The Child Quasi Witness

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This Essay provides a solution to the conundrum of statements made by very young children and offered against an accused in a criminal prosecution. Currently prevailing doctrine allows one of three basic outcomes. First, in some cases the child testifies at trial. But this is not always feasible, and when it is, cross-examination is a poor method for determining the truth. Second, evidence of the child's statement may be excluded, which denies the adjudicative process of potentially valuable information. Third, the evidence may be admitted without the child testifying at trial, which leaves the accused with no practical ability to examine the child.

We contend that courts should apply a very different framework. Some very young children lack the cognitive and perhaps moral development necessary to be considered witnesses for purposes of the Confrontation Clause; they are unable to understand the potential consequences of their statements and the significance of those statements. Accordingly, the Confrontation Clause should not apply to very young children's statements. But a child who makes such a statement is still the source of evidence, often very probative evidence. Fundamental fairness therefore requires that the accused have the opportunity to examine the child in some manner. Such examination should not be cross-examination at trial. Rather, it should adhere to the model used for nonhuman sources of evidence: the accused should be able to select a qualified forensic interviewer, who will examine the child out of court according to a prescribed protocol. In this Essay, we outline standards that such a protocol might provide. This model allows evidentiary use of the child's statement, gives the accused a better opportunity than does cross-examination to expose weaknesses in the child's account, and minimizes trauma to the child.

INTRODUCTION

Preschool teachers noticed that L.P., a boy not quite three-and-a-half years old, had facial bruises and a bloodshot eye. In response to repeated questioning—"Who did this? What happened to you?"—he ultimately said that "Dee" (Darius Clark, his mother's boyfriend) had done it.[1] Clark was eventually charged with several counts of child abuse. The trial court deemed L.P. incompetent to be a trial witness, but it allowed evidence of his out-of-court statement identifying Clark. The jury found Clark

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[1] *State v Clark*, 999 NE2d 592, 595 (Ohio 2013), cert granted, 135 S Ct 43 (2014).

guilty, but both the Ohio Court of Appeals and the Ohio Supreme Court held that admission of L.P.'s statement violated Clark's right under the Sixth Amendment to "be confronted with the witnesses against him."[2]

This case reflects a sadly recurrent pattern: a very young child makes a statement to some authority figure describing criminal activity—often, but not necessarily, physical or sexual abuse inflicted on the child. If an adult had made the statement in similar circumstances, she would understand its gravity and the likely consequence that the information provided would be used in a prosecution of the person whom she described as having committed a crime. Accordingly, under a sound application of the US Supreme Court's decision in *Crawford v Washington*,[3] the adult's statement should be considered testimonial for purposes of the Confrontation Clause, and it could not be admitted against an accused unless he had an opportunity to be confronted with her and cross-examine her, at trial if reasonably possible.[4] But does it make sense to treat the situation the same when the speaker is a very young child who may not appreciate the gravity and likely consequences of her statement?

For more than a decade after *Crawford* transformed the law governing the Confrontation Clause, the Supreme Court declined to take a case that would help clarify how *Crawford* applies when the speaker is a child. But now the Court has granted certiorari in *Ohio v Clark*,[5] which presumably means that the Court will soon address the conundrum of how to apply *Crawford* to children. It seems to make little sense to hold that a young child's statement should be deemed testimonial, and therefore subject to confrontation, because an adult in the position of the child would have understood the likely prosecutorial consequences of the statement. On the other hand, to hold that the accused lacks the confrontation right *because of* relative deficiencies on the speaker's part may seem utterly bizarre and wrongheaded.

We contend in this Essay that some very young children should be treated very differently from adults for purposes of the Confrontation Clause. Our basic thesis may be summarized

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[2] Id at 601, citing US Const Amend VI.

[3] 541 US 36 (2004).

[4] See id at 59. See also *Melendez-Diaz v Massachusetts*, 557 US 305, 310–11 (2009).

[5] Cert granted, 135 S Ct 43 (2014).

briefly. To be deemed a witness for purposes of the Confrontation Clause requires that the speaker be capable of making a testimonial statement. That capacity includes at least a cognitive component: the speaker must recognize that her statement may cause serious adverse consequences for another person and that others regard her as having an obligation to speak accurately. The capacity to be a witness may also include a moral component: testifying in a criminal prosecution is an ordeal (and properly so) and it may be that, as a society, we do not wish to impose this ordeal on very young children. Whatever the capacities required for a person to be a witness for purposes of the Confrontation Clause, we contend that some very young children lack them. As a consequence, out-of-court statements by such children, even statements made to authority figures and describing criminal activity, do not fall within the strictures of the Clause. At the same time, even very young children may be sources of evidence—in some cases quite good evidence—that our judicial system ought to be able to use. But if a child is deemed incapable of being a witness for purposes of the Confrontation Clause, either at the time of her statement or at the time of trial, then the usual method that our system offers parties for testing adverse statements made by a human observer—cross-examination under oath at trial or in some other formal proceeding—is inappropriate. Rather, an accused should be able to have a qualified expert examine the child in an informal, out-of-court setting, subject to a prescribed, scientifically validated protocol.

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

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

functioning and truth-telling capacities as well as flaws in her account of the events at issue.

I. THE DOCTRINAL CONUNDRUM

To understand the confrontation right, it is necessary to recognize that, in providing how witnesses are to give testimony, a judicial system could choose from a wide range of procedures. Witnesses could commit their testimony to writing and seal it before trial, for example, as the ancient Athenians did, or they could testify behind closed doors to a court official, as was the norm in the old continental courts.[6] But *Crawford* held that the Confrontation Clause requires that witnesses against an accused testify in the manner that has been prescribed for centuries by the common law: under oath, subject to cross-examination, and, if reasonably possible, at trial.[7] *Crawford* thus establishes that the Confrontation Clause does not create a substantive standard for the admissibility of evidence. Rather, the Clause provides a procedural right governing the manner in which witnesses testify against an accused.[8] That right reaches statements that are *testimonial* in nature, wherever made.[9] And, as subsequent cases have made clear, it applies *only* to such statements.[10]

The Supreme Court has not yet comprehensively prescribed how to determine whether a statement is testimonial. But in *Michigan v Bryant*[11] the Court indicated that, in the context of an interrogation, the test is whether the "primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."[12] The Court asserted that the circumstances must be assessed objectively: "[T]he relevant inquiry is not the subjective or actual purpose of the individuals involved in a particular encounter, but rather the purpose that reasonable participants would have had, as ascertained from the individuals' statements and actions and the circumstances in

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6 See Douglas M. MacDowell, *The Law in Classical Athens* 242–43 (Cornell 1978); Richard D. Friedman, *'Face to Face': Rediscovering the Right to Confront Prosecution Witnesses*, 8 Intl J Evid & Proof 1, 8 (2004).

7 *Crawford*, 541 US at 53–54, 68–69.

8 See id at 61.

9 Id at 68–69.

10 See, for example, *Whorton v Bockting*, 549 US 406, 420 (2007); *Davis v Washington*, 547 US 813, 823–26 (2006).

11 131 S Ct 1143 (2011).

12 Id at 1154, quoting *Davis*, 547 US at 822.

which the encounter occurred."[13] *Bryant* further indicates that the perspectives of both the speaker and the questioner must be taken into account.[14] Ultimately, because it is the speaker who is or is not deemed to be a witness for purposes of the Confrontation Clause, we believe that the best interpretation of *Bryant* is that (1) the intent of a reasonable person in the speaker's position[15] is the determining factor as to whether a statement is testimonial, but (2) crucial factors in discerning that intent are what that reasonable person would understand to be the questioner's purpose in conducting the conversation and the questioner's likely conduct in response to the conversation.

But how is this standard to be applied in the case of children? Courts could apply it straightforwardly and ask, as in the case of an adult speaker, what the understanding of a reasonable person would be.[16] The use of a reasonable person standard, after all, is meant to avoid the need for determining the mental state of the particular speaker at the time of the statement. An objective test of this sort necessarily does not match perfectly with reality: the understanding of the posited reasonable person will be less insightful than that of some people and more insightful than that of others, but we accept the divergence for the sake of clarity and simplicity. The same principle could be applied to speakers of all ages. But to ignore the child's age requires the court to engage in a rather bizarre inquiry, asking about the understanding that a reasonable adult would have if that adult were in the position of the child speaker—which would be essentially impossible, given that the cognitive distributions of adults and preschoolers are largely nonoverlapping. It is at least somewhat strange to treat the statement of a very young child as testimonial on the basis that a reasonable adult would anticipate prosecutorial use of the statement, even if in fact the child could not plausibly have such an anticipation.

Alternatively, a court might take the child's age into account. Rather than ask what the understanding of a reasonable person in L.P.'s position would have been, for example, one might ask what the understanding of a child of L.P.'s age, and of

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[13] *Bryant*, 131 S Ct at 1156.

[14] Id at 1160.

[15] We use "intent" here as a shorthand; in fact, we believe that if a reasonable person in the position of the speaker would anticipate likely evidentiary use of the statement, then that would also be sufficient to make the statement testimonial.

[16] See, for example, *State v Snowden*, 867 A2d 314, 325 (Md App 2005); *People v Sisavath*, 118 Cal App 4th 1396, 1402 n 3 (Cal App 2004).

ordinary development, would have been. One could thus ask what the understanding of a three-year-old of ordinary development would be. (It does not make sense to ask what a reasonable three-year-old would understand because—as parents know—"reasonable three-year-old" is an oxymoron.)[17]

Such a standard has its own problems. It creates a messy fragmentation of the law—in determining whether a statement is testimonial, continuous age adjustment is used for children up to some presumed age of maturity and then abandoned in favor of a uniform approach based on the one-type-fits-all posited reasonable person for adults.[18] A more substantive concern is that this age-adjusted standard creates what at first appears to be a rather bizarre anomaly—that the child's relative cognitive weakness, by taking the statement outside the scope of the Confrontation Clause, results in *less* protection for the accused.

Our approach steers an alternative course, allowing the admission of a young child's statement under a procedure that is very different from testimony at trial. We do believe that the law should take into account the child's age—meaning that, under our approach, as under the age-adjustment approach for determining whether a statement is testimonial, there are some circumstances in which a child's statement will fall outside the Confrontation Clause even though a statement by an adult in similar circumstances would fall within it. But the approach that we propose here avoids the anomaly of the age-adjustment approach by first posing a different question: before asking whether a statement was testimonial, the court should ask whether the child is capable of being a witness for the purposes of the Clause. The consequences of a negative answer are very different for each of the two questions. When a court decides that a given statement is not testimonial, the result is simply

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[17] But see, for example, *State v Scacchetti*, 690 NW2d 393, 396 (Minn App 2005) (asking whether "the circumstances surrounding the contested statements led the three-year-old to reasonably believe her disclosures would be available for use at a later trial, or that the circumstances would lead a reasonable child of her age to have that expectation"); *People v Vigil*, 127 P3d 916, 925 (Colo 2006):

> [A]n assessment of whether or not a reasonable person in the position of the declarant would believe a statement would be available for use at a later trial involves an analysis of the expectations of a reasonable person in the position of the declarant. Expectations derive from circumstances, and, among other circumstances, a person's age is a pertinent characteristic for analysis.

[18] The Supreme Court has, however, adopted a similar approach in the *Miranda* context. See *J.D.B. v North Carolina*, 131 S Ct 2394, 2408 (2011) (holding that a child's age can be relevant in determining whether a suspect has been taken into custody).

that the Clause does not apply and therefore poses no obstacle to admission of the statement. But a decision under our approach that the child is incapable of being a witness would trigger an altogether different procedure, assuring that ordinarily the statement could not be admitted unless the accused is accorded substantial rights that are more appropriate than cross-examination for dealing with a very young child.

II. THE CAPACITY TO BE A WITNESS

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

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

The Supreme Court has defined "testimony" as "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact."[19] For a person to be a witness under this definition, it is necessary first that she be able to provide a coherent statement for the purpose of "establishing or proving some fact."[20] And second, it is necessary that she be capable of

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[19] *Bryant*, 131 S Ct at 1153, quoting *Crawford*, 541 US at 51.

[20] *Crawford*, 541 US at 51.

solemnity.[21] In this context, solemnity is best understood to refer not to the manner in which the statement is made but rather to an appreciation of the gravity of the declaration—that is, of the potential consequences that it might have and of their significance.

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

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

Adults of ordinary intelligence have the capacity to recognize this chain of causation, though it involves comprehending the perceptions, understandings, desires, and reactions of others, including people not part of the immediate conversation. Very young children do not have that capacity.[22]

Just which children should be considered to have sufficient capacity to be deemed a witness is a very complex question. Developing a sound answer requires two distinct steps. One is to understand a real-world phenomenon: the intricacies of children's development of the various competencies necessary to be capable of the act of witnessing. The second is to choose a standard for determining when—given that individual children develop differently, and that particular capacities tend to develop gradually and at different times—a given child or class of children should be considered sufficiently developed (cognitively and perhaps morally) to be deemed capable of being a witness.

Our primary purpose is to establish that *some* class of children should not be considered capable of being witnesses. Once

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[21] See id.

[22] See *People v Stechly*, 870 NE2d 333, 362 (Ill 2007), quoting Richard D. Friedman, *The Conundrum of Children, Confrontation, and Hearsay*, 65 L & Contemp Probs 243, 251–52 (2002) ("Even statements by very young children may be highly probative. But very young children are not yet at a stage where they can be expected to take the responsibility of being a witness."). In addition to the cognitive argument presented here, there is a moral argument—which we will not analyze further but which we think deserves serious consideration—that society should not impose on young children, perhaps not even until adolescence, the ordeal and responsibility of being a witness. See Sherman J. Clark, *An Accuser-Obligation Approach to the Confrontation Clause*, 81 Neb L Rev 1258, 1280–85 (2003).

one focuses on the nature of witnessing, that proposition should be clear. An eighteen-month-old child may be capable of making a statement that appears to describe criminal conduct;[23] she does not, however, have the capacity to be a witness for purposes of the Confrontation Clause. A fifteen-year-old, on the other hand, clearly has the capacity, both cognitive and moral, to be a witness. Where and how should the line between these two poles be drawn? We offer some thoughts that might help resolve this question, but we do not attempt to reach a definitive answer here.

Researchers have amply documented that young children—particularly those who have not yet reached first grade—are fundamentally unlike older persons in their social cognitions. That is, the inferences that young children derive from social encounters are qualitatively different from those that older persons derive: preschool-aged children fail to understand other persons' mental states—beliefs, intentions, motives, and desires—and they make errors predicting the consequences of their statements to such other persons. There is a biological basis for this deficit: the prefrontal cortex of the developing brain controls so-called executive functions such as monitoring, planning, and impulse control.[24] Although functional from early in life, this brain region is not mature until late adolescence.[25] Numerous studies reveal the deficits that result in young children's cognitions as a result of this neural immaturity.[26] These deficits affect a web of interrelated psychological abilities that are

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[23] See, for example, *State v Webb*, 779 P2d 1108, 1109 (Utah 1989) (concerning an eighteen-month-old girl who, after a bath taken shortly after a visit with her father, said to her mother, "Ow bum daddy").

[24] Marilyn C. Welsh, Bruce F. Pennington, and Dena B. Groisser, *A Normative-Developmental Study of Executive Function*, 7 Developmental Neuropsychology 131, 131–32 (1991). See also generally Hiroki R. Hayama and Michael D. Rugg, *Right Dorsolateral Prefrontal Cortex Is Engaged during Post-retrieval Processing of Both Episodic and Semantic Information*, 47 Neuropsychologia 2409 (2009).

[25] See generally Monica Luciana and Charles A. Nelson, *The Functional Emergence of Prefrontally-Guided Working Memory Systems in Four- to Eight-Year-Old Children*, 36 Neuropsychologia 273 (1998); Dima Amso and B.J. Casey, *Beyond What Develops When: Neuroimaging May Inform How Cognition Changes with Development*, 15 Current Directions in Psychological Sci 24 (2006); John R. Best, Patricia H. Miller, and Lara L. Jones, *Executive Functions after Age 5: Changes and Correlates*, 29 Developmental Rev 180 (2009).

[26] See, for example, Stephen J. Ceci, Stanka A. Fitneva, and Wendy M. Williams, *Representational Constraints on the Development of Memory and Metamemory: A Developmental-Representational Theory*, 117 Psychological Rev 464, 483–84 (2010); Luciana and Nelson, 36 Neuropsychologia at 285 (cited in note 25); Welsh, Pennington, and Groisser, 7 Developmental Neuropsychology at 137–41 (cited in note 24).

involved in understanding the mental states of others as well as the effects that one's own actions and statements have on others.

Most adults can simulate the mental states of other people—put themselves in others' shoes, in the colloquial phrase—so that they can predict others' future behavior and the effect of their own conduct on that behavior.[27] Doing so requires that the person understand that others have thoughts, feelings, and beliefs that may differ from her own and that may motivate others' behavior. Without this understanding—often referred to as "theory of mind" ("ToM")—people would be unable to make sense of the social world and would be ill-suited for social encounters.[28] The term "social understanding" is sometimes used within the framework of ToM to refer to "the ability to conceptualise mental states such as beliefs, desires, and intentions and to use these constructs to interpret and predict the actions of others."[29] The various aspects of these abilities have different developmental trajectories.[30] But before age four, very few children exhibit even rudimentary forms of ToM; by age six, nearly all normally developing children have acquired these rudiments.[31]

Thus, most children under the age of four are unaware that other people might have false beliefs.[32] Indeed, below this age, most children do not recognize that the information that is available to them from their observations is not known by other people; therefore, the basic concept of *informing* another person, and adding to that other person's state of knowledge, is foreign to them. Even well after they gain this recognition, most

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[27] See Nicholas Epley and David Dunning, *Feeling "Holier than Thou": Are Self-Serving Assessments Produced by Errors in Self- or Social Prediction?*, 79 J Personality & Soc Psychology 861, 872 (2000); Emily Balcetis and David Dunning, *Considering the Situation: Why People Are Better Social Psychologists than Self-Psychologists*, 12 Self & Identity 1, 2 (2013); Richard E. Nisbett and Ziva Kunda, *Perception of Social Distributions*, 48 J Personality & Soc Psychology 297, 309 (1985).

[28] See Sandra Bosacki and Janet Wilde Astington, *Theory of Mind in Preadolescence: Relations between Social Understanding and Social Competence*, 8 Soc Development 237, 237 (1999) (finding a positive correlation between ToM skills and social competence).

[29] Id at 237–38.

[30] See id at 238; Welsh, Pennington, and Groisser, 7 Developmental Neuropsychology at 138 (cited in note 24).

[31] See Heinz Wimmer and Josef Perner, *Beliefs about Beliefs: Representation and Constraining Function of Wrong Beliefs in Young Children's Understanding of Deception*, 13 Cognition 103, 104 (1983).

[32] See Jeremy Carpendale and Charlie Lewis, *How Children Develop Social Understanding* 24 (Blackwell 2006).

children lack the ability that adults have to use readily available information to draw an inference about the mental state of another person.[33] Lacking well-developed executive functions, preschool-aged children are unlikely to be capable of the solemnity of recognizing that giving a false account of a past event may cause their listeners and others to take action that will lead to unjustified consequences for another person; these children are likely to say what they believe will please their listeners.[34]

The many experiments that test the limitations on young children's ToM are not, of course, set in the forensic context. But they show in strong terms an inability on the part of very young children to appreciate the mental states of other persons and to predict the consequent behavior of those others—and these studies do so with respect to relatively simple matters. Far more sophisticated understanding is necessary for a child to recognize the mental state of an adult interrogator in the context on which this Essay focuses—that is, the purpose of the interrogator in conducting a conversation about a third person's past conduct is to gather information that may be used against, and perhaps lead to serious punishment for, that person. The experiments therefore provide strong evidence that very young children lack that understanding.

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[33] Numerous experiments demonstrate this. See, for example, id at 30, citing Wimmer and Perner, 13 Cognition 103 (cited in 31); Francesca G.E. Happé, *An Advanced Test of Theory of Mind: Understanding of Story Characters' Thoughts and Feelings by Able Autistic, Mentally Handicapped, and Normal Children and Adults*, 24 J Autism & Developmental Disorders 129, 137–38 (1994) (describing the differences between adults and children in performance of ToM tasks); T. Aboulafia-Brakha, et al, *Theory of Mind Tasks and Executive Functions: A Systematic Review of Group Studies in Neurology*, 5 J Neuropsychology 39, 40 (2011) (discussing studies that "support[ ] the view that [executive function] is necessary for [ToM] development"). These studies suggest that, before ages three to six, children have difficulty recognizing that others operate on a base of information different from their own. See Carpendale and Lewis, *Social Understanding* at 53–59 (cited in note 32).

[34] See Amelia Courtney Hritz, *Lie to Me: Compliant False Accusations by Children* *3–4 (unpublished manuscript, Aug 2014), archived at http://perma.cc/NP5Y-EHVG (describing an experiment in which fifteen of sixteen young children complied with a request to knowingly make a false accusation); Rhona H. Flin, Yvonne Stevenson, and Graham M. Davies, *Children's Knowledge of Court Proceedings*, 80 Brit J Psychology 285, 294 (1989) (indicating that, of the children studied, few of the eight-year-olds but most of the ten-year-olds thought that honesty in court is important "because of the risks of convicting the innocent or releasing the guilty"). Eagerness to please an interrogator does, of course, require some understanding of the responsive conduct that the interrogator wishes (which may, as in the Hritz study, be expressly stated by the interrogator), but it does not require any understanding of how the interrogator's underlying desires, intentions, or beliefs motivate her questions.

This is especially true because the contemplated punishment involves an intricate series of events—well in the future and involving many other people not part of the conversation—that a very young child is not likely to contemplate or understand. Even through age ten, children's very rudimentary comprehension of the legal system is unlikely to include familiarity with the concept of evidence or an understanding of why it is needed in court.[35]

III. CHILDREN AS SOURCES OF EVIDENCE

A. Probative Value and Prejudice

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

Evidence that a child has asserted a proposition X can be significantly probative of X even if (1) it is far less than certain that the child would assert X if X were true, and (2) it is plausible that the child would assert X even if it were not true. What is significant is the *likelihood ratio* of the two probabilities: the evidence will tend to prove X if it is *more probable* that the child would assert X if X were true than that she would assert X if X were false. If two probabilities are the same—so that the likelihood ratio is one—the evidence has no probative value. But usually the likelihood ratio for a child's assertion of a proposition is far greater than one.

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[35] See Karen J. Saywitz, *Children's Conceptions of the Legal System: "Court Is a Place to Play Basketball"*, in Stephen J. Ceci, David F. Ross, and Michael P. Toglia, eds, *Perspectives on Children's Testimony* 131, 135 (Springer-Verlag 1989) (reviewing studies that describe children's lack of familiarity with the courtroom); Flin, Stevenson, and Davies, *Children's Knowledge* at 291, 295 (cited in note 34) (noting that six-year-old study participants did not understand at all the meanings of "evidence" and "witness," among other terms); Amye Warren-Leubecker, et al, *What Do Children Know about the Legal System and When Do They Know It? First Steps down a Less Traveled Path in Child Witness Research*, in Ceci, Ross, and Toglia, eds, *Perspectives* 158, 165–67 (noting that 18 percent of three-year-old study participants knew what a courtroom is, and few children under eight years old knew about witnesses).

We can consider this matter, invoking a standard rubric, by assessing the capacities of perception, memory, sincerity, and communication.[36] Flaws in any of these capacities *can* lead to an inaccurate statement. But children are not random communicators; their capacities usually operate reasonably well. Children's perception of events within their understanding is good.[37] Though very young children are often more vulnerable to suggestion than adults are,[38] their memory is reasonably good, even over an extended period.[39] Despite childhood limitations, memory functions from birth, and it is well developed long before ToM, which usually does not develop before age four.[40] A child, like an adult, might have a motive that deflects her from a sincere desire to tell the truth. But young children are less likely to have such insincere motives than are older persons and tend to have a less well-developed ability to lie;[41] in any event, like adults, young children are far more likely to intend to communicate a given proposition if it is true than if it is false. And, although young children have limited communicative ability, they are usually able to communicate reasonably well about

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[36] See Kenneth S. Broun, ed, 2 *McCormick on Evidence* 178 (Thomson Reuters 7th ed 2013) (speaking in terms of perception, memory, narration, and sincerity).

[37] See Alan Slater and Scott P. Johnson, *Visual Sensory and Perceptual Abilities of the Newborn: Beyond the Blooming, Buzzing Confusion*, in Francesca Simion and George Butterworth, eds, *The Development of Sensory, Motor and Cognitive Capacities in Early Infancy: From Perception to Cognition* 121, 138 (Psychology 1998); Elizabeth Spelke, *Infants' Intermodal Perception of Events*, 8 Cognitive Psychology 553, 554 (1976).

[38] See generally Stephen J. Ceci and Richard D. Friedman, *The Suggestibility of Children: Scientific Research and Legal Implications*, 86 Cornell L Rev 33 (2000); Stephen J. Ceci, David F. Ross, and Michael P. Toglia, *Suggestibility of Children's Memory: Psycholegal Implications*, 116 J Experimental Psychology: General 38 (1987). See also Stephen J. Ceci and Maggie Bruck, *Jeopardy in the Courtroom: A Scientific Analysis of Children's Testimony* 233 (American Psychological Association 1995). In most forensic contexts, suggestibility tends to diminish with age because of older children's stronger memory traces, better monitoring ability, and lower likelihood of incorporating interviewers' suggestions into their accounts. See generally Stephen J. Ceci and Maggie Bruck, *Children's Suggestibility: Characteristics and Mechanisms*, 34 Advances in Child Development and Behav 247 (2006).

[39] See Ceci and Bruck, *Jeopardy in the Courtroom* at 235 (cited in note 38). See also generally Nina R. Hamond and Robyn Fivush, *Memories of Mickey Mouse: Young Children Recount Their Trip to Disneyworld*, 6 Cognitive Development 433 (1991).

[40] See David F. Bjorklund, *Children's Thinking: Cognitive Development and Individual Differences* 250–51, 267 (Thomson Wadsworth 4th ed 2005).

[41] See Michael Lewis, *The Development of Deception*, in Michael Lewis and Carolyn Saarni, eds, *Lying and Deception in Everyday Life* 90, 92 (Guilford 1993) (indicating that the ability of children to mask their feelings increases with age); Ceci and Bruck, *Jeopardy in the Courtroom* at x (cited in note 38) (noting children's "propensity to speak forthrightly").

important aspects of events that they understand;[42] they are certainly more likely to communicate that a given event happened if it is their intent to do so than if it is not.[43]

Thus, the probability that, if an event occurred, sound operation of these capacities would lead the child to state accurately that the event occurred is usually far greater than the probability that, if the event did not occur, unsound operation of one or more of the capacities would lead the child to state inaccurately that the event did occur. This is especially true if the child's statement describes an event—such as ejaculation—with which the child is presumably (though not inevitably) unfamiliar; in such a case, one might conclude that, even if the child is not a particularly accurate reporter, it would be unlikely, if the event did not occur, that the child would happen to come up with the description.[44]

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

Furthermore, even assuming that the child does not appear in court, the potential prejudicial effect of the evidence is very unlikely to be so great as to outweigh the probative value. Such prejudice, if it exists, would arise principally from the jury's overvaluation of the evidence. But one should not jump to the conclusion that the jury will substantially overvalue such evidence. Some of the defects of the evidence will probably be apparent to the jury; jurors are not likely to believe that because a

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[42] Hilary Horn Ratner, Brenda S. Smith, and Robert J. Padgett, *Children's Organization of Events and Event Memories*, in Robyn Fivush and Judith A. Hudson, eds, *Knowing and Remembering in Young Children* 65, 66 (Cambridge 1990).

[43] See Richard D. Friedman, *Route Analysis of Credibility and Hearsay*, 96 Yale L J 667, 681–85 (1987) (analyzing a case in which a child described a stranger's apartment, where she was allegedly molested).

[44] See id.

very young child made a statement it must be true.[45] Expert testimony about the weaknesses of children as observers and reporters may further assist the jury, as may commentary by the court. And substantial further assistance may be provided by the procedure that we now discuss, involving out-of-court examination of the child by a qualified expert.

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

Given that statements by some very young children may be highly probative evidence that provides crucial assistance to adjudicative factfinding—even though the children may be incapable of acting as witnesses—how should a court deal with those statements?

Two models are available, each governing a distinct type of source of evidence. Under both models, the accused has an opportunity to examine the source of evidence, at least if it is available, in an attempt to undermine the inference that the prosecution seeks to draw from the evidence. But this opportunity is very different in the two models. Courts and commentators have assumed that the model for young children is the one generally governing statements by human beings.[46] But we contend that this is inadequate for children deemed incapable of being witnesses; instead, courts should apply the model that governs nonhuman sources of evidence.

When the prosecution offers an adult's statements to prove the truth of a proposition that she asserted, the prosecution contends that she observed an event or condition and subsequently reported on it accurately. And the accused attempts to demonstrate that she may have come to make the statement by some other path. Adverse questioning conducted under formal conditions—by counsel and, if reasonably possible, at trial—is the primary method by which the accused can do so. If the statement is testimonial, then the Confrontation Clause applies, and even if the speaker is unavailable at trial, the statement cannot be admitted unless the accused has had an opportunity for

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

[46] See, for example, *State v Snowden*, 867 A2d 314, 329 (Md App 2005) (applying the same Confrontation Clause test to children that is applied to adults); Michael H. Graham, *The Confrontation Clause, the Hearsay Rule, and Child Sexual Abuse Prosecutions: The State of the Relationship*, 72 Minn L Rev 523, 530–37 (1988).

cross-examination.[47] Even if the statement is not testimonial, the rule against hearsay may still require exclusion of the statement unless either the declarant is brought to trial or the accused had a prior opportunity for cross-examination. And even if an exemption to that rule allows the prosecution to present the statement without producing the declarant, the Compulsory Process Clause of the Sixth Amendment gives the accused the option, assuming that the declarant is available, of bringing her to court and examining her there. Though an accused is sometimes allowed to take depositions for discovery of potential adverse witnesses,[48] this is not the usual model: the accused's opportunity to examine the maker of the statement ordinarily occurs at trial, and the Supreme Court has declared that confrontation is "basically a trial right."[49]

Assuming that we are correct that some very young children are incapable of being witnesses for purposes of the Confrontation Clause, this model offers an inadequate opportunity for examining them. We believe that this is essentially self-evident if at the time of trial the child is still incapable of being an adequate witness—and all the more so if she is still incapable of being a witness at all. But even if, by the time of trial, the child has become capable of being an adequate witness, we believe that adverse questioning at that time offers an inadequate opportunity for examination with respect to the prior statement: the child will still presumably be very young, and the accused would be in a position of having to call the child to the witness stand to examine her about a statement that she made a considerable time before, concerning an event that occurred some time before that.[50]

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

[48] See, for example, FRCrP 15.

[49] *Barber v Page*, 390 US 719, 725 (1968).

[50] Part of the problem is the logical complexity of the task. A cross-examiner aims to establish, "Now, you've just testified to *X*. But *Y* is true. And *X* and *Y* are not compatible." In the posited case, the adverse examiner asks the young witness not about something that she just said, but about a statement (1) that she made at a considerably earlier time, when her cognitive capacities were significantly less developed, (2) the precise contents and context of which are very important, and (3) that concerns an even earlier incident. Young children, barely competent to be witnesses at all, are unlikely to be able to give useful answers to such a line of questions. See generally Rachel Zajac and Harlene Hayne, *I Don't Think That's What* Really *Happened: The Effect of Cross-Examination on the Accuracy of Children's Reports*, 9 J Experimental Psychology: Applied 187 (2003). The problem is aggravated by memory loss, which tends to be more

Now consider the model that applies in the case of nonhuman sources of evidence. Suppose, for example, that a prosecutor presents evidence that the markings on a bullet indicate that it was fired by a particular gun. The accused wishes to undermine the inference sought by the prosecution. Perhaps the particular gun would not always produce the same type of markings, and perhaps such markings could be produced by a different gun. In other words, it may be that the likelihood ratio of the evidence is not as great as the prosecution suggests. Cross-examination of the gun and the bullet is obviously not a possibility. Instead, the accused should have the opportunity to examine them out of court, if feasible.[51]

Such an examination is not, like cross-examination, a series of questions posed by an attorney. Rather, it is examination in a more literal sense—by an expert, chosen by the accused, who is qualified to inspect the source of the evidence and perhaps conduct some experiments on it. The aim of the examination is to assess the prosecution's contention that a given response by the source of evidence is a strong indication that it was subjected to a particular stimulus. The examiner thus attempts to determine how reliably the source, if subjected to that stimulus, provides that response, and whether other stimuli might produce the same response.

The accused's right to conduct such an examination and present the expert testimony is a rule of preference. That is, it does not ordinarily preclude the presentation of the prosecution's evidence if, through no fault of the prosecution,

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severe in young children than in older persons, see, for example, Jodi A. Quas, et al, *Do You* Really *Remember It Happening or Do You Only Remember Being Asked about It Happening? Children's Source Monitoring in Forensic Contexts*, in Kim P. Roberts and Mark Blades, eds, *Children's Source Monitoring* 197, 207–08 (Lawrence Erlbaum 2000); David J. Bjorklund, *Children's Thinking: Cognitive Development and Individual Differences* 284 (Wadsworth 4th ed 2005), and by the danger of corruption of memory: "[I]f children are persistently interviewed, they may actually acquire facts or scripts [understandings of recurrent patterns of social behavior] about the alleged event, even if they had no previous knowledge of this information prior to the series of interviews." Ceci and Bruck, *Jeopardy in the Courtroom* at 257 (cited in note 38).

[51] See *United States v Walker*, 66 Milit Just 721, 742–43 (Navy–Marine Corps Ct Crim App 2008) (noting that federal courts recognize a constitutional right of the accused to have an expert of his choosing perform independent testing of physical evidence under appropriate safeguards). See also FRCrP 16(a)(1)(E)(ii) (giving the accused the right to inspect a tangible object within the government's control that the government intends to use at trial).

examination of the source of the evidence becomes impractical.[52] In this respect, the examination right under this model is less comprehensive than the confrontation right. The latter states the minimum acceptable conditions for a witness to give testimony against an accused. It is the prosecution that must bear the risk that—assuming no fault on the part of the accused—one or more of these conditions cannot be satisfied.[53] But the accused's right to examine a nonhuman source of evidence is part of a generalized right of fairness; if it is feasible to provide the accused an opportunity to examine the source, then ordinarily it is unfair to deny him that opportunity, but if there is no such opportunity, then admission of the evidence does not create unfairness.

The same model should be applied to the statements of very young children who are not mature enough to be considered witnesses. The accused should be allowed to select a qualified expert to examine the child out of court, unless for some reason this is not feasible.[54] The expert would attempt to assess the relative magnitude of the two components of the likelihood ratio—the probability that the child would make the statement that she assertedly did if the event that she reported occurred as she said, and the probability that she would make the statement if the event did *not* occur as she said. The expert could then testify at trial as to her conclusions.

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

C. Guidelines for Conducting the Examination

The essence of our proposal does not depend on the particulars of how the examination of the child should be conducted. But if our proposal were adopted, some protocol would be necessary, and we suggest here a possible set of guidelines. Standards such as these might be imposed by a trial court on an ad hoc basis or more generally by an appellate court, or they might be codified. And even in the absence of constraint, the defense

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[52] For example, the state might perform a laboratory test on material that disintegrates, through no fault of the state, before the accused has an opportunity to examine it.

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

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

might adopt most of these guidelines as a matter of sound practice. Several excellent manuals and memoranda discuss good practice in more depth than we do here.[55]

First, the examination should be conducted by a qualified developmental-forensic interviewer, preferably one with ample training in all relevant areas of developmental science, including children's memory, perception, language, reasoning, emotional development, and family dynamics. Ideally, the interview protocol should be empirically validated by professionals not associated with pro-defense or pro-prosecution advocacy organizations.[56]

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

Third, the interview ought to be video recorded. Child-advocacy centers across the country routinely videotape child-protective-service interviews in rooms that are outfitted with audio-video equipment. Portions of the videotape may be presented at trial as appropriate.

Fourth, the examiner should conduct the interview in such a way that, while allowing her to attempt to determine and assess the child's recollection of the events at issue, also attempts to minimize the likely trauma to the child and tainting of the child's memory.[57]

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[55] See, for example, Debra A. Poole and Michael E. Lamb, *Investigative Interviews of Children: A Guide for Helping Professionals* 98–99 (American Psychological Association 1998) (providing an interview protocol developed by researchers at the National Institute of Child Health and Human Development).

[56] A number of training programs that are affiliated with either pro-prosecution or pro-defense organizations currently accredit or sponsor training workshops. The National District Attorneys Association's National Center for Prosecution of Child Abuse, for example, has established training programs in many states. For one example, see *ChildFirst Pennsylvania: About Us* (ChildFirst PA, 2014), archived at http://perma.cc/Q73T-MXEJ.

[57] The aim of a forensic interview is to collect the facts and their context. In contrast, a therapeutic interview may involve bringing to the surface suspected intrapsychic conflicts. Techniques that may be valuable for therapeutic purposes (for example, play therapy, role-playing, symbolic interpretation, and fostering self-empowerment) can cor-

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

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

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

IV. PRACTICAL ADVANTAGES OF THE QUASI-WITNESS MODEL

We have advocated the model presented here as a matter of principle. Because some very young children lack the capacity to be deemed witnesses, they should not testify at trial and the Confrontation Clause should not apply to their statements, even if those statements would clearly be deemed testimonial were they made by an adult. Despite children's limitations, evidence of their statements may be very probative, not unduly prejudicial, and therefore worthy of admission. And basic fairness gives the accused a right to examine the child out of court—as a source of evidence rather than as a witness—by a qualified forensic examiner and pursuant to a predetermined protocol.

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

First, under prevailing practice, if a child is deemed not competent to testify at trial, an unfortunate lacuna is left open. Either her prior statement is excluded, denying the trier of fact

rupt the child's recollection. Absent empirical validation, these techniques should be avoided in a forensic interview.

potentially valuable information, or it is admitted but the accused has no opportunity to examine her. If, however, any child who cannot be made a witness at trial is treated as a quasi witness, then the lacuna disappears: Secondary proof of the child's statement presumably could be admitted and fully vetted; the Confrontation Clause would pose no barrier. Furthermore, the accused would have a right to examine the child—not through cross-examination by an attorney in open court, but through a pretrial videotaped interview conducted by a qualified forensic interviewer.

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

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

Third, testifying in open court—which can be difficult for anybody—can be especially traumatic for a young child, especially if she is being asked to make an accusation of someone close to her.[58] The Supreme Court has allowed children in some cases to be examined at trial in a room with only the prosecutor

[58] See Gail S. Goodman, et al, *Testifying in Criminal Court: Emotional Effects on Child Sexual Assault Victims*, in 57 *Monographs of the Society for Research in Child Development* 6–7 (July 1992).

and defense counsel present.[59] But this procedure still involves ordinary cross-examination, and it can be applied only if the trial court determines on the basis of case-specific evidence that the child would likely suffer trauma as a result of confronting the accused.[60] The quasi-witness model does not require a prediction of trauma. It allows the child to make her statements, and to be examined on behalf of the accused, in a private, comfortable setting. And it provides for a style of examination that will tend to be much gentler on the child than is cross-examination by an attorney.

Fourth, it is part of American juridical dogma that cross-examination is beyond a doubt "the greatest legal engine ever invented for the discovery of truth."[61] But for various reasons, this is not true with respect to very young children. Cross-examination by an attorney at trial is in fact a disastrously poor method for ensuring truthful statements by young children.[62] A qualified developmental-forensic child interviewer operating in a comfortable setting has a much better chance of eliciting information that may raise doubts about the child's initial account without causing undue emotional trauma to the child.

Fifth, under the practice prevailing in most states, the accused has a right to examine the child—if at all—only at the time of trial, which may take place very long after the events at issue. In many cases, the defense's request for pretrial access to a child witness is not approved. Under the quasi-witness model, examination would occur before trial, and usually there would be no reason why it could not occur when events are relatively fresh in the child's mind.

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[59] See generally *Maryland v Craig*, 497 US 836 (1990).

[60] See id at 855–57.

[61] John H. Wigmore, 5 *Evidence* § 1367 at 32 (Chadbourn rev ed 1974); *Lilly v Virginia*, 527 US 116, 124 (1999) (Stevens) (plurality), quoting *California v Green*, 399 US 149, 158 (1970) (quotation marks omitted).

[62] See Zajac and Hayne, 9 J Experimental Psychology: Applied at 187 (cited in note 50) (concluding, on the basis of an experiment involving five- and six-year-olds in which cross-examination "proved to be unsuccessful in discrediting inaccurate children (i.e., misled children questioned about false events) [and] decreased the accuracy of children who were initially correct," that "cross-examination style questioning is inappropriate for young children"); Rachel Zajac and Harlene Hayne, *The Negative Effect of Cross-Examination Style Questioning on Children's Accuracy: Older Children Are Not Immune*, 20 Applied Cognitive Psychology 3, 4, 11 (2006) (finding that cross-examination reduced accuracy "to a point where accuracy did not differ significantly from chance" with five- and six-year-olds, and significantly even with nine- and ten-year-olds).

CONCLUSION

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