony or answers to open-ended questions" than they were a structured interview.[173] Thus a child's statements still mimic testimony at trial—except for the fatal fact that these statements may never be cross-examined or questioned.

The Supreme Court has emphasized the necessity of cross-examination in order to "tease out the truth" for trial.[174] And arguably, there is a greater need for cross-examination when the witness is a child. The susceptibility of children has been a long-standing concern in these types of cases.[175] Although the centers attempt to minimize the number of interviews a child must endure, prosecutors, psychologists, and parents still may meet with the child to rehearse his story many times.[176] Parents, for example, have admitted to "relentlessly questioning their children until they finally gave sway and admitted to [being] abuse[d]."[177] One mother of an alleged victim admitted that she repeatedly tried to get her child to say that he had

172. *Id.* at 876.

173. Davis v. Washington, 547 U.S. 813, 828 n.1 (2006).

174. Crawford v. Washington, 541 U.S. 36, 67 (2004).

175. *See generally* JOHN DORIS, THE SUGGESTIBILITY OF CHILDREN'S RECOLLECTIONS (1991) (providing a detailed study of child suggestibility). Some say the evidence is inconclusive. John E.B. Myers et al., *Hearsay Exceptions: Adjusting the Ratio of Intuition to Psychological Science*, 65 LAW & CONTEMP. PROBS. 3, 29–32 (2002). But even adult memory has been proven to be fallible; just consider the many cases of false confessions. *See* Beverly Monroe, *Now I Question Everything*, *in* SURVIVING JUSTICE, *supra* note 115, at 203–18 (recalling the horror and confusion of falsely implicating herself); Opinion, *Justice in the Central Park Jogger Case*, N.Y. TIMES, Oct. 16, 2002, at A22 (detailing the case in which five teenagers confessed to brutally raping a woman, noting that false confessions are common, particularly under "intense interrogations"); Innocence Project, False Confessions, http://www.innocenceproject.org/understand/False-Confessions.php (last visited Dec. 1, 2008) (noting that 25% of DNA-exoneration cases involved false confessions).

176. *See, e.g.*, Kaminsky, *supra* note 116, at 18 (discussing how a victim met ten to fifteen times with the prosecutor, and at least once before his interview at the child advocacy center). Needless to say, there are no notes or recordings from these interviews. *See, e.g.*, STEPHEN J. CECI & MAGGIE BRUCK, JEOPARDY IN THE COURT ROOM: A SCIENTIFIC ANALYSIS OF CHILDREN'S TESTIMONY 161 (1995).

177. *Frontline*: *Innocence Lost the Plea*, *supra* note 138. One mother said that while she repeatedly tried to get her child to say that he had been abused: "It was 'no' the majority of the time . . . most of the time he didn't know what I was talking about." *Id.* But ultimately the mother told police only that her son said that he was abused. *Id.*

been abused, even though the child adamantly denied it all but once.[178] By the time she got to police, however, she only told them that her son had admitted to being abused, and police followed her lead.[179]

Moreover, when children are actually abused, they may seek help but falsely accuse someone other than the true abuser "[i]n order to protect the family member but also get out of the situation."[180] While child advocacy centers are designed to reduce false accusations and minimize trauma to the child who braves coming forward, the value of some of their techniques is questionable.[181] Using dolls can be perceived as playing pretend—deemphasizing the importance of telling the truth—and books can be suggestive, especially if repeatedly read.[182]

Child advocacy interviewers do little to address these problems. As noted, the centers can receive money from law enforcement once they determine that a child was sexually abused, but they collect nothing if they do not find evidence of abuse.[183] This monetary motivation makes it questionable whether the centers ever investigate alternative theories to the child's stories or inquire into the weaknesses of the claims.[184] In fact, it seems interviewers may not ask some of the most basic questions to check the reliability of the accusations.[185]

178. *Id.*

179. *Id.*

180. Kaminsky, *supra* note 116, at 18.

181. CECI & BRUCK, *supra* note 176, at 184 ("Simply put, we conclude that there is no available scientific evidence that supports the clinical or forensic diagnosis of abuse made primarily on the basis of a very young child's interaction with anatomical dolls . . . .").

182. *Id.*; CAMPBELL, *supra* note 117, at 61–84 (discussing the benefits and potential consequences of different interviewing strategies).

183. *See* Kaminsky, *supra* note 116, at 18.

184. *Id.* (discussing the financial incentive for the center to find abuse).

185. The RATAC Protocol, for example, does not require checking reliability of the child's statements. AM. PROSECUTOR RES. INST., *supra* note 80, at 2. Though child advocates are trained to find corroboration in order to increase chances for successful prosecution, *id.* at 7, minimal corroboration usually comes from police officers or parents who may have their own incentives. *See, e.g.*, Frontline, Innocence Lost the Plea: Excerpt on Repeated Questioning, http://www.pbs.org/wgbh/pages/frontline/shows/innocence/readings/repeated.html (last visited Sept. 19, 2008) (documenting the progression of a child's story after multiple interrogation sessions with his mother). Children can accuse the wrong family member of sexual abuse in order to get help. Kaminsky, *supra* note 116. If the actual perpetrator is the parent, such corroboration is useless.

According to one director, "the objective of the interview . . . is to collect salient details from reticent children,"[186] but "it is not [the] clinic's role . . . to establish who else has talked to the child, or whether the child may have been encouraged to fabricate allegations."[187] Indeed, unsupported stories like those in the McMartin Preschool case have continued to occur, despite the existence of these centers.[188] Critics argue that the centers actually fuel false memories by unconditionally encouraging children to talk, rewarding them for doing so, and using anatomical dolls and suggestive children's books beforehand.[189]

While some courts argue that the centers' child-centric approach magically minimizes the level of formality to the interview,[190] as Maryland noted, "[s]tatements in response to structured police interrogation are no less testimonial because the police interrogator expresses empathy or friendship for the interviewee."[191] By extension, statements made to concerned child advocates are still subject to testimonial scrutiny.[192] When the structured formality of the interviews elicits responses from a child that resonates of testimony a witness would give on the stand, without the benefit of any independent investigation into the statement's veracity, the child's statements become "inherently testimonial."[193] The fact that the interrogation room has dolls and coloring books does not alter the for-

186. Kaminsky, *supra* note 116, at 16.

187. *Id.* at 22.

188. *See, e.g.*, Frontline, *supra* note 123 (detailing many other tragic cases occurring after the advent of child advocacy centers, even where children were interviewed by therapists "specializing in diagnosing sexual abuse").

189. CECI & BRUCK, *supra* note 176; *see also* CAMPBELL, *supra* note 117, at 86–92 (showing a case study of how the use of dolls and repeated questions can be coercive).

190. *See* State v. Vigil, 127 P.3d 916, 921–26 (Colo. 2006) (finding that the interview did not rise to the formality of an interrogation); *Bobadilla II*, 709 N.W.2d 243, 255 (Minn. 2006) (finding that the interviewer's purpose was to care for the child and not to gather a statement for trial).

191. State v. Snowden, 867 A.2d 314, 328 (Md. 2005).

192. *Id.*

193. Davis v. Washington, 547 U.S. 813, 830 (2006); *see also* State v. Hooper, No. 31025, 2006 WL 2328233, at *5 (Idaho Ct. App. Aug. 11, 2006); State v. Henderson, 160 P.3d 776, 789–90 (Kan. 2007); State v. Justus, 205 S.W.3d 872, 877–81 (Mo. 2006) (holding that statements were testimonial because they were not made "in the midst of an ongoing emergency"); State v. Blue, 717 N.W.2d 558 (N.D. 2006) (holding that the child claimant's video-taped forensic interview was a formal statement); State v. Mack, 101 P.3d 349 (Or. 2004).

mality of the interview, nor the Confrontation Clause analysis.[194]

In the end, child advocacy centers admirably attempt to make child victims' voices heard in the courtroom while protecting the children's medical health and psychological well-being. The statements children make during forensic interviews, however, can be testimonial regardless of the multiple purposes of child advocacy centers. The prosecutorial nature during some interviews parallels the civil law abuses that the Founders intended to avoid—prosecutors should not be directly involved in questioning the alleged victim, interviewers should not be paid according to prosecution rates, and police, prosecutors and child advocacy interviewers should subject the child's statements to some type of truth verification.

III. TESTIMONIAL PRESUMPTIONS: HELPING JUDGES DETERMINE THE PURPOSE OF CHILD ADVOCACY INTERVIEWS

As it currently exists, the primary-purpose test of *Davis* is insufficient to resolve the issue of whether child advocacy center interviews are testimonial or nontestimonial. It allows courts to evade the real issues that make statements testimonial when an interview may have multiple purposes. The primary purpose test should not only take into consideration *Crawford* circumstances—that is, the level of formality of an interview, and the involvement of government agents[195]—but it should expand to include presumptions that certain statements are testimonial. Statements should be presumptively testimonial if police or prosecutors have been directly involved with child advocacy centers, or if there was no alternative-theory testing of a child's story. Because these circumstances may not always exist during the interviews, this solution provides an important safety-valve for admitting statements that are nontestimonial. The state can overcome these presumptions provided they prove certain facts delineated below.

194. *See Snowden*, 867 A.2d at 327–28, (noting that even though the interview room "[bore] little resemblance to the torture chambers," the child advocacy center's "express purpose . . . was to provide a controlled and structured environment for the questioning, or interrogation, of the children about their accounts of a possible crime").

195. Crawford v. Washington, 541 U.S. 36, 56 (2004); *see also Davis*, 547 U.S. at 820–30.

A. PRESUMPTION ONE: DIRECT PROSECUTORIAL INVOLVEMENT

While purportedly prioritizing the child's health and welfare,[196] as argued above, the centers often operate as satellite offices for law enforcement, and the forensic interviews mimic *ex parte* hearings when played before judge and jury without opportunity for the defense to cross-examine. Therefore, statements should be presumed testimonial if prosecutors and police are directly involved in the centers—they should not hide behind the trick mirrors or camera lenses of the interview rooms,[197] and determinations of whether a child has been abused should not be polluted by monetary incentives.[198] The presumption that any statement made by a child during a forensic interview is testimonial should arise where: (1) police were directly involved with the questioning of the child or had a substantial physical presence, thus indicating prosecutorial pressure on the interviewer; or (2) where the child advocacy center is funded with money from prosecuting offices, thus indicating an incentive for the center to prosecute and convict alleged abusers.

While joint investigation statutes may still require collaboration with law enforcement,[199] to protect the rights of the accused and to protect the admissibility of nontestimonial statements, the partnership should be as negligible as possible. Police and prosecutors may refer children to the centers, but they should not provide the interviewers with their version of the facts. To be truly multidisciplinary, interviewers must independently conduct the questioning which will help assess the child's needs.[200]

The state may overcome this testimonial presumption if it proves by clear and convincing evidence that the involvement of

196. *See, e.g.*, CornerHouse, Forensic Interview Services, *supra* note 18.

197. *See Davis*, 547 U.S. at 823; *Crawford*, 541 U.S. at 56 n.7 (discussing the importance of government involvement in the interview and the potential for abuse); *In re* Rolandis, 817 N.E.2d 183, 186 (Ill. App. Ct. 2004) (describing how police officers watched from a two-way mirror).

198. *See, e.g.*, Kaminsky, *supra* note 116, at 18 (alleging that the center has a financial incentive to find that child abuse had occurred in cases where it had not).

199. *See, e.g.*, MINN. STAT. § 626.556 (2006) (requiring prosecutors to work with social services who report potential child sexual abuse cases).

200. *See* State v. Henderson, 160 P.3d 776, 789–90 (Kan. 2007); State v. Justus, 205 S.W.3d 872, 880 (Mo. 2006) (arguing that the prosecutorial connections to the child advocacy centers make the child advocates' work prosecutorial).

law enforcement was ancillary to prosecution. Ancillary involvement would include referrals, competency questions regarding the child, other communications required under state reporting laws, or communications relating to a different suspect.

B. PRESUMPTION TWO: THE LACK OF ALTERNATIVE-THEORY TESTING

A child victim's statements should likewise be presumptively testimonial if the interviewer does not engage in alternative-theory testing of the child. This presumption will arise when interviewers fail to question the child on his understanding of the truth, whether someone else might be the abuser, or how many times a child met with police officers or prosecutors. By failing to pursue this line of questioning, the interviewer rescinds the role of a holistic evaluator of the child's welfare.[201] The questioning then becomes prosecutorial because it simply confirms what the state already believes.

The state may rebut this presumption by proving with clear and convincing evidence that the interviewer was not attempting to confirm a pre-established story, but that he appropriately explored alternative explanations. Factors would include whether the interviewer used nonleading questions throughout the interview, whether the interviewer questioned the child's inconsistent statements without favoring one version of events over another, whether the interviewer sought an explanation for inconsistencies with other existing evidence, and whether the interviewer conducted some inquiry into an alternative perpetrator. The state may also prove that alternative-theory testing was completed at a prior time.

C. THE APPLICATION AND BENEFITS OF THE PRESUMPTIONS

Under this analysis, courts would be required to evaluate the statements on a case-by-case basis, but the presumptions will prevent state courts from ignoring testimonial circumstances by arbitrarily determining which one of the several purposes of the interview is primary.[202] When a testimonial pre-

201. *See* CAMPBELL, *supra* note 117, at 61 (arguing that an interviewer's failure to inquire into basic facts fuels false accusations); *cf. Bobadilla III*, 570 F. Supp. 2d 1098, 1110–11 (D. Minn. 2008) (criticizing a child advocacy interviewer for using suggestive questions in what was "intended to substitute for a separate interrogation by the police").

202. *See, e.g.*, State v. Krasky, 736 N.W.2d 636, 641 (Minn. 2007) (arguing

sumption is held, a child's statement would be inadmissible at trial if the child is not able to testify. This protects defendants from being convicted via videotape, and encourages child advocacy centers to avoid being centers for *ex parte* examinations, thus strengthening their roles as true child welfare centers.

To result in a greater admissibility of interview statements, child advocacy centers should continue to follow a multidisciplinary approach, but in a way that integrates more medical treatment, psychotherapy, and social services by extricating prosecutors and police from the interviews. Instead of using prosecution as a form of advocacy work, the centers should focus on policy work.[203] By speaking at schools, churches, and community organizations, child advocates can teach about the devastating effects of child sexual abuse and the necessity of coming forward to stop its dangerous cycle.[204]

CONCLUSION

The safety, welfare, and health of the child are supposed to trump any goals of prosecution, or needs of the courts. However, certain aspects of the forensic interviews at child advocacy centers can make a child's out-of-court statements testimonial regardless of the primary purpose of the questions. This Note proposes that the Confrontation Clause analysis include rebuttable presumptions that direct prosecutorial involvement and a lack of alternative-theory testing causes statements to be testimonial. This solution not only protects defendants by ensuring that courts focus on the true concerns of the Confrontation Clause, but it also aids children by encouraging child advocacy centers to limit prosecutorial involvement, thus protecting them against potential psychological pressures by overeager prosecutors. If such presumptions had been in place for Orlando Bobadilla—where a police officer sat in his accuser's interview room while the questioner failed to test the truth of T.B.'s statements—his constitutional rights would not have been violated.

that the intent of joint-investigation statutes makes statements nontestimonial).

203. See NCAC, *The CAC Model*, *supra* note 18 (discussing possibilities for child advocacy policy work).

204. *Id.*