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Editor's Note—Summer 2008

This issue of *The Michigan Child Welfare Law Journal* covers a variety of compelling issues. In "Trading Family for Permanency: Legal Orphanage Under the Adoption and Safe Families Act" (Carey), the author notes that both federal and Michigan policy state a preference for the reunification of families, but both expedite the process to terminate parental rights. The implication is that it is more desirable to terminate parental rights and "free" a child for adoption than it is for the child to remain in foster care for longer than one year. The author argues a balance must be struck between the parents' fundamental liberty interest in the care, custody, and control of their children, the states' interest in protecting children, and the children's best interests.

In "Childhood Sexuality: What Professionals Need to Know" (Dingwell & Timm), the authors note that childhood sexuality is a difficult topic for many professionals. Oftentimes it simply is ignored unless there is a serious problem. However, there is much confusion about what exactly constitutes problematic sexual behavior. Some behaviors are quite common developmentally, and if misconstrued, children can be traumatized by the reaction of those around them. The authors provide helpful assessment guidelines for professionals who work in the area of child welfare about what is "normal" childhood sexuality, what might be cause for concern, and what needs immediate intervention.

In "Traumatic Testimony: Easing Stress on Testifying Children While Protecting the Confrontation Rights of the Accused" (Tluczek), the author describes the unique difficulties of bringing child sexual abuse cases to trial. The author focuses on the current constitutionally permissible steps the courts may take to protect child witnesses in such cases. The author discusses the difficulty in balancing the potential infringement of the defendant's constitutional rights with the compelling interest of protecting child victims from further abuse.

I hope you find this issue interesting and useful. As always, the editorial board welcomes your feedback on this and future issues to ensure that *The Michigan Child Welfare Law Journal* is of value to you.

Message from the Chair

For those of us who have been practicing in the area of children's law for a number of years, one of the goals was to break the cycle of abuse and neglect. Certainly, this process was and is usually easier with younger children than with older children. However, breaking the cycle was not only important to me for the younger children, but for the older ones as well. But once we had the teen, then what? Unless they were lucky enough to be matched with a terrific foster family, they continued to struggle. Through the years, we sadly saw few services for the benefit of older teens in the system.

Fortunately, efforts have been made and continue to be made to create and provide services to help foster youth grow into productive and contributing adults. In our work in the children's law area, we need to stress to caseworkers and young people who we have contact with to take advantage of the services and resources which may not only benefit teens as they transition out of the system but will eventually be a benefit to us all.

A study of former foster youth in three Midwestern states found that those who left foster care at age 18 were:

- Three times more likely than their peers who had not been in foster care to be unemployed or not in school.
- Twice as likely to be unable to pay their rent.
- Fewer than half had bank accounts.
- 30 percent of the males and 11 percent of the females had been incarcerated at least once after leaving foster care.

A survey of 237 Michigan foster youths ages 18-23 found similar outcomes. Only 12 percent were employed full time and only 36 percent were working part time. More than half were on public assistance and 40 percent said they were either homeless or had no stable housing. Foster youths struggle in their attempts to obtain higher education. They struggle with finances, budgeting, places to stay during holidays and a basic family support structure.

Critical issues for young adults soon to leave or having recently left foster care are education, employment and housing. Many of these young people also want and agree they need to maintain sibling connections, be a part of decisions about them and ensure they have a permanent connection to a caring adult before they leave foster care. They need support to help learn to drive and obtain a driver's license, apply for higher education financial aid and obtain important life skills such as financial planning to help the transition from foster care to being an adult. Programs created to assist with these issues are wonderful for teens without other resources but they need assistance in obtaining them and watching for the restrictions.

Youth in Transition is a funding source available for foster youth to cover expenses not covered by other government or community resources or to supplement services from other sources. To be eligible, youth must be either 1) active in the foster care system, placed out of their home based on abuse and neglect, starting at age 14 and up to age 21, or 2) be aged 18 to 21, who have been in foster care on or after their 14th birthday but are no longer under DHS supervision. Youth with an open case can access funds through their case manager. Those with closed cases must apply for closed case services in the current county of residence through the local DHS office. Covered YIT expenses include Daily Living skills, transportation, and mentorship, parenting skills, employment services, educational support, driver's education, graduation expenses, physical and mental health services, housing and relationship building skills.

The Tuition Incentive Program is a federal incentive program that encourages eligible students to complete high school by providing tuition assistance for the first two years of college and beyond. To be eligible, a student must have (or have had) Medicaid coverage for 24 months within a 36-consecutive-month period as identified by the Michigan Department of Human Services (DHS). This program may be applied for while the child is in foster care and used at a later time, whether subsequently adopted or not. However, to take advantage of the program, youth must graduate prior to age 20 and begin using TIP within 4 years of high school graduation at a participating college.

Michigan Youth Opportunity Initiative, a joint effort of the Jim Casey Youth Opportunities Initiative and Michigan Department of Human Services, is for current or former foster youth, aged 14 – 23. MYOI is an effort to improve outcomes for foster youth as they age out of care. It's focused on education, employment, housing, physical and mental health, transportation, and social and community engagement. The program helps with budgeting, credit, keeping bank accounts, and investing. Two savings accounts at a local bank are opened for the youth. One account is for personal use. The second savings account is called an Individual Development Account - or an IDA. The IDA is a matched savings account, for every dollar saved, it's matched, dollar-for-dollar up to $1,000 per year. Having an IDA is a way to save for long-term asset purchases. Approval to withdraw this money is necessary and can only be used for certain things. MYOI also pays stipends for youth board meetings and sometimes incentives for things like getting good grades, graduating from high school, and attending college. Every time youth are paid, half of it is put in the IDA account to help save more. Check for this program at your local DHS office. If it is not available yet in your county, there may be a comparable program through your county DHS or Extension Program. In Clinton County , there is a wonderful program for foster and adopted youth called Creating Connections which mirrors MYOI. The young people participating have formed friendships, found caring mentors, developed skills, and earned and saved money.

The Education and Training Voucher Program allows Michigan to provide up to $5,000 per year to a student in an accredited college or trade school. Youth must have been in foster care on or after their 14th birthday because of abuse or neglect. They may have been adopted from foster care on or after his/her 16th birthday. They must have a high school diploma or GED. They must be enrolled prior to his/her 21st birthday and eligibility continues until age 23 provided they receive at least a 2.0 GPA. Due to the fact that more foster youth are staying in college and reapplying for vouchers, the ETV grants topped out at $2,500 in 2008 as compared to $5,000 in 2007.

Michigan Universities have also been asked to help. The University of Michigan has developed the Blavin Scholarship for foster children, orphans or wards of the court for the upcoming Fall 2008-2009 school year. They have 8 scholarships available for up to $5,000 each. Western Michigan University will provide full tuition scholarship for any foster youth who pays for their room and board with federal grants. The benefits of the Western program include dorms which remain open during university holidays and on-campus tutoring. Michigan State University 's School of Social Work offers about $1200 a year to former foster children studying to become social workers.

We all must do our part in working with foster care youth, and those adopted at a later age and who frequently have the same issues, as they age out of the system and become adults. No one is truly independent at 18. We all have a role in supporting our youth, particularly those who have not been as fortunate as others, but are still as deserving. ◎

Trading Family for Permanency:
Legal Orphanage under the Adoption and Safe Families Act

by Traci Carey

Introduction

The tragedy of Liberty Trejo and her three children is exemplary of the disheartening effects resulting from the United States and Michigan child welfare legal systems. Liberty's story began at age 14, when she first started dating 24-year-old Gregory Trejo. At age 17, she gave birth to their first son, Gregory Jr.[1] Two years later, in 1992, Liberty and Gregory were married, and the couple had another son, Timothy.[2] In 1993, Samantha was born.[3] After just over a year of marriage, Liberty and Gregory divorced in November of 1994, and Liberty was granted full custody of the three minor children.[4] Liberty was 21 years old, a divorcée, a single mother of three, unemployed, facing eviction,[5] and had no transportation.[6] By the following April, Liberty sought help so that she could get her life together and raise her children properly.[7] She had already placed Gregory Jr., then age four, in the care of her mother and stepfather when she temporarily and voluntarily placed Timothy, age three, and Samantha, age one, in the Department of Social Services' care.[8] At the time of their placement, Liberty was said "to be a good mother."[9] An initial report stated that the children were "well behaved, well mannered, and that it was evident they had been provided for and given good treatment all their life [sic]."[10]

The case plan for this family required Liberty to obtain suitable housing, obtain employment, undergo a psychological examination, attend parenting classes, visit her children, and to contact her caseworker weekly.[11] One of the involved agencies was to provide assistance in finding housing by providing referrals.[12] Liberty found employment within a week[13] and was also able to obtain transportation.[14]

Over the next 12 months, Liberty substantially complied with the case plan's requirements, but was unable to obtain housing.[15] Despite her repeated requests, there was no evidence that the agency had provided Liberty with any assistance in finding or securing suitable housing.[16] On July 12, 1996, the Department of Social Services filed a petition to have Liberty's parental rights over the three minor children terminated.[17] Three statutory grounds for termination were alleged.[18] The two grounds that the court found merit in were the provisions found in Mich. Comp. Laws § 712A.19b(3)(c)(i) and (g),[19] which state:

> (c)(*i*) The conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age;
>
> and,
>
> (g) The parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age.[20]

The court found that these grounds had been proven by clear and convincing evidence,[21] based on Liberty Trejo's "failure" to obtain suitable housing. Even though these statutory grounds are met only when no reasonable expectation exists for their resolution "within a reasonable time considering the child's age,"[22] no consideration was given to the fact that Liberty and her new husband would be moving into a three-bedroom home within months of the proceeding.[23] Once the statutory grounds are met, the

court must terminate parental rights, unless termination "is clearly not in the best interests of the child."[24] Liberty Trejo's parental rights to all three of her minor children were terminated. Consequently, the court succeeded in destroying a family.

In his dissent, Justice Cavanaugh conveyed his opinion that the facts "only show that respondent had a difficult time recovering from the emotional and financial effects of her divorce . . . ."[25] The dissent concluded with a quote from *Santosky v. Kramer*, stating the court must remember that the "fundamental liberty interest of natural parents in the care, custody, and management of their child[ren] does not evaporate simply because they have not been model parents or have lost temporary custody of their child[ren] to the State."[26] Liberty Trejo is only one example of a loving, dedicated mother punished for trying to get her life together after an emotionally and financially draining divorce.

A parent's right to raise his or her children has been repeatedly protected by the United States Supreme Court.[27] Child welfare policy once furthered the protection of the parents' constitutional and fundamental liberty interest in the care, custody, and control of their minor children. As such, reunification of families was preferred and encouraged. Termination of parental rights was a last resort. A shift in policy occurred in which ensuring the child's health and safety became the paramount concern,[28] and permanency for the children is now of the utmost importance. The federal government implemented new legislation to reflect this policy shift, and the states followed in order to receive federal funding for their foster care programs.

Under the new regime, foster care is deemed undesirable. This appears appropriate, as "foster care placement and foster care experience more generally are associated with poorer development outcomes for children."[29] Both the federal policy and Michigan's policy state a preference for the reunification of families, but both expedite the process to terminate parental rights. The implication is that it is more desirable to terminate parental rights and "free" a child for adoption than it is for the child to remain in foster care for longer than one year.

Child welfare must return its focus to reunifying families whenever possible. The expeditious termination of parental rights does not properly address or resolve the increased number of children in foster care. The unintended effect of "freeing" children for adoption sooner via earlier termination of parental rights is that more children are left to linger in foster care for longer periods because they no longer have a family to reunify with and adoptions are simply not occurring at a rate comparable to the rate at which parental rights are being terminated. As one commentator observed, "the number of children entering the system continually exceed[s] the number leaving."[30] This paper argues that permanency should not be sought through the demise of family relationships in every circumstance. Rather, a balance must be struck between the parents' fundamental liberty interest in the care, custody, and control of their children, the states' *parens patriae*[31] interest in protecting children, and the children's best interests.

Background

The legal history of parental rights begins in colonial America. During that period, the law regarded children as property owned by their fathers.[32] In the 1800s, a policy shift occurred in which American custody law focused on the mother.[33] As society began to concentrate on the moral and educational development of children, the mother came to be the "nurturing" parent responsible for the child's development in these areas.[34] Courts started to recognize the concept of "best interests of the child" and implemented a preference that mothers take custody over the children.[35]

The next shift in child welfare policy came during the Industrial Revolution.[36] Division of labor and the rise of specialties contributed to a culture where society relied on the advice of experts.[37] This trend found its way into case law and statutes, and its continuation led to the phenomenon of "The State as Superparent."[38] The State used this authority to intervene into the privacy of families when parents failed to meet the acceptable standards of proper child rearing.[39]

Child welfare became a growing concern with the increase of divorce and poverty between the 1960s and 1990s.[40] The increasing concern of child welfare and increasing awareness of deficiencies in foster care systems throughout the twentieth century led the federal government to get involved.[41] In 1935, Congress enacted the Child Welfare Services Program of the Social Security Act, in which the federal government funded a broad range of preventative and protective services for abused and neglected children.[42] This was the first

federal legislation to affect child welfare, and several other laws were enacted in the following years.[43] It was not until 1980, though, that Congress directly addressed protecting abused and neglected children in foster care with the passage of the federal Adoption Assistance and Child Welfare Act.

The Adoption Assistance and Child Welfare Act

The Adoption Assistance and Child Welfare Act (AACWA) was enacted in 1980.[44] This legislation was passed as Congress' reaction and attempt to correct the increasing occurrence of "foster care drift."[45] [46] The AACWA was the first federal legislation to directly impact the states' administration of their individual foster care systems, and required the states to strictly adhere to the federal standards in order to receive federal funding. The main policy goal of the AACWA was clear: reunify families and terminate parental rights only when "reasonable efforts" were unsuccessful.[47] This policy favored the parents' fundamental liberty interest in the care, custody, and control of their children over the state's interest in general child welfare.[48] The AACWA's stance was that it was preferable to keep potentially unstable families intact, rather than demolishing potentially stable families experiencing hardships.[49]

The federal legislation created a scheme in which states had to meet the statutory requirements in order to receive federal funds for foster care.[50] AACWA conditioned a state's receipt of funds on its implementing reasonable efforts to prevent the removal of children from their homes, and in finding adoptive placements if removal were unavoidable.[51] States were further required to implement "case review systems"[52] in which case developments are assessed at least every six (6) months.[53] During these judicial or administrative reviews, the child's case plan could be updated according to the progress made in rectifying the conditions leading to the child's removal.[54]

In addition to reviewing cases every six months, states were required to implement dispositional hearings within 18 months of the child's first placement in foster care and at regular intervals from then on.[55] At these dispositional hearings, the court would determine the child's future.[56] The court's four options were to return the child home, keep the child in foster care for a limited time, continue the child in foster care long-term, or place the child for adoption.[57]

Despite this legislation, foster care saw a rise in the number of children separated from their parents.[58] The approximately 500,000 children in foster care (nearly double that of a decade earlier[59]) experienced an average stay of almost three years.[60] Ten percent of children in foster care stayed for seven years or more.[61] Sixty percent of children are placed with more than one family during their time in foster care, and 28 percent experience three or more placements.[62] Congress determined that the primary failure of AACWA was in not clearly defining "reasonable efforts."[63] After a federal district court decision holding "reasonable efforts" unenforceable due to vagueness,[64] and the Supreme Court not allowing a parent to seek relief under 42 U.S.C. § 1983[65] when a state allegedly did not provide "reasonable efforts," states could not identify what the AACWA required of them.[66] This lack of guidance, combined with the strong policy favoring reunification of families, led state courts to return many children to unsafe homes, where they were further abused and/or neglected.[67] Congress eventually enacted the Adoption and Safe Families Act as an effort to rectify the shortcomings of the AACWA.

The Adoption and Safe Families Act

The Federal Statute

The Adoption and Safe Families Act (ASFA) was enacted in 1997 to resolve the shortcomings of the AACWA.[68] The ASFA addresses the need to increase adoption of children in the foster care system and declares this as one of its purposes.[69] Additionally, the ASFA addresses the impracticability of family reunification and "foster care drift."[70] Under the ASFA, parents' fundamental liberty interest in the care, custody, and control of their children has become inferior to both the states' interest in general child welfare and the child's safety and interest in a permanent home.[71] Four chief reforms to the AACWA were enacted with the ASFA.[72] These were: (1) emphasizing the health and safety of the child; (2) removing the requirement of "reasonable efforts" in some instances; (3) placing time limits on reunification efforts in order to increase the pace children moved back to families or toward adoption; and (4) increase the number of children in foster care that successfully obtain adoptions.[73]

The ASFA clarified the "reasonable efforts" requirement of the AACWA, and even eliminated this

requirement where aggravated circumstances exist.[74] Congress found that generally adoption is preferable to foster care.[75] Testimony was given that a primary barrier to adoption of foster children was the "reasonable efforts" required under the AACWA because decision-makers involved would err on the side of protecting parental rights instead of termination.[76] Consequently, the ASFA both clarifies the "reasonable efforts" requirement and eliminates it in certain circumstances.

In clarifying the "reasonable efforts" requirement, the ASFA does not define the term, but does state that "**i**n determining reasonable efforts to be made with respect to a child, . . . and in making such reasonable efforts, the child's health and safety shall be the paramount concern,"[77] and, that "if continuation of reasonable efforts is determined to be inconsistent with a child's permanency plan, effort must be made to place the child in a timely manner in accordance with the permanency plan and to complete whatever steps are necessary to finalize the permanent placement of the child."[78] State welfare agencies are also encouraged to search for appropriate adoptive placements while simultaneously providing "reasonable efforts" to the family.[79] [80] Furthermore, "reasonable efforts" are no longer required where a court has determined that:

(i) the parent has subjected the child to aggravated circumstances (as defined in State law, which definition may include but need not be limited to abandonment, torture, chronic abuse, and sexual abuse);
(ii) the parent has --
  (I) committed murder . . . of another child of the parent;
  (II) committed voluntary manslaughter . . . of another child of the parent;
  (III) aided or abetted, attempted, conspired, or solicited to commit such a murder or such a voluntary manslaughter; or
  (IV) committed a felony assault that results in serious bodily injury to the child or another child of the parent; or
(iii) the parental rights of the parent to a sibling have been terminated involuntarily.[81]

The emphasis placed on the child's health and safety and the limiting (or eliminating) of the requirement of "reasonable efforts" would not be as effective without the new time restrictions for reunification put into place by the ASFA. First, the "case review system" requirements under the ASFA forces states to hold permanency planning hearings within 12 months after the child enters foster care, and at least annually from then on.[82] Under the AACWA, courts were mandated to conduct the first permanency planning hearing within 18 months from the time the child entered into foster care.[83] This change requires state agencies to determine the child's permanency plan, and hence the child's future permanent living arrangement, at least six months earlier than under the AACWA.

The second, and more significant, time limitation implemented by the ASFA is the 15/22 rule. Specifically, the ASFA requires that:

> in the case of a child who has been in foster care under the responsibility of the State for 15 of the most recent 22 months, or, if [an exception to the "reasonable efforts requirement" exists], the State shall file a petition to terminate the parental rights of the child's parents (or, if such a petition has been filed by another party, seek to be joined as a party to the petition), and, concurrently, to identify, recruit, process, and approve a qualified family for an adoption, unless—
>
> (i) at the option of the State, the child is being cared for by a relative;
>
> (ii) a State agency has documented in the case plan (which shall be available for court review) a compelling reason for determining that filing such a petition would not be in the best interests of the child; or
>
> (iii) the State has not provided to the family of the child, consistent with the time period in the State case plan, such services as the State deems necessary for the safe return of the child to the child's home, if reasonable efforts . . . are required to be made with respect to the child.[84]

Thus, under the ASFA and where "reasonable efforts" are required, parents have only 15 months to comply with the case plan and rectify those conditions

which initially brought the child under the court's jurisdiction.[85] If the parents fail, the state *must* file a petition to terminate parental rights.[86] However, there is no requirement under the ASFA that an adoptive family be successfully identified and approved before the termination of parental rights occurs.[87] Courts have not construed the ASFA to impose such a requirement, either.[88] Where "reasonable efforts" to preserve and reunify the family are not required under the ASFA, the state must hold a permanency planning hearing within 30 days from the child's initial placement in foster care.[89]

In order to increase foster care adoptions, the ASFA encourages adoptions through several means. First, termination of parental rights will occur sooner under ASFA's scheme, which "frees" the children in foster care for adoption earlier than under the AACWA.[90] Secondly, inter-jurisdictional barriers no longer validly delay adoptions, as the ASFA mandates states to document efforts to identify adoptive families.[91] "At a minimum, such documentation shall include child-specific recruitment efforts such as the use of state, regional, and national adoption exchanges, including electronic exchange systems, to facilitate orderly and timely in-state and interstate placements."[92] Lastly, the ASFA provides financial incentives to the states.[93] A state receives either $2,000 or $4,000 for each adoption in a fiscal year that exceeds the state's base number.[94]

The term "base number of foster child adoptions for a State" means --

(A) with respect to fiscal year 2003, the number of foster child adoptions in the State in fiscal year 2002; and

(B) with respect to any subsequent fiscal year, the number of foster child adoptions in the State in the fiscal year for which the number is the greatest in the period that begins with fiscal year 2002 and ends with the fiscal year preceding that subsequent fiscal year.[95]

The financial incentives encourage the states to increase its number of foster child adoptions every year. The incentives will only be received when the number of foster care adoptions for a given year exceeds the greatest number of adoptions in any one year since 2001.[96] If a state fails to exceed its "base number of foster child adoptions," the state would not receive any additional financial gains.[97]

States would receive no federal funding for their respective foster care systems unless they implemented an approved plan which satisfies the ASFA and its reforms to the AACWA. Michigan has employed a statutory scheme that attempts to meet or exceed the requirements found under the ASFA, as have the other 49 states. The following section takes a deeper look into Michigan's statutory scheme.

Implementation of the Adoption and Safe Families Act in Michigan[98]

Michigan has enacted legislation and court rules designed to satisfy the requirements of the ASFA so that Michigan could continue to receive federal funds for both the administrative costs of foster care, and also to receive the additional incentive subsidies (mentioned above).[99] For example, the ASFA provides that a child may only be removed from a home when there exists:

(i) a voluntary placement agreement entered into by a parent or legal guardian of the child . . . ; or

(ii) a judicial determination to the effect that continuation in the home from which removed would be contrary to the welfare of the child and that reasonable efforts . . . have been made.[100]

The Michigan Court Rules follow this procedure by requiring the courts to determine that staying in the parental home was "contrary to the child's welfare" in the initial court order which authorized the child's removal.[101] Additionally, within 60 days of the child's removal, the court must determine that "reasonable efforts" to prevent the removal were either made or not required.[102] The Michigan legislature also enacted statutory requirements to meet the other time limitations demanded by the ASFA.

Under Michigan's legislation, parents have a mere 12 months to comply with the case plan and rectify those conditions which initially brought the child under the court's jurisdiction. Mich. Comp. Laws § 712A.19a provides that:

if a child remains in foster care and parental rights to the child have not been terminated, the court shall conduct a permanency planning hearing within 12 months after the child was removed from his or her home. Subsequent permanency planning hearings shall be held no

> later than every 12 months after each preceding permanency planning hearing during the continuation of foster care.[103]

Just as the ASFA demands, under the Michigan legislation "[a] permanency planning hearing shall be conducted to review the status of the child and the progress being made toward the child's return home or to show why the child should not be placed in the permanent custody of the court."[104] The Michigan statute further provides that:

> [i]f the court determines at a permanency planning hearing that the child should not be returned to his or her parent, the court shall order the agency to initiate proceedings to terminate parental rights to the child not later than 42 days after the permanency planning hearing, unless the court finds that initiating the termination of parental rights to the child is clearly not in the child's best interests.[105]

Furthermore:

> [i]f parental rights to the child have not been terminated and the court determines at a permanency planning hearing that the return of the child to his or her parent would not cause a substantial risk of harm to the child's life, physical health, or mental well-being, the court shall order the child returned to his or her parent. In determining whether the return of the child would cause a substantial risk of harm to the child, the court shall view the failure of the parent to substantially comply with the terms and conditions of the case service plan . . . as evidence that return of the child to his or her parent would cause a substantial risk of harm to the child's life, physical health, or mental well-being. In addition to considering conduct of the parent as evidence of substantial risk of harm, the court shall consider any condition or circumstance of the child that may be evidence that a return to the parent would cause a substantial risk of harm to the child's life, physical health, or mental well-being.[106]

When reading these three sections of the Michigan Juvenile Code together, the scheme is that courts must hold a permanency planning hearing within 12 months from the date the child entered foster care. At that proceeding, the court will determine whether the child should return to the parents or not. This determination is based on "the failure of the parent to substantially comply with the terms of and conditions of the case service plan" or the development of other circumstances after the initial removal of the child.[107] If the parent has not substantially complied with the case plan, then "the court *shall* order the agency to initiate proceedings to terminate parental rights"[108] within 42 days of the permanency planning hearing, "unless the court finds that initiating the termination of parent rights to the child is clearly not in the child's best interests."[109]

Courts must make a determination to return the child to his or her parents at the permanency planning hearing. Likewise, supervising agencies face a statutory mandate.

> A supervising agency shall strive to achieve a permanent placement for each child in its care, including either a safe return to the child's home or implementation of a permanency plan, no more than 12 months after the child is removed from his or her home. This 12-month goal shall not be extended or delayed for reasons such as a change or transfer of staff or worker at the supervising agency.[110]

If the parent has not already substantially complied with the case plan for 12 months, the agency will most commonly support termination of parental rights at the permanency planning hearing. Thus, parents in Michigan face a 12-month time limitation in which they must rectify those conditions which initially brought the child under the court's jurisdiction.

The Current Posture of Foster Care

The goal of the ASFA was "to promote the adoption of children in foster care."[111] In comparing pre-ASFA adoption rates to post-ASFA adoption rates, Health and Human Services secretary Donna E. Shalala declared that in 1996, 28,000 foster care children had been adopted.[112] In 1999, foster care children saw a 64 percent increase in the number of adoptions, for a total of 46,000.[113] Initially, this statistic is impressive, but one soon realizes that the average increase in adoptions is less than 1.1 percent of the total number of foster care children on any given day.[114] More importantly, the average increase in adoptions is far out-

numbered by the children entering foster care whose parental rights have been terminated and who have no hope for adoption.[115] One Michigan family court judge argues from firsthand experience that the ASFA and its Michigan correlate have caused a surge in legal orphans.[116] The ASFA may be succeeding in its stated goal of increasing adoptions, but it is certainly failing in its purpose of increasing permanency for children.

Today, the average length of time a child waits to be adopted is over three years.[117] Michigan children remain in foster care for an average of 40 months before being adopted, while nationally, children average a 42-month stay.[118] Nearly half of the children in foster care will be placed in three or more families or institutions while in the system.[119] [120]

Foster care systems throughout the United States house 114,000 children who await adoption because the parental rights of their parents were terminated by state courts.[121] In Michigan, a total of 21,173 children are in foster care, and 6,496 are awaiting adoption.[122] Compare this to the 2003 figures of approximately 6,200 children in foster care whose parental rights had been terminated, and only 4,500 whose case plans called for adoption.[123] These numbers are even more tragic when one looks at the pre-ASFA trends. Between 1986 and 1996, the number of legal orphans awaiting adoption steadily ranged between 600 and 800.[124]

Not only are children not finding permanency, but more children are being forced into foster care because their parents' rights are being terminated. Between 2000 and 2003, there was a clear upward trend in the number of children awaiting adoption due to their parents' rights being terminated, even though the total number awaiting adoption has decreased.[125] In 2000, there were 7,742 children awaiting adoption, and 5,197 of them had their parents legally severed.[126] By 2003, only 7,129 children were awaiting adoption, but 6,729 had been legally detached from their parents.[127] The increase of 1,532 children no longer legally tied to a family was only met with an increase of 849 adoptions. In 2000, 1,701, or 21.8 percent, of the children leaving foster care were doing so via adoptions.[128] By 2003, slightly more than 28 percent of foster care children, or 2,550, exited the system after being adopted.[129]

Though the system appears to be successful in increasing the number of adoptions, permanency for the children is not immediate. In 2003, 95.8 percent of legal adoptions in Michigan occurred after 12 months or more.[130] More than 17 percent of adoptions did not take place until four years or more had lapsed.[131] The statistics reveal an overall trend which indicates that from 2000 to 2003, adoptions were taking longer to become finalized.[132]

In contrast to the trends seen in children exiting foster care via adoptions, about one half of children in foster care will be reunified with their families after a relatively short time in the system.[133] However, the percentage of children exiting foster care through reunifications decreased over the time period from 2000 to 2003.[134] In 2000, 56.2 percent of foster children, or 4,385, were reunited with their families.[135] Only 54.8 percent of foster children in 2003 escaped foster care through reunification.[136] Even though the percentage decreased, the actual number of children still increased due to the rapidly growing foster care population.

While evidence shows that more children are experiencing reunification with their families, the statistics also reveal that children suffer a recurrence of maltreatment within a six-month period at higher rates than previous years.[137] According to the National Child Abuse and Neglect Data System (NCANDS), which collected data from 45 states, 7.3 percent of children were victimized again with six months.[138] Michigan reported about 7 percent of its children suffering re-victimization. Between 2000 and 2003, Michigan reported an approximate 112 percent increase in the number of maltreatment recurrences within six months.[139] This was the highest of any reporting state.[140]

The significant increase in the number of children experiencing a recurrence of maltreatment within six months could have resulted from a number of factors. First, the overall number of children encountering the system has drastically increased. This means more children are available to be returned home, which in turn increases the risk of recurring maltreatment. However, this explanation probably does not alone account for the statistics. A second possibility is that some courts are reluctant to terminate parental rights, but know they must do so once the 12-month time limit expires. Some judges may prefer to place children with their families before the parents have been able to wholly rehabilitate. By giving the parents more than a year to rehabilitate, reunified families experience lower rates of reentry into the system.[141]

In any case, the evidence from 2000 to 2003 is more than clear that despite the governmental goal of providing permanency to children who enter the foster care system as a result of parental abuse or neglect, these children are not finding permanency in Michigan. The current legal scheme seems to be successful in its endeavor to increase the number of foster care children obtaining legal adoptions. On the other hand, the child welfare system is radically failing in that more children are becoming legal orphans remaining in the system long-term. The legislatures should consider what can be done to rectify the premature termination of parental rights and the resulting legal orphanage, while still maintaining the success of increased adoptions and striving to create more adoptive placements.

Proposed Solutions

Congress acted when it became widely accepted that the Adoption Assistance and Child Welfare Act was failing. Their enacted resolution was the Adoption and Safe Families Act. Now Congress needs to show an interest in the current legislation's shortcomings and craft another potential solution. Namely, Congress should be concerned by the increase in terminations of parental rights, which are in turn causing an unintended proliferation of legal orphans. While incentives for adoption appear to be effective, adoptions are not rising at a pace comparable to that of parental rights terminations. The possibilities and potential solutions are endless. Several are discussed below.

Emphasize the Best Interests of the Child

First and foremost, Congress should implement legislation in which the child's best interests are the paramount concern in child welfare policy.[142] Focusing on the parents' fundamental liberty interest and encouraging reunifications failed under the AACWA. In response, the ASFA stated that "the child's health and safety shall be the paramount concern,"[143] and effectively placed the states' *parens patriae* interests above all others involved. This scheme is also failing. Logically, one would expect to focus on the child's best interests in child welfare policy. Doing so will also require adjudicators to balance the states' interests against the parents' interests, and determine which is most appropriate on a case-to-case basis.

The current termination standard presumes that termination is in the child's best interests rather than requiring a showing that termination is actually in the child's best interests.[144] The statute states:

> If the court finds that there are grounds for termination of parental rights, the court shall order termination of parental rights and order that additional efforts for reunification of the child with the parent not be made, unless the court finds that termination of parental rights to the child is *clearly not in the child's best interests*.[145] (Emphasis added).

By requiring the court to find termination "is clearly not in the child's best interest," the Michigan legislature implies that termination is in the child's best interest. This standard is nearly impossible to rebut.[146]

The current scheme requires the state to prove by clear and convincing evidence[147] that the statutory grounds justifying termination had been met, and then mandates termination, unless the record as a whole supports not terminating parental rights because it would be against the child's best interests. If a court is satisfied that clear and convincing evidence exists on the record to support termination, it seems illogical and improbable that the same record will reveal compelling reasons to circumvent termination. In contrast, if a showing that termination is in the child's best interest were required, the state would first have to prove by clear and convincing evidence that the statutory grounds justifying termination had been met, and then, that such termination is the most beneficial outcome for the child. This latter approach will better reflect what the child's best interests truly are.

In assessing whether termination is in the child's best interests, states could initially mimic any factors used in such a determination under the relevant custody provisions.[148] Michigan defines "best interests of the child" in the Child Custody Act of 1970,[149] but courts are not obligated to consider these factors in termination of parental rights proceedings.[150] Other factors could also be considered, such as the child's stability, length of stay in foster care,[151] the strength of the parent-child relationship, the parents' compliance with the case plan, and the likelihood of achieving permanence for the child.[152]

Concentrating on the best interests of the child will require a case-by-case determination by the courts, and their analysis should focus on whether it is

better for *this* child to be in a less-than-perfect family, or to linger indefinitely in foster care and await an adoption that is not guaranteed. Also, case plans should be unique to each family's needs. While this is already required under the ASFA, review of the Michigan system reveals that it is often not done.[153] This is probably true because of the high turnover rates of social service workers, and the extreme caseloads they must handle. In order to successfully individualize the case plans, Congress should consider defining "reasonable efforts."

Define "Reasonable Efforts"

The ASFA clarified the "reasonable efforts" requirement by stating that "**i**n determining reasonable efforts to be made with respect to a child, . . . and in making such reasonable efforts, the child's health and safety shall be the paramount concern."[154] Congress should further clarify the meaning of "reasonable efforts" that states are required to make under the ASFA. This could be done in one of three ways.

Congress could take the initiative to explicitly define the term in the ASFA itself. This would avoid having discrepancies among the states, but would also take more control over child welfare away from the states. Secondly, Congress could demand the states define the term themselves, and obtain approval. This could be overseen by the same federal agency that is already responsible for approving state legislation and ensuring states are satisfying the requisites of the ASFA. Either way, the definition of "reasonable efforts" should convey the government's expectations of welfare services to be provided. At a minimum, the definition should mandate the agency to ascertain the root cause for state involvement and provide services to rectify that condition. For example, in the *Trejo* case, the root problem was that the mother could not provide adequate housing for her children. The state agencies should have at least focused on this problem and offered services to locate and obtain low-income housing, and also provided guidance for getting other welfare assistance to afford such housing if necessary.

As a third option, Congress could change the language. One suggestion would be to require agencies provide their "best efforts." This term is recognized in contract law to mean "diligent attempts to carry out an obligation."[155] Another suggestion would be to use "diligent efforts."[156] This phrasing implicates that states should not simply offer services, but should make additional efforts to ensure families receive the necessary services. The commentator notes that "diligent efforts" would only be proper in cases of neglect.[157] Requiring such efforts in cases of severe or repeated abuse might only expose the child to additional harm and victimization.[158] [159] "Diligent efforts" would also indicate that social service agencies should provide reunified families with appropriate after-care programs to ensure the family remains stable and together. More federal and state funds need to be directed to this purpose.

Encourage Reunification

The two proposed solutions offered thus far implicate a desire to encourage reunification of families. Evidence suggests that generally, children are more stable with continuing parental contact.[160] Admittedly, though, reunification will generally not be desirable when the child comes under the court's jurisdiction as a result of severe or repeated abuse, rather than neglect. In situations where the abuse was an isolated incident, welfare services may sufficiently address and alleviate the problem, and reunification would be a feasible outcome. Congress should reform the ASFA to acknowledge the difference between severe or repeated abuse and neglect, and call for different procedures based on the type of case. In doing so, Congress again has the option of creating definitions itself, or leaving it to the state courts to do. Michigan already has separate definitions of abuse and neglect in its Child Protection Law.[161] In Michigan,

> "Child abuse" means harm or threatened harm to a child's health or welfare that occurs through nonaccidental physical or mental injury, sexual abuse, sexual exploitation, or maltreatment, by a parent, a legal guardian, or any other person responsible for the child's health or welfare or by a teacher, a teacher's aide, or a member of the clergy.[162]

And,

> "Child neglect" means harm or threatened harm to a child's health or welfare by a parent, legal guardian, or any other person responsible for the child's health or welfare that occurs through either of the following:
>
> (i) Negligent treatment, including the failure to provide adequate food, clothing, shelter, or medical care.

(ii) Placing a child at an unreasonable risk to the child's health or welfare by failure of the parent, legal guardian, or other person responsible for the child's health or welfare to intervene to eliminate that risk when that person is able to do so and has, or should have, knowledge of the risk.[163]

The difference in these definitions is in the intent of the actor. Abuse occurs through an intentional, non-accidental act, whereas neglect is the result of a failure to act. Services can more readily be offered to people who did not know to act, or how to act, than they can be to people who intentionally acted wrongly. More importantly though, children are at less risk for harm when in neglectful situations than they are in abusive situations, unless the neglect is ongoing and unresolved. Consequently, it is appropriate to provide more safety to those in abusive family settings by not encouraging reunification to the same extent.

Encourage Kinship Care Placements

A less drastic, but beneficial, change in the ASFA would be to encourage kinship care placements. Preferences favoring the placement of a child with a relative whenever possible are already in place. One of the three exceptions to the 15/22 rule is when, "at the option of the state, the child is being cared for by a relative."[164] However, in order for this exception to apply, the relative caretaker must be eligible to be a foster parent under the applicable state requirements. Instead, Congress should lower or eliminate the standards for a relative caretaker, so that more kinship care placements may be utilized.

Additionally, Congress should provide a financial incentive to the states for placing the children with relatives rather than strangers. States should be rewarded because the child is not in the "classic" foster care system. Further, Congress should provide financial assistance to the states so that the states may provide financial assistance to relative caretakers similar to the assistance given to foster care providers. Michigan currently does not provide financial assistance to kinship caretakers, but would be obligated to do so if the federal legislation were amended to include such a requirement.

Kinship care placements have several advantages over typical foster care. First, children in kinship care are less likely to experience multiple moves.[165] Children subject to kinship care are more likely to be placed with their siblings, and agencies will not be burdened with finding multiple homes for the children.[166] Children in the care of a relative are likely to be less traumatized for two reasons. The children know their caretaker and have an ongoing relationship with him or her, and the children are more likely to stay in regular contact with their biological parents.[167] Kinship care also allows the children to escape the stigmatization associated with foster care.[168] Last of all, placing the children with relatives will exempt the parent from the stringent 12-month time limits otherwise imposed.

Relative care placements are not without their risks. Some evidence suggests that abuse exists in intergenerational cycles.[169] This risk could be easily averted with careful reviews of the kinship caregivers by the child welfare agencies, both before placement and with follow-ups. Another concern is that unsupervised visitation with the biological parents may occur when it would not be appropriate,[170] as in cases of severe abuse. Critics also suggest that kinship care could be used as a means for parents to get more governmental assistance, because foster care payments are typically larger than other types of welfare payments.[171] However, some states currently do not even provide foster care payments to kinship providers, so this concern has less merit as it is not universal.

A clear definition of "relative" or "kin" would have to be shaped in order for this solution to be optimally effective. Again, Congress or the states could create the definition. Either way, the defining body should be encouraged to create a broad definition that would recognize "any adult with whom the child has an established relationship,"[172] as a relative. This way, the definition will capture the most people possible, and create the most opportunities.

Certainly, no single solution just proposed will be sufficient to resolve the ASFA's shortcomings. These are also not the only possible solutions to the current problems faced by the United States and Michigan child welfare systems. The options for Congress are plentiful. The initial step is for the legislators to become concerned by the failures of ASFA and seek reform to correct those shortcomings.

Conclusion

If and when Congress chooses to amend the Adoption and Safe Families Act, they should consider: (1) requiring a best interests of the child finding by the adjudicator, and ensuring that case plans are developed on an individualized, case-by-case basis; (2) clearly defining or changing the language of "reasonable efforts," and allowing for different approaches for abuse cases versus neglect cases; (3) refocusing state efforts on reunification; and (4) encouraging relative placements.

Future research needs to be conducted so that society can ensure its children are being adequately cared for. One area of interest may be in determining which family situations are most compatible with reunification efforts.[173] Certain factors lend themselves to a child's successful departure from foster care. Knowing what these factors are, and training social service workers to recognize them, would allow social service workers to focus their limited time and resources according to the relative need of each family.

Research will need to continue collecting and analyzing annual data regarding foster care children. Statistics should be generated regarding the number of children entering foster care, how many have become legal orphans, how long children remain in foster care, which avenues are placing children outside of foster care, and how many children reunified with their families experience maltreatment (rates of reentry)[174] and within how much time. Other areas related to children in foster care may also be of interest.

If Congress were to amend the ASFA to include any of the proposed solutions, the arena of social work would likely feel the heaviest impact. By encouraging reunification and demanding individualized case plans, social workers will be required to perform more tasks. Case management will continue to be a challenge. This will likely have a negative effect overall, unless the turnover rate of case workers is addressed and improved. The legal system will probably not be significantly impacted.

A child's need for permanency should not be sought through the demise of family relationships in every circumstance. A balance must be struck between the parents' fundamental liberty interest in the care, custody and control of their children, the states' *parens patriae* interest in protecting children, and the children's best interests. The current applicable statute, the Adoption and Safe Families Act, does not do this and desperately needs reform.

Endnotes

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2 Paruch, *supra* Footnote 1.

3 Paruch, *supra* Footnote 1.

4 Paruch, *supra* Footnote 1.

5 Paruch, *supra* Footnote 1. The couple was two months behind on rent when the divorce became finalized.

6 Paruch, *supra* Footnote 1.

7 *In re Trejo*, 462 Mich. 341, 345; 612 N.W.2d 407 (2000).

8 *id*.

9 Paruch, *supra* Footnote 1 at 123.

10 Paruch, *supra* Footnote 1 at 123.

11 Paruch, *supra* Footnote 1 at 123.

12 Paruch, *supra* Footnote 1 at 123.

13 Child Protection Reform Organization Testimonials, (2007), http://www.childprotectionreform.org/testimony/testimony_home.htm.

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15 Paruch, *supra* Footnote 1 at 126.

16 Paruch, *supra* Footnote 1 at 124.

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18 462 Mich. at 348.

19 462 Mich. at 350.

20 Mich. Comp. Laws § 712A.19b(3)(c)(i) and (g) (2007).

21 462 Mich. at 350.

22 Mich. Comp. Laws § 712A.19b(3)(c)(i) and (g) (2007).

23 462 Mich. at 363.

24 Mich. Comp. Laws § 712A.19b(5) (2007).

25 Paruch, supra Footnote 1 at 133.

26 462 Mich. at 373-74, quoting *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

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31 This term is Latin for "parent of his or her country," and is defined to mean "the state in its capacity as provider of protection to those unable to care for themselves." Black's Law Dictionary (8th ed. 2004).

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33 Wilhelm, *supra* Footnote 30.

34 Wilhelm, *supra* Footnote 30.

35 Wilhelm, *supra* Footnote 30.

36 Wilhelm, *supra* Footnote 30 at 626.

37 Wilhelm, *supra* Footnote 30 at 626.

38 Wilhelm, *supra* Footnote 30 at 626.

39 Wilhelm, *supra* Footnote 30 at 626.

40 Wilhelm, *supra* Footnote 30 at 627.

41 Hort, Katherine A., *Is Twenty-Two Months Beyond the Interest of the Child? ASFA's Guidelines for the Termination of Parental Rights*, 28 Fordham Urb. L.J. 1879, 1891 (2001).

42 Allen, MaryLee and Mary Bissell, *Safety and Stability for Foster Children: The Policy Context*, 14 Children, Families, and Foster Care 1, pg. 48, 71 (2004).

43 Allen, *supra* Footnote 40.

44 Hort, *supra* Footnote 39 at 1892.

45 "Foster Care Drift" is a term used to describe the phenomenon of children spending extended periods of time in foster care because long-term goals either did not exist or were not followed through with. Hort, *supra* Footnote 39 at 1880.

46 Hort, *supra* Footnote 39.

47 Wilhelm, *supra* Footnote 30 at 623.

48 Wilhelm, *supra* Footnote 30 at 623.

49 Wilhelm, *supra* Footnote 30 at 623.

50 Wilhelm, *supra* Footnote 30 at 623.

51 Kemper, Kurtis A., *Construction and Application by State Courts of the Federal Adoption and Safe Families Act and Its Implementing State Statutes*, 10 A.L.R.6th 173 (2006).

52 As defined at 42 U.S.C. § 675(5)(C) (2000).

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54 Kemper, *supra* Footnote 51.

55 Kemper, *supra* Footnote 51.

56 Kemper, *supra* Footnote 51.

57 Kemper, *supra* Footnote 51.

58 Kemper, *supra* Footnote 51.

59 O'Laughlin, *supra* Footnote 29 at 1432.

60 Kemper, *supra* Footnote 51.

61 O'Laughlin, *supra* Footnote 29 at 1433.

62 O'Laughlin, *supra* Footnote 29 at 1433.

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64 *Del A. v. Roemer*, 777 F.Supp. 1297, 1308 (E.D. La. 1991).

65 This statute provides citizens with an opportunity for remedy in certain circumstances where governments allegedly violate the citizens' civil rights.

66 Wilhelm, *supra* Footnote 30 at 624.

67 Wilhelm, *supra* Footnote 30 at 624.

68 Hort, *supra* Footnote 39 at 1896.

69 Pub. L. No. 105-89, 111 Stat. 2115 (2000).

70 Hort, *supra* Footnote 39 at 1896.

71 Kemper, supra Footnote 51.

72 Wilhelm, *supra* Footnote 30 at 617.

73 Wilhelm, *supra* Footnote 30 at 618.

74 Wilhelm, *supra* Footnote 30 at 629; 42 U.S.C. § 671(a)(15)(D) (1998).

75 Kemper, *supra* Footnote 51.

76 Kemper, *supra* Footnote 51.

77 42 U.S.C. § 671(a)(15)(A) (1998).

78 42 U.S.C. § 671(a)(15)(C) (1998).

79 Kemper, *supra* Footnote 51.

80 Many commentators criticize the use of "concurrent planning," in which child welfare agencies provide "reasonable efforts" while also searching for other routes to permanency, such as adoption. I believe this debate is too large to adequately address in this paper. However, I recognize that the use of "concurrent planning" may be yet another factor leading to the increase in legal orphanage under the ASFA.

81 42 U.S.C. § 671(a)(15)(D) (1998).

82 42 U.S.C. § 675(5)(C) (1998).

83 Kemper, *supra* Footnote 51.

84 42 U.S.C. § 675(5)(E) (2000).

85 Kemper, supra Footnote 51.

86 Kemper, supra Footnote 51.

87 Kemper, *supra* Footnote 51.

88 Kemper, *supra* Footnote 51.

89 42 U.S.C. § 671(a)(15)(E)(I)-(ii) (1998).

90 42 U.S.C. § 675(5)(E) (1998), 42 U.S.C. § 671(a)(15)(E)(I)-(ii) (1998).

91 Hort, *supra* Footnote 39 at 1896.

92 42 U.S.C. § 675(1)(E) (2000).

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96 42 U.S.C. § 673b(3) (2000).

97 42 U.S.C. § 673b(3) (2000).

98 I am writing this article as a third year law student. I intend to join the State Bar of Michigan and practice family law within the State of Michigan.

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101 Corrigan, *supra* Footnote 95. 45 C.F.R. § 1356.21(c).

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103 Mich. Comp. Laws § 712A.19a(1) (2007).

104 Mich. Comp. Laws § 712A.19a(3) (2007).

105 Mich. Comp. Laws § 712A.19a(6) (2007).

106 (Emphasis added.) Mich. Comp. Laws § 712A.19a(5) (2007).

107 Mich. Comp. Laws § 712A.19a(5) (2007).

108 Mich. Comp. Laws § 712A.19a(6) (2007).

109 Mich. Comp. Laws § 712A.19a(6) (2007).

110 Mich. Comp. Laws § 722.954b(1) (2007).

111 Pub. L. No. 105-89, 111 Stat. 2115 (2000).

112 Wilhelm, *supra* Footnote 30 at 640.

113 Wilhelm, *supra* Footnote 30 at 640.

114 Wilhelm, *supra* Footnote 30 at 640.

115 Wilhelm, *supra* Footnote 30 at 640.

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118 *Key Facts: Michigan*, Kids Are Waiting, a Project of The Pew Charitable Trusts, (2007), http://kidsarewaiting.org/reports/factsheets/?StateID=MI.

119 *Key Facts: Michigan*, Kids Are Waiting, a Project of The Pew Charitable Trusts, (2007), http://kidsarewaiting.org/reports/factsheets/?StateID=MI.

120 In Michigan, 41 percent undergo three or more placements. Nationally, 42 percent undergo three or more placements. *Key Facts: Michigan*, Kids Are Waiting, a Project of The Pew Charitable Trusts, (2007), http://kidsarewaiting.org/reports/factsheets/?StateID=MI.

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124 Tacoma, *supra* Footnote 116 at 38.

125 *Chapter VI. State Data Pages*, U.S. Department of Health & Human Services Administration for Children & Families: Children's Bureau, (2007), http://www.acf.hhs.gov/programs/cb/pubs/cwo03/state_data/michigan.htm.

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138 *Chapter II. Achieving Safety Related Outcomes*, U.S. Department of Health & Human Services Administration for Children & Families: Children's Bureau, (2007), http://www.acf.hhs.gov/programs/cb/pubs/cwo03/chapters/chaptertwo2003.htm.

139 *Chapter II. Achieving Safety Related Outcomes*, U.S. Department of Health & Human Services Administration for Children & Families: Children's Bureau, (2007), http://www.acf.hhs.gov/programs/cb/pubs/cwo03/chapters/chaptertwo2003.htm.

140 *Chapter II. Achieving Safety Related Outcomes*, U.S. Department of Health & Human Services Administration for Children & Families: Children's Bureau, (2007), http://www.acf.hhs.gov/programs/cb/pubs/cwo03/chapters/chaptertwo2003.htm.

141 The commentator suggests that the ability to maintain a parent-child relationship through a longer foster care placement is the link to the lower reentry rates. Wulczyn, *supra* Footnote 127 at 105.

142 O'Laughlin, *supra* Footnote 29 at 1455.

143 42 U.S.C. § 671(a)(15)(A) (1998).

144 O'Laughlin, *supra* Footnote 29 at 1434.

145 Mich. Comp. Laws § 712A.19b(5) (2007).

146 Tacoma, Kenneth L., "Lost and Alone on Some Forgotten Highway: ASFA, Binsfield, and the Law of Unintended Consequences," *Mich. Child Welfare J.* (Spring 2007), pg. 37, 41; http://chanceatchildhood.msu.edu/pdf/CWLJ_sp07.pdf.

147 See *Santosky v. Kramer*, 455 U.S. 745 (1982), holding that the clear and convincing standard of proof is appropriate in parental rights termination proceedings.

148 Michigan law requires a court to make a finding on 11 to 12 different factors when determining child custody disputes. These are: (a) the love, affection, and other emotional ties existing between the parties involved and the child; (b) the capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any; (c) the capacity and disposition of the parties involved to provide the child with food, clothing, medical care, or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs; (d) the length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity; (e) the permanence, as a family unit, of the existing or proposed custodial home or homes; (f) the moral fitness of the parties involved; (g) the mental and physical health of the parties involved; (h) the home, school, and community record of the child; (i) the reasonable preference of the child, if the court considers the child to be of sufficient age to express preference; (j) the willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents; (k) domestic violence, regardless of whether the violence was directed against or witnessed by the child; and, (l) any other factor considered by the court to be relevant to a particular child custody dispute. Mich. Comp. Laws § 722.23 (1993).

149 Mich. Comp. Laws § 722.23 (1993).

150 *In re Trejo*, 462 Mich. 341; 612 N.W.2d 407 (2000), held that a separate hearing to determine the child's best interests is not required. Furthermore, this does not violate due process protections because the court is able to look at the record as a whole when making the "best interests" determination.

151 O'Laughlin, *supra* Footnote 29 at 1440.

152 Paruch, *supra* Footnote 1 at 154.

153 Corrigan, *supra* Footnote 95 at 25.

154 42 U.S.C. § 671(a)(15)(A) (1998).

155 Blacks Law Dictionary (8th ed. 2004).

156 Wilhelm, *supra* Footnote 30 at 646.

157 Wilhelm, *supra* Footnote 30 at 646.

158 Wilhelm, *supra* Footnote 30 at 646.

159 It should be noted that the occasional abuse case may be the result of an isolated incident and could possibly be corrected through services. The courts should have discretion in identifying those cases and seek reunification if the circumstances suggest this course would be sensible.

160 O'Laughlin, *supra* Footnote 29 at 1442.

161 Mich. Comp. Laws § 722.622 (2004).

162 Mich. Comp. Laws § 722.622(f) (2004).

163 Mich. Comp. Laws § 722.622(j) (2004).

164 42 U.S.C. § 675(5)(E) (2000).

165 O'Laughlin, *supra* Footnote 29 at 1451.

166 O'Laughlin, *supra* Footnote 29 at 1451.

167 O'Laughlin, *supra* Footnote 29 at 1451.

168 O'Laughlin, *supra* Footnote 29 at 1451.

169 O'Laughlin, *supra* Footnote 29 at 1452.

170 O'Laughlin, *supra* Footnote 29 at 1452.

171 O'Laughlin, *supra* Footnote 29 at 1452.

172 O'Laughlin, *supra* Footnote 29 at 1456.

173 Wulczyn, *supra* Footnote 127 at 99.

174 Wulczyn, *supra* Footnote 127 at 105.

Childhood Sexuality:
What Professionals Need to Know

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Abstract

Childhood sexuality is a difficult topic for many professionals. Oftentimes it simply is ignored unless there is a serious problem. However, there is much confusion about what exactly constitutes a problem. Some behaviors are quite common developmentally and if misconstrued children can be traumatized by the reaction of those around them. This article will provide helpful assessment guidelines for professionals who work in the area of child welfare about what is "normal" childhood sexuality, what might be cause for concern, and what needs immediate intervention.

The word sexuality evokes different feelings in everyone; some positive, some negative, commonly a mixture of both. When we talk about the topic of *childhood* sexuality, most people start to get a little nervous. Some would prefer to just "not go there." Others are fine with the topic in the abstract, but when it comes down to actually knowing what to do or say when confronted with a situation involving childhood sexual behavior, they become less sure of themselves.

However, because sexuality is a part of normal childhood development, it should not be ignored. Adults should talk with children about sexuality and respond to questions in the same manner they would about anything else—in open, honest ways—obviously doing so in an age-appropriate way (Wilbur & Aug, 1973). Lack of communication about sexuality and sexual behavior can potentially lead to a variety of emotions for children such as confusion, guilt, shame, or negative consequences such as sexual acting out.

Unfortunately, for a variety of reasons, childhood sexuality can move away from what is considered a normal developmental path. At these times, professionals need to be acutely aware of when to intervene. Assessment can be difficult because the situations in which the behaviors occur are all unique. However, there are behaviors that demand intervention. This article gives specific guidelines to identify this continuum of normal to problematic behaviors.

Understanding Normal Sexual Behaviors

Infants and toddlers relate to their world through touch and pleasure. In normal environments, they quickly learn that when they are in distress they are picked up, held, and touched, which in turn provides them with both pleasure and a sense of security. Self-genital exploration begins in infancy and brings pleasurable and soothing feelings (Cavanagh Johnson, 1993). Toddlers may even discover ways of creating these feelings through rubbing their genitals on objects such as toys and furniture. However, even though infants and younger children may be able to physiologically experience this pleasure or orgasm from masturbation, it is thought to be purely reflexive and that children cannot experience orgasm at full cognitive capabilities until adolescence (Martinson, 1976).

As children grow to school age and get closer to the onset of adolescence, their self-touching will become more specific and more goal oriented toward orgasm. As they begin to learn that their genitals are private, they also begin to become more inhibited and seek privacy for these activities.

Children inevitably go through stages where they become curious about activities that involve their genitals or the genitals of others. Early on, they may want to watch others in the bathroom and become interested in bathroom functions. It is normal for them to begin wanting to see or touch others genitals or women's breasts and ultimately begin learning about boundaries between themselves and those around them.

It is common for children to begin to incorporate sex into their everyday play. Normal children's sexual play is exploratory between young children that usually includes spontaneity, joy, laughter, embarrassment, and/or sporadic levels of inhibition and

disinhibition (Gil & Cavanagh Johnson, 1993). At all stages of childhood—infancy, childhood, and pre-adolescence—children are learning to relate to the world around them and participate in role-playing. Normal play and role-playing, which typically includes playing house, getting married, or "playing doctor," helps children to understand anatomical differences, gender roles, and relationships between the people in their lives. This play helps them to put perspective on where they fit in all of the relationships around them.

As children get older and have more peer contact, they become privy to a lot more information about their bodies and sexuality. Their role-playing may begin to include themes that are more adult as they compare their knowledge and become curious. They may begin to imitate things they have seen on television or in their home, such as kissing, dating, petting, and other sexual or intimate behaviors. As they get closer to the onset of adolescence, they may begin to imitate and/or figure out what intercourse is and begin to experiment with it as well as oral sex and other types of sexual behavior.

Gil (1993) summarized the typical spectrum of sexual curiosities and behaviors of children as follows:

> Children become interested in their bodies first, and later develop an interest in experimentation with others. Sexual interests therefore range from self-stimulation, to exhibitionism, to periods of inhibition, to touching others, and finally, to experimenting with kissing, fondling, oral sex, and penetration. (p. 31).

Please see Table 1 for a detailed summary of childhood sexual behavior from preschool to grade four and the two examples given below regarding normal childhood sexual behavior.

> **Example:** A young mother walks into the living room where her four-year-old son is watching television. She notices that the program on television has his full attention and he is gently rubbing his genitals against his favorite stuffed animal. She wonders if she should be alarmed at this behavior and calls her pediatrician. The pediatrician assures her this is normal behavior and encourages her to start having conversations with him about what kind of touching feels good and about that being something that is done in private, not in public.

As a rule, unless he is masturbating to the point of pain or injury or seems unable to stop touching in public despite repeated redirection to do otherwise, there should be little cause for concern. What can potentially be problematic is an intense negative reaction on the part of the caregiver. Reactions that include yelling, shaming, hitting, or other severe punishments can cause emotional confusion for the child and pair something that is supposed to be pleasurable with emotional or physical pain. Here is another example of normal childhood sexual behavior.

> **Example**: A seventeen-year-old girl is babysitting for three neighborhood children age three to five and hears excited peals of laughter and squeals coming from upstairs. She goes up to see what all the excitement is about and sees that the kids are taking turns lifting up their shirts and then squealing and running away. They all laugh and encourage each other with, "Your turn." She interrupts the game and tells them to go outside to play.

Later when the parents get home, the babysitter tells them what she witnessed. The parents take her concerns seriously and ask her specific questions about what she saw. Since the children were laughing while it was happening, seemed to be equally participating, and they are all around the same age, this would be considered age-appropriate sexual play. The parents should have an open, non-shaming talk with the children about their "game" so that they can start understanding the boundaries of their bodies and those of other children. No further intervention would be necessary at this time. If the behavior was to continue and any of the above criteria were to shift, the situation would have to be reassessed.

Implications of Negative Reactions

Negative reactions to sexual behavior can be detrimental to a child's development. If children receive negative reactions to normal development or behaviors, they can be more susceptible to developing feelings of shame and confusion in relation to their bodies and sexual behavior. Extreme negative reactions to normal childhood sexual behavior can set a child up for a lifetime of confusion and/or fear.

A child who fears negative reactions from caregivers may begin to keep secrets, which can have extreme consequences. Without open communication about

such topics, free of shame, guilt, or embarrassment, a child may not report if someone touches him/her in inappropriate ways. The following example is an illustration of a situation that can instill these types of fears.

> **Example:** A mother walks in and finds her six-year-old daughter playing "dress up" with a friend who is a boy; both of them are naked except for their underwear. The mother becomes upset and begins to cry and yell at her daughter. She immediately sends the boy home, gets her husband and starts asking question after question of her daughter about what "nasty" things they were doing. She then schedules an examination with the pediatrician in order to make sure her daughter has not been sexually abused.

During all of this, her daughter is wondering what she did wrong to make her mother so upset. She sees that her playing caused her to have to go to the doctor, be asked questions about things she knows nothing about, and becomes highly confused and embarrassed. She feels ashamed of the play she was involved in and does not want to engage in any behavior that may upset so many people again, so she begins to associate anything that has to do with nudity, sexuality, or her body as having negative consequences.

Disruptions to Normal Sexual Development

Normal childhood sexual development can be disrupted in a variety of ways that typically involves some form of "oversexualization." Oversexualization occurs when children are exposed to age inappropriate sexual knowledge or activities. This exposure can happen anywhere in a child's environment, including home, school, or community, and can include everything from minor incidents to long-term chronic sexual abuse.

In the Home

There are a variety of ways children can be oversexualized or exposed to age inappropriate sexual information in the home. A highly sexualized home environment may include parental fights about sex, sexual jealousy between partners, sexual language, sexual jokes, sexual comments about others' bodies, sexual gestures, and sexualized comments about men and women, etc. (Cavanagh Johnson, 2004).

A lack of emotional or physical privacy in the home includes children being privy to details of their parents' sex lives and problems. Sometimes, even under the guise of keeping children safe, they may have their bodies inspected, discussed, groomed, and/or touched in ways that are inappropriate. It can be problematic if there is no privacy and people walk in on each other in the bathroom, or where inappropriate sexual behaviors or nudity occur in living areas of the home. (Cavanagh Johnson, 2004).

While it may not be overtly sexual, children who are used to meet a parent's emotional needs or be a substitute for an adult partner can get very confusing messages about his or her own sexual attitudes, behaviors, and feelings. (Cavanagh Johnson, 2004).

Other obvious sources of age inappropriate sexual information, especially when there is not enough adult supervision, can include television, video games, movies, magazines, and the Internet. All of these sources can range from being mildly inappropriate to extremely inappropriate as is true of any early exposure to pornography. (Cavanagh Johnson, 2004).

Community

Children can also be highly vulnerable within the community. They can easily become prey to adults and adolescents who expose them to inappropriate sexual topics. Some neighborhoods in and of themselves are sexually explicit—where prostitution is common and sex is used in exchange for drugs. Children may routinely witness sex that is aggressive, hear violent sexual language, or see forced sex. (Cavanagh Johnson, 2004).

Continuum of Sexuality

Exposure to inappropriate sexual information can occur on a continuum—from a one-time event to long-term sexual trauma. Any of these situations can change the course of normal sexual development and potentially result in confusion and/or acting out behaviors. Unfortunately, many children have been exposed to inappropriate sexual information and/or experienced negative sexual events. (Finkelhor, 1994). Although the focus of this article is not explicitly on sexual trauma, we would be remiss if we did not mention a few of the consequences of this most severe form of oversexualization.

Sexual trauma not only severely disrupts a child's current development but can also lead to a lifetime

of problems such as posttraumatic stress, cognitive distortions, emotional pain, an impaired sense of self, and interpersonal difficulties. (Briere, 1994). According to Kendall-Tackett, Meyer Williams & Finkelhor (1993), for preschoolers, the most common symptoms are anxiety, nightmares, general PTSD, internalizing (e.g., depression), externalizing (e.g., hyperactivity), and inappropriate sexual behavior. For school-age children, the most common symptoms include fear, neurosis and general mental illness, aggression, nightmares, school problems, hyperactivity, and regressive behavior.

Indicators of Problematic Sexual Behavior

Examples of problematic sexual behavior in children can be: over-sexualized play with dolls, putting objects into anuses or vaginas, excessive or public masturbation, seductive behavior, requesting sexual stimulation from adults or other children, forcing others to engage in sexual activities, and age-inappropriate sexual knowledge. (Beitchman, Zucker, Hood & daCosta, 1991). One criterion alone does not necessarily indicate a problematic sexual behavior in a child; however, it can act as an indicator that perhaps the child's behavior be reviewed further, and the context of the behavior evaluated. A framework for evaluating child sexual interactions, by Eliana Gil and Tony Cavanagh Johnson (1993), is provided below. The framework prompts professionals to assess five criteria when making decisions about sexual behavior between children: the age difference, the size difference, the difference in status, the type of sexual activity, and the dynamics. Each one of these criteria is explored below, and an outline is provided in Table 2.

Age Difference Between Children

Essentially, the more considerable the age difference between children, the more potentially problematic the difference. The larger age difference potentially results in a significant difference in size, strength, emotional and cognitive development. Consequently, the younger child is more at risk for experiencing adverse effects from the interaction. According to Gil and Cavanagh Johnson (1993), an age difference of more than three years warrants further investigation. If two children of the same age peek at one another's genitals and run away giggling, it would be considered age appropriate. However, an eight-year-old initiating sexual play with a toddler is much more problematic.

Size Difference between Children

According to Gil and Cavanagh Johnson (1993), size difference, even among children of the same age, can lead to coercive interaction, bullying, and/or feelings in the smaller child of not having a choice. This is not always the case, but when a case includes children of significant size difference, it should be evaluated further to make sure coercive and/or bullying behavior is not taking place. The older child may not even realize his size may intimidate other children into behaviors with which they are not comfortable.

Difference in Status

Considering whether one child has a different status in relationship to the other child(ren) involved is important as well. Often children (with or without regard to age or size) are put in the position of being a babysitter and/or caretaker over other children. According to Gil and Cavanagh Johnson (1993), this creates an inequality between the child(ren) than can be used to coerce cooperation of the other child(ren). It is important to remember that the child with the status may or may not realize he could easily influence the other children to participate in play or sexual interaction with which they are not comfortable.

Types of Sexual Behavior

The types of sexual behavior children engage in can vary greatly due to social, familial, cultural, and religious values and beliefs. Gil and Cavanagh Johnson (1993) explain that the rule of thumb is to consider the progression of curiosity and activity on a continuum. They explain that the further down the continuum away from normal sexual behaviors (see Table 1), the more worrisome they become. For example, a six-year-old who wants to penetrate other children vaginally or anally with his fingers, penis, or a foreign object is depicting unusual and potentially harmful behavior that should be evaluated immediately.

Dynamics

Dynamics of sexual play include assessing how the children themselves feel about the incident. If children express feelings of fear, anxiety, or agitation, the interactions should be explored further. Gil and Cavanagh Johnson (1993) indicate that problematic sexual behaviors often have themes of dominance, coercion, threats, and force.

Using the Framework in Assessment

Example: A day care worker walks in on two five-year-old boys playing a game of "show me yours and I'll show you mine" in the restroom. One boy quickly pulls up his pants and starts crying as he runs out of the bathroom. The other refuses to answer any questions about what they were doing. The worker, thinking this is normal play, decides not to mention it to anyone.

The boys, both five years old, are at the same development level. They are about the same size, and neither one of them has status over the other. However, the dynamics of the play upon getting caught—one of the boys starting to cry and the other not being forthcoming about what they were doing—could be cause for concern. Normal sex play usually involves innocence, perhaps giggling, and a lack of shame. Both the behavior of the boy who cried and ran away and the secretiveness of the other should prompt further investigation. Was it shame? Was it fear?

Example: A mother goes to check on her daughter, a nine-year-old girl, who is in her room playing with a five-year-old neighbor boy. As the mother walks down the hallway, she hears her daughter telling the little boy to touch her private parts because it will feel good. She walks in to find the children naked from the waist down and her daughter pinning down the little boy trying to kiss him.

When assessing this situation, the age difference alone should trigger one to consider the difference in emotional and cognitive development. The considerable age gap may well give the girl a perceived status difference in the boy's eyes as well. Size difference gives the nine-year-old girl an advantage over the young boy. Furthermore, the fact that the girl was holding the boy down, and *possibly* coercing him by telling him it will feel good make it inappropriate. The situation and both children should be evaluated further to determine what intervention is necessary.

Problematic Behaviors

Children who exhibit problematic sexual behaviors often live in unstable, unpredictable environments. Cavanagh Johnson (2004) explains that these environments create confusing states of arousal. In response to arousal, children can experience physiological effects such as erections or lubrication. With lack of proper role models, children do not know how to properly discharge uncontrollable feelings of anger and have difficulties expressing it. Anger can become internalized as self-hatred and depression or be externalized and result in the perpetration of abuse against others. (Briere & Elliott, 1994). It has been found as well that children who become perpetrators themselves find movies that contain the dual themes of sex and violence particularly stimulating. (Okami, 1992).

Problematic sexual behaviors have higher levels of arousal, and the sexual activity can become habitual behavior for the child. It is as though no other activity gives the same degree of pleasure, comfort, or reassurance, and it becomes the focus of the child's life. This behavior is usually extremely unresponsive to any parental or caretaker limits or distractions. (Gil & Cavanagh Johnson, 1993). Two examples of problematic sexual behavior that have become habitualized are given below.

Example: Amanda is six years old and started kindergarten this year. She is very bright and participates in class with enthusiasm. However, her teacher is getting extremely frustrated with her inappropriate behavior. Several times throughout the day Amanda will disappear from class activities and her teacher will find her in the same corner, masturbating. She stops when asked and rejoins the class, but continues to disappear to do this. This has happened repeatedly on the playground as well.

Because Amanda has to be repeatedly asked to stop and has not been able to, there definitely needs to be further assessment for Amanda. The inability to stop moves beyond normal touching for pleasure and could be considered compulsive masturbation. Here is another example of problematic sexual behavior.

Example: Jake is ten years old, and his foster mother is taking him for his yearly physical exam. Upon physical examination, the doctor discovers bruises in his groin area and that his penis is raw. The doctor asks him what happened, and eventually Jake tells him that in a previous foster home, an older boy had molested him. Jake reports excessively washing himself because he felt "dirty" and engaging in self harm behaviors to his groin area because at times during the perpetration he had experienced pleasure and felt he needed to be punished.

Jake is clearly experiencing a great deal of psychological distress and should be referred for sexual abuse treatment immediately.

Conclusion

Sexual behavior and curiosity in children is not reason in and of itself for alarm. It is crucial that children be comfortable with their bodies and their sexual development. It is important that adults in their lives do not react in negative ways to normal sexual behaviors as well as knowing when further assessment is called for.

If a professional is unsure about particular sexual behaviors, he/she should refer to guidelines about age appropriate behaviors, such as those provided in Table 1, and utilize the framework by Gil & Cavanagh Johnson (1993) in Table 2 to determine risk factors of behaviors between children. One warning sign, behavior, or incident does not necessarily mean there is a problem, but with the presence of other symptomatic factors, or when a pattern develops, the situation needs further attention.

Table 1 - Summary of Childhood Sexual Behaviors (Cavanagh Johnson, 2004)

	Natural and Healthy Behaviors	Potential Warning Signs
Preschool Age	Touches/rubs own genitals when diapers are changed, falling asleep or when afraid, tense, or excited. Explores differences between boys and girls, touches private parts of familiar adults, but stops when asked to. Looks at nude people. Asks about genitals, breasts, and where babies come from. Erections, likes to be nude, interested in watching people in the restroom. Interest in having a baby, uses "dirty" words for bathroom and sexual functions, interested in own feces, plays doctor and inspects bodies of others, puts something in own genitals or rectum one time for curiosity or exploration. Plays house, role plays Mommy and Daddy.	Touches/rubs self in public after being asked not to or instead of normal childhood activities, asks continuous questions about genital differences, plays male or female roles in angry manner, hates own or other sex. Sneakily touches others' genitals or demands to. An obsession with nude people, asks questions of strangers about sexual knowledge that is not age appropriate. Has painful erections, refuses to get dressed, or shows private parts in public. Forces one's way into bathroom, has fear or anger about babies or the birthing process. Uses "dirty" words in public or after being asked not to. Continually plays with or smears feces after scolding. Forces other children to play doctor, uses coercion or force in putting something in genitals or rectum of self or other children. Simulated or real intercourse without clothes, oral genital contact.
Kindergarten to 4th Grade	Asks about genitals, breasts, intercourse, and babies. Interested in watching/peeking at people in the restroom. Uses "dirty" words for bathroom functions, genitals, and/or sex. Plays doctor, inspects others' bodies, interested in having/birthing a baby or shows others his/her genitals in private. Interest in urination and defecation, touches/rubs own genitals when going to sleep, when tense, excited or afraid. Plays house, thinks the other gender is gross, talks about sex with friends, interest in having a girl/boy friend. Wants privacy to change, likes dirty jokes, imitates sexual sounds, plays games related to sex. Includes genitals on drawings, looks at nude people, pretends to be opposite gender, compares genitals, interested in touching private parts of other same age children, kisses familiar people, erections, puts something in own genitals/rectum for the physical sensation, curiosity or exploration. Interest in breeding behavior of animals.	Shows fear or anxiety about sexual topics, asks endless questions about sex, age inappropriate sexual knowledge. Secretly watches people in the restroom or refuses to leave people alone in restroom. Continual use of dirty words even after told not to. Forces other children to disrobe or play doctor. Boy pretends to have baby after month/s, displays fear about babies or intercourse, shows genitals at school/in public after told not to or to express anger. Plays with and/or smears feces after told not to or urinates outside of toilet bowl. Continues to touch or rub genitals after being told not to or to the point of physical pain. Humping other children with clothes on, naked, or forcing others. Uses "dirty" language in reference to other gender or toward another's family. Aggressive or fearful in demand for privacy. Continues to tell dirty jokes when asked not to. Forcing others to play sexual games. In drawings, genitals are most prominent feature. Plays roles in angry or aggressive manner, or hates own/other gender or own genitals. Demands to see genitals/breasts of others or of others outside of age group. Coerces others to touch their genitals, forces mutual oral/anal or vaginal sex. French kissing, talking in a sexualized manner, displays of affection cause anxiety. Continuous erections/ fear of them/hurting self to stop erection. Coercion or force putting something in own or others genitals or rectum, sexual behavior with animals.

Table 2 - Summary of Framework for Evaluation (Gil & Cavanagh Johnson, 1993)

Criteria	Description
Age Differences	Sharing of age inappropriate information and behaviors, younger child may feel coerced.
Size Differences	Even if the larger child is of the same age as the smaller child, the smaller child may feel intimidated or forced to participate.
Status Differences	Children put in charge of other children (regardless of difference in age or not) in babysitter or caretaker roles can be seen as coercive or exploitive of the other children if they engage in sexual behavior with them.
Type of Behavior	The type of behavior must be put into context in relation to cultural, familial, societal norms.
Dynamics	The interactions between the children and how they perceived the incident individually; i.e., did one feel forced and the other see the cooperation as consent?

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Traumatic Testimony:
Easing Stress on Testifying Children While Protecting the Confrontation Rights of the Accused

by Claire Tluczek

Introduction: Balancing Two Important Concerns

Although different sources reveal different rates of prevalence, it is clear that child abuse is a significant problem. Because of the difficulty of bringing child sexual abuse cases to trial, in 1984, only about 24 percent of cases nationally came to trial.[1] This difficulty stems from the characteristics of child abuse situations and how they interact with the legal system. Often, offenders plea bargain or are treated as mentally ill individuals in need of treatment rather than punishment, or parents opt to protect their children from the stress and anguish of testifying by not permitting testimony.[2] Child abuse typically takes place in private locations, thus making third-party witnesses unavailable, and is often not reported right away, removing the likelihood of physical evidence to link the accused to the crime.[3] This leaves to the abused child the daunting task of convincing a jury of the abuse. Aside from the intimidating courtroom and confusing legal system, the child also must then face down the accused, a person with whom the child frequently has a relationship of love and trust, such as a parent or person of authority. Children who testify in court are often conflicted about testifying against someone who is often a family member, fear they will be punished for their part in the crime, suffer trauma from explaining the abuse in detail, and fear that the accused could carry out threats that may have been made to hurt the child or their loved ones.[4] The court in *State v. Sheppard*, a New Jersey Superior Court case, explained the difference between child and adult testimony, writing:

> [a]n adult witness testifying in court, surrounded by the usual court atmosphere, aware of the black-robed judge, jury, attorneys, members of the public, uniformed attendants, a flag and religious overtones, is more likely to testify truthfully. The opposite is true of a child, particularly when the setting involves a relative accused by her of sexual abuse. She becomes fearful, guilty, anxious, and traumatized.[5]

What must be kept in mind is that although a child could have suffered terrible abuse, the operative phrase is "could have." Research revealed figures as high as 65 percent of allegations being unfounded and as low as one percent; however, the one percent figure is based upon the logically false premise that children do not lie about abuse.[6] At trial, the defendant is innocent until proven guilty, and under the Constitution, possesses specific rights that cannot be easily infringed. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him."[7] The Supreme Court clarified and explained what the confrontation clause was meant to guarantee in *Mattox v. United States* in 1895.[8] Confrontation includes:

> personal examination and 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 testimony whether he is worthy of belief.[9]

With the multiple hearsay exceptions to the confrontation clause, including the dying declaration exception created in *Mattox,*[10] it is clear that not all statements against the accused to be used at trial need to be made face to face. The Supreme Court clarified further in *California v. Green*, stating that the purpos-

es of confrontation were to: 1) require the witness to testify under oath with the penalty of perjury imposing upon the witness the seriousness of the matter, 2) subject the witness to cross-examination, the "greatest legal engine ever invented for the discovery of truth,"[11] and 3) allow the jury to discern the demeanor of the witness as he testifies, further assisting the jury in determining credibility.[12] The potential face-to-face requirement of the confrontation clause could serve to prevent child abuse witnesses from testifying against their abusers, allowing dangerous criminals a greater chance to be free to abuse because often, young victims simply cannot face down their abusers.

Current Law: The Supreme Court Balances the Interests

Initially the Supreme Court stressed face-to-face confrontation

The Supreme Court began to address the question of permissible protections for testifying children in *Coy v. Iowa*.[13] The defendant was convicted of two counts of lascivious acts with a child, and, during trial, pursuant to an Iowa statute, the trial judge permitted the two complaining witnesses to testify behind a screen.[14] With proper lighting, the child witnesses were visible to the defendant, but the defendant was not visible to the children as they testified against him.[15] The defendant argued that this was a violation of his right to confrontation under the Sixth Amendment.[16] The Supreme Court, in a majority opinion authored by Justice Scalia, agreed with him, focusing great attention on attempting to establish a face-to-face confrontation requirement.[17] The majority discussed whether the state's stated interest in protecting child witnesses outweighed the confrontation right, but dismissed that concern by determining that, in this instance, there were no findings that the witnesses needed special protection.[18] Although the statute in question permitted testimony by closed circuit television (CCTV) and behind screens, the majority did not specifically determine whether testimony by CCTV would be constitutionally permissible.

Another interest tips the scale in favor of protecting child witnesses

The Supreme Court settled the question as to whether closed circuit television (CCTV) could be utilized as a method for testimony by child witnesses in child abuse cases in *Maryland v. Craig*.[19] A day care owner, Sandra Craig, was charged with first- and second-degree sexual offenses, perverted sexual practice, and assault and battery, after six-year-old Brooke Etze[20], made allegations of abuse.[21] After learning of complaints of abuse at Craig's facility, Brooke's parents took her to a therapist, who, along with a medical examiner, confirmed that she was a victim of sexual abuse.[22] In order to explain the abuse that occurred at Craig's kindergarten and pre-kindergarten center,[23] the accusing children would need to tell the court what happened. Maryland had a procedure that permitted witnesses who alleged child abuse to testify by one-way CCTV.[24] In order to permit testimony by CCTV, the judge needed to make a determination that if the child testified in the courtroom it would "result in the child suffering serious emotional distress such that the child cannot reasonably communicate."[25] If a judge determined that the child should not testify in the courtroom, the witness, prosecutor, and defense counsel would leave the courtroom, examination and cross-examination would be completed in a separate room, and the questioning would be transmitted to the courtroom.[26] Trial would continue as usual, with the defendant communicating with his attorney electronically (usually by phone), except that the child witness would not see the defendant.[27]

The state presented evidence that the named victim, along with other children alleging that Craig molested them, were not able to testify in the courtroom because they would suffer serious emotional distress.[28] An expert explained to the court that the children would be unable to communicate effectively.[29] The expert testified that the children would either withdraw and curl up, become agitated such that they would not be able to follow questions and stay on topic, refuse to talk, or suffer a high level of anxiety.[30] The trial court agreed with that determination, allowed the children to testify via CCTV, and the defendant was convicted.[31] The conviction was affirmed by the Maryland Court of Special Appeals, but reversed by the Court of Appeals of Maryland.[32] The Court of Appeals agreed with the lower court's determination that the confrontation clause does not require a face-to-face confrontation, but disagreed with the phrasing and the determination of serious emotional distress. It reasoned instead that the serious distress must stem from the face-to-face confrontation, and that "[u]nless

prevention of 'eyeball to eyeball' confrontation is necessary to obtain the trial testimony of the child, the defendant cannot be denied that right."[33]

In the majority opinion by Justice O'Connor, the Supreme Court reasoned that, although in *Coy v. Iowa* "the vonfrontation vlause guarantees the defendant a face-to-face [sic] meeting with witnesses appearing before the trier of fact,"[34] that does not make that right absolute.[35] O'Connor referenced language from *Coy* that specified that the question as to whether there were exceptions to the face-to-face rule was left to be determined at a later date, but that an exception would only be allowed if "necessary to further an important public policy."[36] In *Coy*, the legislative presumption that there would be trauma if the child witness had to testify facing the defendant was not sufficient, and because there was no individualized finding that the child needed protection, the exception in that case was an impermissible violation of confrontation clause rights.[37] In *Craig,* however, there were specified findings that specialized protection was necessary, which prompted the majority to determine if there was an important public policy concern that requires an exception.[38]

Dissecting the confrontation clause jurisprudence, the Court determined that the rights bestowed by the confrontation clause include personal examination, the witness being required to give his testimony under the seriousness of the oath with perjury as a punishment for false statements, cross-examination, and the ability by the jury to see the demeanor of the witness, better enabling the jurors to determine credibility.[39] The Court determined that due to the multiple hearsay exceptions to the confrontation clause, what has been established is merely a *preference* for face-to-face confrontation,[40] and that "a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured."[41] The question then becomes whether there is an important public policy or important state interest involved with the testimony of child abuse witnesses.

Previously the Supreme Court has twice held that there is a compelling state interest sufficient to override a fundamental right, in those instances the First Amendment, in order to protect children. In *Globe Newspaper Co. v. Superior Court of Norfolk County*, the Supreme Court determined that there was a compelling interest in "the protection of minor victims of sex crimes from further trauma and embarrassment."[42] Although in that case, the court struck down a statute that permitted the judge to clear the courtroom of the public, including press, a case-by-case exception was created in instances of child sexual abuse.[43] Additionally, in *New York v. Ferber*, the Court determined that there was a compelling interest in protecting "the physical and psychological well-being of minors" when it upheld the conviction of a bookstore owner who sold films depicting young boys in sexual acts for knowingly promoting a sexual performance by a child.[44] In each of those instances, the Court permitted an abridgement of First Amendment rights in order to protect children from detrimental effects that resulted from sexual abuse.

Balancing the interests of a defendant to have face-to-face confrontation and the interests of the state regarding protecting the physical and psychological well being of children, the Court determined that the interest of the state "at least in some cases [outweighs] a defendant's right to face his or her accuser in court."[45] Acknowledging the stress and harm children suffer when forced to testify in a courtroom while facing the accused, the Court held:

> if the state makes an adequate showing of necessity, the state interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of a special procedure that permits a child witness in such cases to testify at trial against a defendant in the absence of face-to-face confrontation with the defendant.[46]

The Court was quick to explain that the state must show necessity on a case-by-case basis, and that its ruling does not guarantee each child an automatic determination that testimony by CCTV is necessary.[47] The question as to what defined necessity was left unanswered, but the Court reasoned that necessity was more than nervousness or hesitation, that necessity must be more than just a base fear that accompanies testifying in a courtroom, and that the trauma must stem from the presence of the defendant, and be greater than a de minimis fear of being near the defendant. [48] The majority also overruled a determination by the Court of Appeals of Maryland

that the judge did not follow proper procedure by not first determining the child could not testify in front of the defendant by requiring the child to attempt to testify in the defendant's presence, and then did not attempt two-way CCTV before proceeding to one-way CCTV.[49] Although that procedure would provide support for the use of one-way CCTV during child witness testimony, the majority opted not to establish evidentiary requirements of that nature.[50]

The Court found it significant that the CCTV procedure in Maryland preserved all the elements of confrontation: the child must be competent to testify, the child is sworn in, the child is cross-examined, and the judge, jury and defendant are able to observe the demeanor of the child.[51] These elements aid the court and jury in determining if the witness is less than truthful, and enable the child to deliver better testimony.[52] The Court reasoned that the converse would be true: children who suffered emotional distress would be more likely to give false or incorrect testimony if forced to take the stand in a courtroom rather than in a separate room via CCTV.[53] Because of that, the Court was convinced that the use of one-way CCTV "does not impinge upon the truth-seeking or symbolic purposes of the confrontation clause" where it is "necessary to further an important state interest."[54]

A stinging dissent by Justice Scalia illustrated his displeasure at the majority subordinating a constitutional right to advance current public policy.[55] Scalia reasoned that, according to *Coy*, the right to face-to-face confrontation is an absolute right.[56] He argued that the unwillingness of a child to testify "cannot be a valid excuse under the confrontation clause, whose very object is to place the witness under the sometimes hostile glare of the defendant."[57] Citing his own majority opinion in *Coy*, Scalia reasoned again "[t]hat face-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult."[58] He characterized the interest the state has in protecting children from trauma from testifying in a courtroom as the prosecution's problem for calling a witness that cannot reasonably communicate.[59] The dissent made a strong case against providing exceptions to the confrontation clause by discussing the tragedy in Jordan, Minnesota, where 24 adults were charged with molesting 37 children, only to have the charges dropped against 21 of them, and an FBI report concluding that there was no credible testimony or corroboration to support the charges.[60] His implication is that the right to face-to-face confrontation is so great due to the danger of false complaints that the interest of protecting children from the trauma of face-to-face testimony is not compelling.[61]

The Particulars of Closed Circuit Television Testimony

The amici curiae address pros and cons

Testimony by CCTV is advocated in an amicus brief reasoning "a serious impediment to eliciting truthful testimony from the victims of child sexual abuse is an inability of the child to recount the incident(s) of abuse in the presence of the abuser."[62] Studies have also found that "it is harder for children to tell the truth to someone's face than behind their back when their testimony involves an accusation against the person."[63] The trauma from having to testify in front of the defendant could be so severe that the child would be unable to speak about the incident.[64] One amicus brief cited a particular study, explaining, "there was a direct correlation between children who were afraid of testifying in front of the defendant and their inability to answer prosecutor's questions."[65] Another cited study suggested that the children would respond better to questions in a smaller room than a traditional courtroom.[66] For these reasons, testimony by CCTV is preferable to forcing a child to testify in a courtroom.

The American Psychological Association submitted a brief in favor of neither party.[67] Although the brief stated that "psychological data suggests that both the state's interest in discovering the truth about sexual abuse and its interest in shielding minors from emotional distress imposed or exacerbated by the legal system may be threatened by strict adherence to a criminal defendant's right to 'face' his or her accuser."[68] Other sources reveal abused children suffer fears that the defendant will injure them because they fail to understand that just because the defendant is close does not mean he may take action towards the child.[69] In on instance, a child left the courtroom after testifying and exclaimed, "Mom, he didn't give me the evil eye. I think he's just going to kill you and not me."[70] Additionally, according to People Against Child Abuse

et al., a 1974 study revealed that 84 percent of judges asked believed that children who testified in court in child sexual abuse cases suffered trauma as a result.[71] Its amicus brief cited studies explaining that children who testify in court face to face with the defendant suffer negative effects.[72] Alternatively to most research, the APA brief recognizes that testifying in court before a defendant can traumatize a child, but also states that not all children suffer negative effects and that some children benefit from the experience.[73] For this reason, the APA advocates a case-by-case determination as to whether testimony by CCTV is necessary in the face of limiting the rights of the defendant.[74]

Research on the effects of closed-circuit television testimony and juries

A central purpose of the confrontation clause is the ability to judge the demeanor of witnesses, which makes it vital for prosecutors to be able to present witnesses in the most credible light possible. A study from University of Northern Illinois by Orcutt et al. designed to test whether jurors were able to determine the difference between deceptive and non-deceptive testimony by children[75] revealed a pro defense bias in cases of CCTV.[76] The mock jurors viewed the testimony of the child via one-way closed circuit television and in a live courtroom.[77] The study concluded "the use of protective measures may not always be in the best interest of justice or the truth-telling child."[78] The results did not reflect the presumption that jurors would be more easily be able to tell if a child witness was being truthful in open court versus CCTV, instead that "CCTV did not appear to distract from the factfinders' abilities to reach the truth."[79] For a prosecutor and parent who know that a child will be unable to withstand face-to-face confrontation, results such as these are a mixed blessing because although they substantiate the notion that there is no difference in truth telling ability between CCTV and courtroom testimony, the pro-defense bias is a downside. Jurors exposed to courtroom testimony were more likely to convict than jurors who heard the child witnesses via CCTV.[80] However, a pro-defense bias serves to bolster the case for permitting testimony via CCTV because it helps to ease the perception that a defendant will be presumed guilty.[81]

A study from the University of California-Davis by Goodman et al. examined the effects of CCTV on child witness testimony comparing juror reactions with courtroom and one-way CCTV testimony of child witnesses.[82] Regarding accuracy in testimony, the research revealed "a small but significant but positive effect of closed-circuit technology on children's answers to the direct questions overall."[83] Children who testified via CCTV suffered less anxiety than children who testified in the courtroom.[84] Similar to the other studies discussed, there was a negative bias associated with the believability of the child witnesses who testified via CCTV.[85] This study did not specifically reveal a pro-defense bias,[86] but a bias against the child witness certainly works in favor of the defendant.

Finally, a study from Ross et al. revealed slightly different results.[87] Although the study utilized videotape testimony with child actors rather than live children,[88] like the two previously discussed studies, the results warrant mention. The study consisted of two experiments: in the first experiment, the participants watched a video of a complete trial,[89] and in the second experiment, the trial video was stopped right after the child testified.[90] Each group of participants was shown the child witnesses testifying in a courtroom, in a courtroom with a protective screen between the child and the defendant, and with CCTV.[91] Experiment one revealed that there was no support for a hypothesis that there would be a difference in credibility or in conviction rates between the three modes of testifying.[92] Experiment two revealed the same credibility determination, but revealed the same pro-defense bias as the Orcutt study.[93] Although the study indicates different results regarding credibility, while not aiding prosecutors in convicting child abusers, it argues for permitting CCTV testimony. It removes the potential fear of bias toward the child.

Issues and potential problems from the Craig *decision*

Craig is not a perfect solution to the child witness testimony issue.[94] Although *Craig* permits CCTV upon a showing of necessity, necessity is not defined at this time.[95] The Supreme Court could opt to define necessity by the standards set in *Globe*, requiring the trial judge to look at the age and psychological state of the victim, along with the nature of the crime, and the thoughts and interests of the victim and his or her parents.[96] The Court in *Craig* required that the presence of the defendant be the initiating factor in the child's distress.[97] Would that showing of necessity first require

a judge to observe the child in the presence of the defendant, thus requiring the very thing the prosecutors and parents would seek to avoid: trauma to the child? In an amicus brief to the court, People Against Child Abuse et al., argued against the Maryland law, requiring a judge to first determine that the child could not be in the defendant's physical presence, and then determine that the child could not testify via two-way closed circuit television, before permitting the child to testify via one-way CCTV, because this multi-step procedure presents more than one opportunity for the child to be traumatized before finally allowing one-way CCTV.[98]

In one anecdotal instance, a child entered the courtroom, saw the defendant and the others in the courtroom, and ran out, refusing to return.[99] By permitting this to occur, there may be a detrimental effect on the number of cases reported and prosecuted because parents will not report sexual assaults, to spare their children from the trauma of the courtroom[100] and depending on the statute, the trauma of multiple attempts to face their victimizer. New York Criminal Procedure Law § 65.20(9) provides factors a-l in order to evaluate whether a child witness would suffer "severe mental or emotional harm."[101] One or more of the factors must be found by a standard of clear and convincing evidence. The twelve factors permit wide discretion without forcing a child to flee a courtroom in terror. The factors consider characteristics such as whether there has been a relationship of respect and authority over the child by the alleged perpetrator, or whether the defendant lived with the child at the time of the alleged abuse.[102]

CCTV is not capable of capturing the full picture when a child testifies due to the camera position. With the camera fixed upon the child, the viewing courtroom is unable to see the faces of the prosecutor and the defense, thus preventing them from fully understanding to what or whom the witness is reacting.[103] Additionally, the emotions of the child, hidden away in another room, on a cold monitor, remove an element of reality from the experience, and can potentially reduce the effectiveness of the testimony.[104] Conditions in the room that differ from the courtroom such as differing temperatures could lead a child to look uncomfortable for reasons of which the viewing audience would be unaware.[105] Similarly, different states, districts, or courtrooms could have differing procedures for CCTV, thus varying the reliability or credibility of the testimony.[106]

The courtroom has the potential to become more emotional, unpredictable, and difficult to manage when the defendant decides to represent himself and proceed pro se. The Maryland statute in question in *Craig* does not permit CCTV if the defendant is representing himself.[107] If a defendant wishes to represent himself, a dangerous proposition for the non-lawyer, he runs the risk of the child witness simply refusing to testify for that reason alone, thus muddling the truth-finding potential of the trial to an extreme.[108] Other states do not have the same requirements, permitting the accused attacker to question the alleged victim, prompting one child to state, "[i]t makes you feel like you're the victim again. It hurt a lot."[109] It is important to note that there is an important distinction between intimidation and confrontation, and the Pennsylvania Superior Court expressed that as well, explaining that the right of confrontation is not a right to intimidate the witness.[110]

However, the pro se defendant presents a significant problem because he would then be present in the separate room as the child testified, defeating the purpose of one-way CCTV, or, if two-way CCTV is utilized, the child could be frightened and unable to give accurate testimony by the presence of the defendant questioning her on a television screen.[111] The Supreme Court has not addressed this issue at this time. The balancing of the compelling interest to protect child abuse victims from trauma from testifying in the presence of the defendant against a person's right to represent himself would depend on whether a court takes the absolutist route, stating that the right shall not be infringed, or if it will make a similar declaration as in *Craig*, stating that the right of self-representation is not absolute.[112] The Fourth Circuit did not allow cross examination by a pro se defendant against child witnesses who were testifying via CCTV, reasoning that "the trial court adequately found that preventing this cross-examination was necessary to further the state's important interest in protecting child sexual abuse victims from further trauma."[113] An unreported case from the Eastern District of Michigan held the same, citing to *Fields*, explaining that "the state has a strong interest in protecting the physical and emotional well-being of the child victim from this confrontation."[114] The court drew a parallel between confrontation and

self-representation regarding the interest in protecting the child and reasoned that if confrontation could be limited to protect that interest, self-representation may be limited as well.[115]

Subsequent Developments: Federally, Michigan, and Constitutionally

The federal government acts following Craig

Shortly after Craig was decided, Congress passed the Child Victims' and Child Witnesses' Rights Act (CVCWRA).[116] The CVCWRA specifically included a provision for two-way CCTV testimony.[117] The statute defines a child as someone who is under the age of 18, and is either "a victim of a crime of physical abuse, sexual abuse, or exploitation" or "a witness to a crime committed against another person."[118] In situations where the offense has been committed against a child, the government can petition for the child to testify via two-way CCTV under §3509(b)(1)(A) of the CVCWRA if the court determines that the child cannot testify in open court.[119] To determine if the child will be permitted to testify via CCTV, the court looks to see if 1) "the child is unable to testify because of fear," 2) "there is a substantial likelihood, established by expert testimony, that the child would suffer emotional trauma from testifying," 3) "the child suffers a mental or other infirmity," *or* 4) if "conduct by defendant or defense counsel causes the child to be unable to continue testifying."[120] In order to permit CCTV, the court must make a finding on the record that the child is unable to testify.[121] Most importantly, just as with *Craig*, the CVCWRA specifies that "the child shall be subjected to direct and cross examination."[122] This statute could serve the gap in *Craig* created by the court's failure to define necessity.

Although different circuits have had different interpretations of the terms in the CVCWRA, they are outside the scope of this article, which will briefly address the Sixth Circuit Court of Appeals.[123] The Sixth Circuit has not extensively addressed the CVCWRA.[124] The two cases that address the CCTV testimony provision of the CVCWRA each came to a different conclusion as to whether CCTV was appropriate on the facts. After being kidnapped and molested for two weeks, 11-year-old Adan Alvarado had issues with testifying in open court against his attacker.[125] An expert testified that his fear of the defendant would "significantly impair his ability to testify if he was required to testify in [the defendant's] presence."[126] The court questioned him on camera, and that, combined with the expert testimony that his memory and communication abilities would be impaired, convinced the court to permit two-way CCTV testimony under §3509(b)(1)(B)(ii) of the CVCWRA.[127] After noting that *Craig* allows a procedure that "preserves the essence of effective communication," the court applied §3509(b)(1)(B)(ii), and allowed the testimony by CCTV because there was no evidence to contradict the expert testimony that there was a substantial likelihood that Alvarado would suffer emotional trauma from testifying in open court.[128]

A similar issue was addressed in *United States v. Moses*, and the court reached the opposite conclusion.[129] The trial court in *Moses* permitted a child witness to testify via two-way CCTV testimony under §3905(b)(1)(B) of the CVCWRA because it found her to be fearful and that she would "be traumatized by testifying."[130] After discussing *Craig*, the CVCWRA, and additional case law, the court determined that "§3509(b)(1)(B)(i) requires a case-specific finding that a child witness would suffer substantial fear or trauma and be unable to testify or communicate reasonably because of the physical presence of the defendant," and that "a general fear of the courtroom is insufficient."[131] Under this standard, the Sixth Circuit held that the trial court was in error to permit the child witness to testify via CCTV because the child stated that she was unafraid of the defendant, simply that she did not want to see him because "he did 'a bad thing to my sister.'"[132] This follows *Craig,* which does not permit CCTV testimony if the fear is only from the courtroom, or a de minimis fear of the defendant.[133] Additionally, CCTV testimony was improper because the expert who testified that there would be a substantial likelihood of emotional trauma, as required under the CVCRWA, was a social worker, and not an expert "for purposes of rendering a psychological or psychiatric opinion under §3509(b)(1)(B)(ii)."[134] *Moses* demonstrates that while the Sixth Circuit attempts to find a balance between *Craig* and the CVCRA, the application of each operates strongly to protect the confrontation rights of the defendant.

Michigan takes action

In 1988, pre-*Craig*, Michigan enacted its own leg-

islation addressing the admissibility of CCTV testimony for child abuse victims under MCL 712A.17b.[135] Under the current version, section 17.b(1)(d) defines a witness as "a person under 16 years of age," or "a person16 years of age or older with a developmental disability."[136] This is different from the federal version, which sets the applicable age at 18.[137] In cases of child abuse and child sexual abuse, MCL 712A.17b(12) permits the court to allow the child to testify in a way that she is shielded from viewing the respondent, but the respondent is still able to consult with his attorney and see the child as she testifies.[138] Importantly, the child witness does not have to be able to see the respondent.[139] Although this language does not specifically mention CCTV testimony, a situation in which the child is unable to testify in court before the defendant, but the defendant is still able to see the child while she testifies, is how CCTV allows child witnesses to testify, and past interpretations under this provision include its application to CCTV.

Additionally, this alternative to in-court face-to-face confrontation is not permitted in every instance. The court must make a finding that "psychological harm would occur if the witness were to testify in the presence of the respondent at a court proceeding" before an alternative method of testimony is utilized.[140] The Michigan Court of Appeals addressed the application of the phrase "psychological harm" in *In Re Hensley*, stating that "the court need not utter the magic words 'psychological harm' on the record before it can order protective measures as long as the record reveals the court was aware of the issue to be determined and resolved it."[141]

Previously, the Michigan Court of Appeals addressed the intersection of *Craig* and MCL 712A.17b, and CCTV in *In Re Vanidestine*.[142] Following his conviction for second degree criminal sexual conduct, the defendant appealed, arguing that the trial court improperly permitted the child victim to testify by two-way CCTV.[143] After discussing *Craig* in detail,[144] including the requirements that there be a specific finding of necessity, that the child be traumatized by the presence of the defendant and not merely the courtroom, that the distress be such that the child cannot reasonably communicate, and that there must be cross examination to protect the essence of the adversarial process,[145] the Court of Appeals then turned to the issue of necessity.[146] To determine what was necessary to protect the welfare of the child witness, as required under MCL 712A.17b(14)(a)-(b), the Court considered the age of the child and the nature of the offence.[147] The court took into account the young age of the witness, the serious nature of the offense such that she still has nightmares, refuses to go into the bathroom where the incident occurred alone, and a tic the child has developed, along with testimony that the child will experience trauma from testifying; the court then held that it was necessary to offer her protection.[148] The Court of Appeals found this sufficient to support a finding of necessity.[149] Without a Supreme Court declaration of necessity, the states are left to apply their own laws to determine when it is necessary to offer a child witness protective testimony by CCTV.

Crawford *and* Craig

In 2004, the Supreme Court handed down a landmark decision regarding testimonial evidence in *Crawford v. Washington*.[150] *Crawford* held that regarding testimonial hearsay, the confrontation clause requires "unavailability and a prior opportunity for cross examination" for testimonial hearsay to be admitted.[151] *Crawford* is a significant decision, and therefore a brief discussion of its potential application to *Craig* is warranted. Because *Crawford* requires a prior opportunity for cross examination, CCTV could be utilized more frequently to acquire testimony in child abuse cases and obtain admissibility for out-of-court testimonial statements.[152] This principle was demonstrated in *United States v. Kappell*.[153] After the child witnesses testified via CCTV, the defendant tried to claim on appeal that there was a violation of *Crawford*.[154] The Sixth Circuit disagreed, and although the claim for appeal was not specifically based on the CCTV testimony, the court reasoned that by testifying through CCTV, they were cross examined and that satisfied *Crawford*.[155] Although *Crawford* limits admissibility of out-of-court statements of child abuse victims, *Craig*'s preservation of the essential elements of confrontation continues to provide a vehicle for testimony by child witnesses to reach the court.[156]

Alternative Solutions: Other Protections for Child Witnesses

Allowing all children to testify via closed-circuit television

One potential modification to the CCTV determination in *Craig* would be to permit all children to

testify via CCTV regardless of their ability to testify, the nature of the crime, or identity of the defendant.[157] Assuming the state can show necessity stemming from the harm to the child and the defendant being the cause of the harm, this solution is arguably more appropriate because 1) children typically enjoy special protections in the law different from adults, 2) it is unlikely that the framers concerned themselves with child witnesses while drafting the Sixth Amendment, thus removing arguments of original intent, 3) direct physical confrontation can reduce the reliability of children's testimony, and 4) by limiting this exception to children, it could serve to prevent the creation of multiple Sixth Amendment exceptions.[158] However, this does not serve to completely rebut the negative effect on a defendant's presumption of innocence, perpetuating the "presumption that the defendant is guilty, dangerous and intimidating."[159]

Lap legislation/comfort person

Another way to ease the stress upon a child when she testifies in a courtroom is to allow a support person to accompany the child. This is sometimes called "lap legislation" because the child sits in the person's lap.[160] Although this may potentially be a solution to the testimony dilemma, if a child fears the defendant carrying out threats of violence against the child or her loved ones, the presence of comfort person, who could potentially be someone the defendant (allegedly) threatened will likely not serve to ease the child's fear. However, this will serve to alleviate any potential shadow of guilt that could fall upon the defendant by CCTV testimony because it is reasonable for a jury to think the witness is merely a scared child comforted by a comfort person. Alternatively, it is also possible that the presence of another individual could signal to the jury that the child is being prompted. Further discussion is beyond the scope of this paper; however, it is important to mention as an alternative to total removal of the child from the courtroom.

Conclusion

When the Supreme Court permits an infringement upon a constitutional right in favor of a compelling interest, the decision often pits two valid and important principles against one another. In this case, by permitting children to testify via one-way CCTV, the Court preserves the central elements of the confrontation right and secures credible and necessary testimony by the people who are often the only witnesses to the crimes against them: the children. ◎

Endnotes

1 Todd Neuman, "A Child's Well Being v. a Defendant's Right to Confrontation," 93 *W. Va. L. Rev*. 1061, 1082 n.5 (1991).

2 Karen R. Hornbeck, "Washington's Closed-Circuit Testimony Statute: An Exception to the Confrontation Clause to Protect Victims in Child Abuse Prosecutions," 15 *U. Puget Sound L. Rev*. 913, 916-17 (1992).

3 Brian L. Schwalb, "Child Abuse Trials and the Confrontation of Traumatized Witnesses: Defining "Confrontation" to Protect Both Children and Defendants," 26 *Harv. C.R.-C.L. L. Rev.* 185, 186 (1991).

4 Russell Nuce, *Child Sexual Abuse: A New Decade for the Protection of our Children?* 38 Emory L.J. 581, 608 (1990).

5 Hornbeck, *supra* note 1, at 917 (quoting *State v. Sheppard*, 484 A.2d 1330, PINCITE (N.J. Super Ct. Law Div. 1984).

6 Therese L. Fitzpatrick, "Innocent Until Proven Guilty: Shallow Words for the Falsely Accused in a Criminal Prosecution for Child Sexual Abuse," 12 *U. Bridgeport L. Rev*. 175, n.111 (1991) (pagination stops before the footnotes).

7 U.S. Const. amend. VI.

8 Carolyn M. Nichols, "The Interpretation of the Confrontation Clause: Desire to Promote Perceived Societal Benefits and Denial of the Resulting Difficulties Produces Dichotomy in the Law," 26 *N.M. L. Rev*. 393, 400 (1996).

9 *Id*. at 400 (1996) (quoting Mattox v. United States, 156 U.S. 237 (1895)).

10 *Id.* at 401-02.

11 *California v. Green*, 399 U.S. 149, 158 (1970) (citation omitted).

12 *Id.* at 158; Danielle Goblirsch, *Balancing the Rights of Child Sexual Abuse Victims as Witnesses and the Constitutional Rights of Defendants: Has the Iowa Legislature Gone too Far to Protect the Child Victim*, 14 Hamline J. Pub L. & Pol'y 227, 231 (1993).

13 *Coy v. Iowa*, 487 U.S. 1012 (1988).

14 *Id.* at 1014-15.

15 *Id.* at 1015.

16 *Id.* Although the Supreme Court determines that face-to-face confrontation is not required for child abuse victims in all cases, state courts are free to interpret the confrontation clause requirements in their state constitutions to require a stricter standard.

17 *Id.* at 1018-21. Scalia opted to leave the determination as to whether there could be any exceptions to his face-to-face requirement for consideration on a later date. *Id.* Interesting, that day came two years later, with a much different result in *Craig*.

18 *Id.* at 1020-21. Neither the Supreme court in *Coy v. Iowa*, nor the Iowa Supreme Court in *State v. Coy*, addresses any facts that would support a finding of necessity for the screen between the defendant and the child witness. See *State v. Coy*, 397 N.W.2d 730 (Iowa 1986).

19 *Maryland v. Craig*, 497 U.S. 836 (1990).

20 Jan Sanders, "Protecting the Child Victim of Sexual Abuse While Preserving the Sixth Amendment Confrontation Rights of the Accused: Maryland v. Craig," 35 *St. Louis. U. L.J.*495, 495 (1991).

21 *Craig*, 497 U.S. at 840.

22 Neuman, *supra* note 1, at 1063-64. In June 1986, Brooke's parents learned of the abuse and in July 1986, she began therapy. Susan Howell Evans, "Criminal Procedure—Closed Circuit Television in Child Sexual Abuse Cases: Keeping the Balance Between Realism and Idealism—Maryland v. Craig," 26 *Wake Forest L. Rev.* 471, 473 (1991). After 20 sessions, the child stated that Craig kicked her "private parts," and legs, stuck her with thumbtacks, inserted a stick in her vagina, and told her that her parents would not love her if she told. *Id*. A pediatrician with expertise in child sexual abuse stated that her hymen was scarred in a way that was consistent with penetrating abuse. *Id*.

23 Sanders, *supra* note 20, at 495.

24 *Craig*, 497 U.S. at 840.

25 *Id.* at 840 (quoting Md. Cts. & Jud. Proc. Code Ann. § 9-102(a)(1)(ii) (1989).

26 *Craig*, 497 U.S. at 841.

27 *Id.* at 841-42. Because the defendant is not able to directly communicate with his attorney in a face-to-face manner, it is argued that his rights are being infringed to a greater degree than the court suggests, by quickly dismissing the importance of close attorney client communication. Schwalb, *supra* note 3, at 202-03.

28 *Craig*, 497 U.S. at 842.

29 *Id.*

30 *Id.*

31 *Id.* at 842-43.

32 *Id.* at 843.

33 *Id.* (citation omitted).

34 *Id.* at 844 (quoting *Coy v. Iowa*, 487 U.S. 1012, 1016 (1988)).

35 *Craig*, 497 U.S. at 844.

36 *Id.* at 844-45.

37 *Id.* at 845.

38 *Id.*

39 *Id.* at 845-46 (1990)(citing *California v. Green*, 399 U.S. 149, 158 (1970).

40 *Craig*, 497 U.S. at 849.

41 *Id.* at 845 (1990).

42 *Id.* at 853 (1990)(citing *Globe Newspaper Co. v. Superior Court of Norfolk County*, 457 U.S. 596, 607 (1982).

43 Rachel I. Wollitzer, "Sixth Amendment: Defendant's Right to Confront Witnesses: Constitutionality of Protective Measures in Child Sexual Assault Cases," *J. Crim. L. & Criminology* Vol. 79, No. 3, 759, 779 (1988).

44 Hornbeck, *supra* note 2, at 928-29.

45 *Craig*, 497 U.S. at 853.

46 *Id.* at 855.

47 *Id.* at 855-56. The court compared *Globe*, explaining that just as in *Globe*, there was not a guarantee that the judge would clear the court in every case, the judge would not make a determination of necessity in each case. *Id.*

48 *Id.* at 856; Neuman *supra* note 1, at 1069.

49 *Craig*, 497 U.S. at 858-60; Neuman *supra* note 1, at 1069-70.

50 *Craig*, 497 U.S. at 860.

51 *Id.* at 850.

52 *Id.*

53 See *id* at 857.

54 *Id.* at 852

55 *Id.* at 861 (Scalia, J. dissenting).

56 See *id.* at 862.

57 *Id.* at 866.

58 *Id.* (quoting *Coy v. Iowa*, 487 U.S. 1012, 1020 (1988)).

59 *Id.* at 867 (Scalia, J. dissenting).

60 *Id.* at 868-69.

61 See *id.* at 869-70.

62 Brief for Robert A. Butterworth, Attorney General for the State of Florida et al., as Amici Curiae Supporting Petitioner, *Maryland v. Craig*, 497 U.S. 836, (1990) (No. 89-478), 1989 WL 1127435 at *5 [hereinafter Butterworth].

63 Holly K. Orcutt et al., "Detecting Deception in Children's Testimony: Factfinder's Abilities to Reach the Truth in Open Court and Closed Circuit Trials," 25 *Law & Hum. Behav*. No. 4, 339, 342 (2001).

64 Butterworth, *supra* note 62, at *5.

65 Brief for People Against Child Abuse et al., as Amici Curiae Supporting Petitioner, *Maryland v. Craig*, 497 U.S. 836, (1990) (No. 89-478), 1990 WL 10013100 at *15 [hereinafter People Against Child Abuse].

66 *Id.*

67 Brief for American Psychological Association as Amicus Curiae Supporting Neither Party, *Maryland v. Craig*, 497 U.S. 836, (1990) (No. 89-478), 1990 WL 10013093 at *1 [hereinafter APA Brief]. A brief by a doctor in the field of child psychiatry took issue with the use of the word "scientific" in reference to studies cited and stated that "[f]or every article the APA quotes in support of some position, there is another article that refutes it." However, he neglects to cite the articles refuting the positions in the APA brief; Brief of Richard A. Gardner, M.D. as Amicus Curiae Supporting Respondent, *Maryland v. Craig*, 497 U.S. 836, (1990) (No. 89-478), 1990 WL 10013111 at *9; See also Brief of Institute for Psychological Therapies as Amicus Curiae Supporting Respondent, *Maryland v. Craig*, 497 U.S. 836 (1990) (No. 89-478), 1989 W.L. 1127452 at * 25. But see Gail Goodman et al., "The Best Evidence Produces the Best Law," 16 *Law & Hum. Behav*. No. 2 244, 249 (1992)(explaining particular criticisms of the APA amicus brief are incorrect and that the evidence utilized was the best at the time).

68 APA Brief, *supra* note 67, at *5.

69 People Against Child Abuse, *supra* note 65, at *12. In day care situations, the threats are often terrible because the young children lack the capacity to understand that it would not be possible for the perpetrator to carry them out. *Id* at *13.

70 *Id.* at at *12 (citation omitted).

71 *Id.* at *9.

72 *Id.* at *10.

73 APA Brief, *supra* note 67, at *10.

74 *Id.* at *4.

75 Orcutt *supra* note 63, at 340.

76 *Id.* at 370.

77 *Id.* at 344.

78 *Id.* at 370.

79 *Id.* at 366.

80 *Id.*

81 *Id.* at 366-67.

82 Gail S. Goodman et al., "Face-to-Face Confrontation: Effects of Closed-Circuit Technology on Children's Eyewitness Testimony and Jurors' Decisions," 22 *Law & Hum. Behav.* No. 2, 165, 171 (1998).

83 *Id.* at 197.

84 *Id.*

85 *Id.* at 199.

86 *Id.* at 198.

87 David f. Ross et al., "The Impact of Protective Shields and Videotape Testimony on Conviction Rates in a Simulated Trial of Child Abuse," 18 *Law & Hum. Behav*. No. 5, 553 (1994).

88 *Id.* at 556.

89 *Id.*

90 *Id.* at 561.

91 *Id.* at 553.

92 *Id.* at 560-61.

93 *Id.* at 565.

94 There is an argument that *Craig* should be applied to the testimony of the elderly permitting CCTV when a person cannot physically travel to court to testify, and in cases of elder abuse where the witness would be traumatized by testifying. J. Steven Beckett and Steven Stennett, "The Elder Witness—The Admissibility of Closed Circuit Television Testimony after Maryland v. Craig," 7 *Elder L.J.* 313, 333-36 (1999). While researching for this paper, a large portion of case law consisted of attempts at alternative uses for CCTV. A complete discussion of that is beyond the scope of this paper.

95 Amy Ljungdahl, "Maryland v. Craig: Public Policy Trumps Constitutional Guarantees," 14 J. *Comtemp. Legal Issues* 515, 520 (2004).

96 Wollitzer, *supra* note 43, at 789.

97 Ljungdahl, *supra* note 95, at 520.

98 People Against Child Abuse, *supra* note 65, at *7.

99 *Id.* at *11.

100 *Id.* at *7.

101 Brief for Robert A. Butterworth, Attorney General for the State of Florida et al., (Butterworth II) as Amici Curiae Supporting Petitioner, *Maryland v. Craig*, 497 U.S. 836, (1990) (No. 89-478), 1990 WL 10013106 at *17 [hereinafter Butterworth II]. "The court may consider, in determining whether there are factors which would cause the child witness to suffer serious mental or emotional harm, a finding that any one or more of the following circumstances have been established by clear and convincing evidence: (a) The manner of the commission of the offense of which the defendant is accused was particularly heinous or was characterized by aggravating circumstances. (b) The child witness is particularly young or otherwise particularly subject to psychological harm on account of a physical or mental condition which existed before the alleged commission of the offense. (c) At the time of the alleged offense, the defendant occupied a position of authority with respect to the child witness. (d) The offense or offenses charged were part of an ongoing course of conduct committed by the defendant against the child witness over an extended period of time. (e) A deadly weapon or dangerous instrument was allegedly used during the commission of the crime. (f) The defendant has inflicted serious physical injury upon the child witness.

(g) A threat, express or implied, of physical violence to the child witness or a third person if the child witness were to report the incident to any person or communicate information to or cooperate with a court, grand jury, prosecutor, police officer or peace officer concerning the incident has been made by or on behalf of the defendant. (h) A threat, express or implied, of the incarceration of a parent or guardian of the child witness, the removal of the child witness from the family or the dissolution of the family of the child witness if the child witness were to report the incident to any person or communicate information to or cooperate with a court, grand jury, prosecutor, police officer or peace officer concerning the incident has been made by or on behalf of the defendant. (i) A witness other than the child witness has received a threat of physical violence directed at such witness or to a third person by or on behalf of the defendant. (j) The defendant, at the time of the inquiry, (i) is living in the same household with the child witness, (ii) has ready access to the child witness or (iii) is providing substantial financial support for the child witness. (k) The child witness has previously been the victim of an offense defined in article one hundred thirty of the penal law or incest as defined in section 255.25, 255.26 or 255.27 of such law. (l) According to expert testimony, the child witness would be particularly suceptible [FN1] to psychological harm if required to testify in open court or in the physical presence of the defendant. N.Y. Crim. proc. law § 65.20(9) (1989).

102 Butterworth II, *supra* note 101, at *17.

103 Schwalb, *supra* note 3, at 201.

104 *Id.* at 201-02.

105 Neuman, *supra* note 1, at 1080.

106 See *Id.* at 1080-81.

107 Schwalb, *supra* note 3, at 204.

108 See *Id.*

109 Julie A. Anderson, "The Sixth Amendment: Protecting Defendant's Rights at the Expense of Child Victims," 30 *J. Marshall L. Rev*. 767, 768 (1997).

110 Hornbeck, *supra* note 2, at 939.

111 Evans, *supra* note 22, at 497.

112 See *id.* at 498.

113 *Fields v. Murray*, 49 F.3d 1024, 1039 (4th Cir. 1995).

114 *Smith v. Smith*, No. 05-CV-74045-DT, 2007 WL 1585653, at *7 (E.D. Mich. May 31, 2007)(unreported).

115 *Id.*

116 Janet Leigh Richards, "Protecting the Child Witness in Abuse Cases," 34 *Fam. L.Q.* 393, 399 (2000).

117 18 U.S.C. 3509(b)(1) (2006); Richards, *supra* note 116, at 399-00.

118 18 U.S.C. 3509(a)(2)(A)-(B) (2006).

119 §3509(b)(1)(A).

120 §3509(b)(1)(B)(i)-(iv).

121 §3509(b)(1)(C). The court can question the child in chambers or "at some other comfortable place other than the courtroom" on the record to determine if the child is able to testify. §3509(b)(1)(C). Also present are the prosecutor, the defense attorney, the guardian at litem, and the child's attorney. §3509(b)(1)(C).

122 §3509(b)(1)(D) (2006).

123 See *United States v. Bordeaux*, 400 F.3d 548 (8th Cir. 2005)(holding the Sixth Amendment was violated because the determination that CCTV testimony was necessary did not meet the *Craig* standards, and reaffirming a previous holding in *United States v. Turning Bear*, 357 F.3d 730 (8th Cir. 2004) that the CVCWR statute is unconstitutional "to the extent that it requires a different showing of fear from what *Craig* requires"); *United States v. Rouse*, 111 F.3d 516 (8th Cir. 1997) (holding that under the CVCWR statute an expert is not required to show that the child cannot testify "because of fear" and that the court's own "observation and questioning of a severely frightened child" is sufficient); *United States v. Etimani*, 328 F.3d 493 (9th Cir. 2003) (applying the CVCWR statute and permitting the two-way CCTV monitor to be in the same room as the child witness, but not within the child's direct line of vision); *United States v. Garcia*, 7 F.3d 885 (9th Cir. 1993) (harmonizing *Craig* and the CVCWR statute to permitting procedures that were consistent with *Craig* but only mentioned in the CVCWR statute); *United States v. Carrier*, 9 F.3d 867 (10th Cir. 1993) ("declining to decide whether the findings required by 18 U.S.C. §3509(b)(1)(B) fail to meet *Craig* standards because the trial court's finding satisfied both the statutory language and the *Craig* standards")(explanatory parenthetical quoting Janet Leigh Richards, "Protecting the Child Witness in Abuse Cases," 34 *Fam. L.Q.* 393, n. 34 (2000)); Marc Chase McAllister, "Two-Way Video Trial Testimony and the Confrontation Clause: Fashioning a Better Craig Test in Light of Crawford," 34 *Fla St. U. L. Rev*. 835 (2007) (discussing a split between the Second and the Eleventh Circuit regarding CCTV under Federal Rule of Evidence 15 and its application to the *Craig* test).

124 A search of citing references on Westlaw limited to the Sixth Circuit and Michigan revealed six cases: *United States v. Shaw*, 464 F.3d 633 (6th Cir. 2006) (does not address CCTV testimony); *United States v. Bourne*, 19 F.3d 747 (6th Cir. 1997) (does not address CCTV testimony); *Pesquera v. Jackson*, No.

06-CV-101862007, 2007 WL 2874219 (E.D. Mich. Sept. 25, 2007) (unreported) (addressing videotaped testimony, not CCTV); *United States v. Ramos-Ramos*, No. 1:07-CR-08, 2007 WL 1467250 (W.D. Mich. May 18, 2007) (does not address CCTV testimony).

125 *United States v. Weekley*, 130 F.3d 747, 749 (6th Cir. 1997).

126 *Id.* at 752.

127 *Id.*

128 *Id.* at 753-54.

129 *United States v. Moses*, 137 F.3d 894 (6th Cir. 1998).

130 *Id.* at 896.

131 *Id.* at 898.

132 *Id.* at 898-99.

133 *Maryland v. Craig*, 497 U.S. 836, 856 (1990)

134 *Moses*, 137 F.3d at 900.

135 Mich. Comp. Laws §712A.17b (2008); Michigan Legislature, http://legislature.mi.gov/doc.aspx?mcl-712A-17b. Michigan is not the only state to have its own legislation on the subject. Nearly 4/5 of states allow one-way or two-way CCTV testimony for child witnesses in select circumstances. Sophia Rowlands, "Cole's Law Confronts Constitutional Issues: Expanding the Availability of Closed Circuit Child Testimony in the Face of the Confrontation Clause," 37 *McGeorge L. Rev.* 294, 296 (2006).

136 Mich. Comp. Laws §712A.17b(1)(d) (2008).

137 18 U.S.C. 3905(a)(2) (2006).

138 Mich. Comp. Laws §712A.17b(12) (2008).

139 §712A.17b(12).

140 §712A.17b(12).

141 *In Re Hensley*, 560 N.W.2d 642, 643 (Mich. Ct. App. 1997). *Hensley* was not a child abuse case; however, it addressed termination of parental rights. *Id.*

142 *In Re Vanidestine*, 463 N.W.2d 225 (Mich. Ct. App. 1990).

143 *Id.* at 226.

144 *Craig* was decided after this case went to trial, but before the appeal was decided, so it was new law at the time. *Id.* at 227.

145 *Id.* at 227-28.

146 *Id.*at 228.

147 *Id.* At the time, psychological maturity was also a factor. *Id.*

148 *Id.*

149 *Id.*

150 *Crawford v. Washington*, 541 U.S. 36 (2004). At issue in *Crawford* was the admissibility of out-of-court statements made to a police officer during the course of an investigation of a rape. *Id.* at 38-40.

151 *Id.* at 68.

152 Matthew M Staab, "Child's Play: Avoiding the Pitfalls of Crawford v. Washington in Child Abuse Prosecution," 108 *W. Va. L. Rev.* 501, 537 (2005).

153 *United States v. Kappell*, 418 F.3d 550 (6th Cir. 2005).

154 *Id.* at 554.

155 *Id.* at 555.

156 Recently, in a case addressing the application of *Crawford*, the Supreme Court held that state courts are permitted to "give broader effect to new rules of criminal procedure than is required" by the new opinion. *Danforth v. Minnesota*, 128 S.Ct 1029,1033 (2008). The Court in *Danforth* explained that the *Teague* decision, while preventing retroactivity from new decisions unless the case falls within an exception, does not "limit the authority of a state court, when reviewing its own state criminal convictions, to provide a remedy for a violation that is deemed 'non-retroactive' under *Teague*." *Id.* at 1042. This decision will likely have scant effect on CCTV testimony regarding *Crawford* because CCTV permits cross-examination by an available witness.

157 Schwalb, *supra* note 3, at 198.

158 *Id.* at 197-98.

159 *Id.* at 200.

160 *Id.* at 205. Additionally, this can also include allowing the child to hold the judge's hand. *Id.* However, it seems rather unlikely that a child would find comfort in grasping the hand of a stern, official-looking stranger.

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