

# WINKING AT THE JURY: “IMPLICIT VOUCHING” VERSUS THE LIMITS ON OPINIONS ABOUT CREDIBILITY

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*This Article presents empirical data about a common kind of testimony: descriptions by professionals of what alleged child-abuse victims said to them in interviews. The data suggest that these professionals tend to identify with the children they interview and often believe they can recognize truthful statements. These beliefs likely affect how the professionals testify, to produce “implicit vouching” for the children’s statements despite evidence law’s general prohibition of opinion testimony about the truthfulness of a victim’s statement. Allowing explicit testimony about credibility would resolve this conflict by permitting examination of the reasons for the witness’s opinion about the child’s credibility. This could make fact-finding more authentic and more reliable.*

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## INTRODUCTION

“So we just dance around it, but basically say the words, you know, ‘the child is being truthful,’ without saying that.” This is how a social worker has described testifying about interviews with children who are alleged victims of abuse.<sup>1</sup> An empirical study conducted for this Article shows that this type of “implicit vouching” is likely to be common, even though evidence law purports to prohibit professionals’ testimony about credibility. What can we infer when the legal system allows actions that contradict an established rule? It may be that the

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1. See *infra* Part II.B. Considering a similar kind of insincerity in a constitutional law context, Professor Barry Friedman has written, “[w]inking breeds contempt: contempt for the law, and for the Court’s own pronouncements.” Barry Friedman, *The Wages of Stealth Overruling (with Particular Attention to Miranda v. Arizona)*, 99 GEO. L.J. 1, 53 (2010).

rule is problematic and that courts are avoiding the rule to produce fair results without confronting its flaws. Or the rule may make sense, but has aspects that make it hard for courts to achieve consistent applications. In either situation, examining the rule makes sense, in order to be clear about its shortcomings or to work out ways to apply it better. An analysis is particularly important when this dynamic occurs in the context of a crucial issue in cases for which society demands accurate resolutions: cases where a child has stated that he or she was the victim of abuse and the child's credibility may be strongly controverted.

This Article presents data suggesting that when professionals testify about children's statements, their testimony likely conveys "implicit vouching" to juries. In addition, this Article shows, in an analysis of appellate opinions, that courts have difficulty in administering a conventionally accepted exception to the prohibition of opinions on credibility that requires them to distinguish between forbidden opinions on the truthfulness of a particular statement and permitted opinions on general aspects of truthfulness. This reinforces the phenomenon of witnesses vouching for the credibility of alleged victims despite the law's professed rejection of this practice.

Because implicit vouching already conveys many witnesses' beliefs about the credibility of alleged victims under the current regime, this Article recommends authorizing standard opinion testimony in place of the camouflaged opinion testimony the system now tolerates. This change makes sense because allowing witnesses to make explicit statements about their beliefs related to children's credibility would make their testimony more authentic. Also, if a witness's vouching for an alleged victim were permitted to be explicit, instead of implicit, it would be subject to scrutiny through cross-examination and contradictory testimony. This could increase fairness for defendants and could increase the accuracy of jury findings. This reform would remove the false dichotomy between testimony on truthfulness in general and testimony on the truthfulness of specific individuals.

## I. CONVENTIONAL PROHIBITION OF EXPERT OPINION ON CREDIBILITY

### *A. Defining "Opinion on Credibility"*

To examine how evidence law unfortunately misapplies its professed doctrines on relevance and expert testimony in the context of trials that involve scrutiny of statements by children, it will be helpful to analyze a basic conceptual difficulty—defining the kinds of testimony that can properly be called testimony about credibility. It may sometimes be difficult to distinguish testimony about a speaker's credibility from testimony about other topics that can support a conclusion that is consistent with the content of a speaker's statement. In every case that involves a statement by an alleged victim, essentially all of the prosecution's proof could be characterized as related to the credibility of the alleged victim. This is because the prosecution's proof will be aimed at proving that the events described by the victim really did take place. A jury that believes the events occurred will, likely, also believe that the victim's statement was accurate.

Evidence that supports the credibility of an alleged victim because it corroborates the victim's statements in this way differs from evidence that supports the credibility of the alleged victim by drawing conclusions from the victim's own words. This distinction can be illustrated in a hypothetical case. Assume that a child has bruises and has made a statement accusing X of beating him. The prosecution seeks to show that X beat the child, causing those bruises. An expert witness would routinely be permitted to testify as follows:

- a) I saw bruises on the victim, and
- b) attributes of the victim's bruises lead me to conclude that they were likely associated with having been beaten.

The expert's testimony supports the credibility of the child, but because it is not expressly based on the child's accusatory statement, courts typically would treat the testimony as properly admissible.<sup>2</sup> The problem explored in this Article requires differentiating this kind of expert witness testimony from a different kind of expert testimony that might be offered in the same case:

- a) I heard the victim describe having been beaten by X, and
- b) attributes of the victim's narration lead me to conclude that it was likely associated with having been beaten by X.

In contrast with their treatment of testimony like "attributes of the child's physical condition support a conclusion that a certain event caused that physical condition," courts routinely treat testimony of the type "attributes of the child's narration support a conclusion that a certain event caused that narration"<sup>3</sup> as prohibited vouching for the credibility of a witness.

### ***B. Rule 702 and Constraints on Opinion Evidence on Credibility***

The Federal Rules of Evidence ("FRE") and parallel state evidence codes have general provisions on expert testimony that could support the admission of expert<sup>4</sup> testimony on credibility.<sup>5</sup> In the language of FRE 702,

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2. For example, in *Butler v. State*, expert testimony reasoned that petechiae in the eye of a murder victim supported a conclusion that she had been strangled. 100 So. 3d 638, 667 (Fla. 2012). *But see* *United States v. Whitted*, 11 F.3d 782, 787 (8th Cir. 1993) (finding a doctor's diagnosis of sexual abuse was characterized as a "thinly veiled way of stating that" the alleged victim had spoken truthfully).

3. It is possible to categorize many other types of testimony that relate to credibility with varying degrees of directness. In *Schutz v. Texas*, the court identified five categories of evidence that touch on a complainant's credibility in child sexual assault cases: (1) substantive evidence of guilt that incidentally impacts on credibility; (2) general testimony relating to impaired witnesses or declarants; (3) general testimony that directly attacks credibility; (4) general testimony that supports credibility; and (5) specific testimony supporting or attacking credibility. 957 S.W.2d 52, 75-76 (Tex. Crim. App. 1997).

4. Analyses of opinion testimony about credibility usually focus on opinions that might be given by experts. In many cases, professional interviewers will be qualified as experts. Where they are treated as lay witnesses, because jurors may perceive them as experienced and authoritative, and because they are likely to imply their opinions about the

[a] witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

and if the testimony is based on reliable application of reliable principles and methods to sufficient facts or data. As is well known, expert testimony is routinely admitted for many topics, including typical ones like the standard of care for medical professionals or analysis of DNA. Courts have also approved the admission of expert testimony on less common topics such as: relationships between pimps and prostitutes;<sup>6</sup> microscopic hair analysis;<sup>7</sup> whether a crime scene had been staged to seem like a burglary had occurred;<sup>8</sup> the motivation of a person's suicide;<sup>9</sup> and, the likelihood that a person with a developmental disability would seek help in a dangerous situation.<sup>10</sup> These examples suggest an application of the basic idea that an expert's testimony is admissible if it could assist a jury's fact-finding and if the witness has a proper basis for offering the opinion. But the topic of credibility gets negative treatment. Courts read a "not on credibility" limitation into the facially neutral rules about allowable topics for expert testimony. Courts justify this by stating that: the witness has used deficient methodology; the witness is not qualified; the jury's own common sense makes expert opinion unhelpful; the probative value of such testimony would be outweighed by the waste of time; and, this type of testimony would invade the province of the jury.<sup>11</sup>

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credibility of interview subjects, it is also sensible to explore ways in which their opinions (and counter proof) may be admitted.

5. The Rules do offer specific provisions about opinion on credibility in Federal Rules of Evidence, Rule 608. This provision specifies that testimony bolstering credibility may be introduced only after credibility has been attacked. *See id.* It controls evidence on the topic of "character" for truthfulness, a topic different from a professional's opinion that a person has or has not been truthful on a specific occasion when that opinion is derived from observations of the person's narration instead of from observations or knowledge of that person's general personality or character traits. *See id.*

6. United States v. Brooks, 610 F.3d 1186, 1195–96 (9th Cir. 2010).

7. Connecticut v. West, 877 A.2d 787, 806–10 (Conn. 2005).

8. Kansas v. Patton, 120 P.3d 760, 782–85 (Kan. 2005).

9. Kivland v. Columbia Orthopaedic Grp., LLP, 331 S.W.3d 299, 310–12 (Mo. 2011).

10. California v. Dejourney, 121 Cal. Rptr. 3d 787, 799–803 (Ct. App. 2011).

11. Michael W. Mullane, *The Truthsayer and the Court: Expert Testimony on Credibility*, 43 ME. L. REV. 53, 68 (1991) ("Appellate courts, however, have continued to affirm, and even mandate, exclusion of expert testimony on credibility, generating an impressive list of arguments supporting their decisions."); *see, e.g.*, Snowden v. Singletary, 135 F.3d 732, 737–38 (11th Cir. 1998) (where an expert testified that 99.5% of children tell the truth, the court stated "[t]hat such evidence is improper, in both state and federal trials, can hardly be disputed"); New Hampshire v. Huard, 638 A.2d 787, 789 (N.H. 1994) (the state may not present evidence to preempt the jury's job of deciding which parties and witnesses are truthful); *see also* Wes R. Porter, *Repeating, Yet Evading Review: Admitting Reliable Expert Testimony in Criminal Cases Still Depends upon Who Is Asking*, 36 RUTGERS L. REC. 48, 55–56 (2009) (reviewing the "province of the jury" doctrine).

Ambivalence about expert testimony on credibility is manifest in some elaborations of the anti-opinion principle that some states apply. They may allow expert testimony on the credibility of a child sexual assault victim, but only if the defense challenges the alleged victim's credibility.<sup>12</sup> This rationale has allowed testimony, for example, that "we always believe the child when they disclose [something of a sexual nature,]"<sup>13</sup> and testimony by a counselor that she "did not believe that the complainant's outcry was the result of someone suggesting she make such an outcry."<sup>14</sup> Another doctrinal development has attempted to differentiate between expert opinion that a child has lied and expert opinion that a child has given testimony influenced by manipulation or fantasies.<sup>15</sup>

### C. Scholars' Views on Admissibility of Opinions on Credibility

In an early edition of his famous treatise, Judge Jack B. Weinstein analyzed the pro-admissibility tenor of the then-new Federal Rules of Evidence and wrote, "[e]xpert witnesses . . . may now be called to express their opinion of the witness' veracity."<sup>16</sup> The renowned evidence scholar Margaret Berger presented a similar view. In a 1989 article, she explained that, "[a]s originally enacted, article VII in no way purported to limit the subject area of an expert's testimony."<sup>17</sup> She explained further that Rule 704's limitation on expert testimony about a person's mental state controls such testimony only when the mental state is a substantive issue, and that in all other circumstances, a properly qualified expert

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12. *Montana v. St. Germain*, 2007 MT 248, ¶ 27, 336 Mont. 17, 153 P.3d 591, 597.

13. *New Hampshire v. DeCosta*, 772 A.2d 340, 344 (N.H. 2001); *see also* *Minnesota v. Myers*, 359 N.W.2d 604, 610 (Minn. 1984).

14. *Darling v. Texas*, 262 S.W.3d 920, 924 (Tex. App. 2008); *see also* *Michigan v. Lukity*, 596 N.W.2d 607, 615–16 (Mich. 1999) (holding that an expert properly testified that a victim's behavior was consistent with that of a sexual abuse victim, after the defense opened the door by claiming that the victim had emotional problems that made her testimony incredible); *Missouri v. Couch*, 256 S.W.3d 64, 70–72 (Mo. 2008) (holding that a child psychologist properly discussed the characteristics the child victim exhibited that suggested that the victim did not fit the description of someone making false allegations, after defense counsel opened the door by cross-examining her regarding the characteristics of children who make false allegations).

15. *See* *Schutz v. Texas*, 957 S.W.2d 52, 67–68 (Tex. Crim. App. 1997) (collecting cases and concluding that this distinction is worthwhile, so that expert testimony on manipulation could be permitted).

16. 3 JACK B. WEINSTEIN & MARGARET A. BERGER, *WEINSTEIN'S EVIDENCE* ¶ 608 (Joseph M. McLaughlin ed., 1st ed., rev. vol. 1996), quoted in Amy Bowen Poulin, *Credibility: A Fair Subject for Expert Testimony?* 59 FLA. L. REV. 991, 991–92 (2007). For an analysis of this issue in the context of common law, *see* Michael Juviler, *Psychiatric Opinions as to Credibility of Witnesses: A Suggested Approach*, 48 CAL. L. REV. 648 (1960).

17. Margaret A. Berger, *United States v. Scop: The Common-Law Approach to an Expert's Opinion About a Witness's Credibility Still Does Not Work*, 55 BROOK. L. REV. 559, 586 (1989).

may testify about someone's mental state or condition if that testimony satisfies the helpfulness standard that is one of the "central policy concerns" of the Rules.<sup>18</sup>

On the other hand, in the treatise *Modern Scientific Evidence*, the authors state that "[c]ourts nearly uniformly prohibit experts (or any witness) from offering an opinion regarding the trustworthiness of a witness' specific allegations."<sup>19</sup> And the most recent edition of Judge Weinstein's treatise, prepared by new authors, states "[t]he credibility of witnesses is normally an issue left exclusively to the finder of fact, and is an improper subject for expert testimony."<sup>20</sup> The difference in viewpoint between the two editions of the Weinstein treatise demonstrates a tension between contemporary judicial treatment of expert testimony about credibility and the treatment that modern evidence codes seem to require. Another illustration of this tension is seen in the treatise volume *The New Wigmore: Expert Evidence*. That work seems to support the current consensus that prohibits expert testimony on credibility,<sup>21</sup> stating "the traditional rule retains its merit," but it also states that "[e]ven today, in limited situations, general evidence about the veracity of a particular class of witnesses should be admissible."<sup>22</sup>

## II. UNACKNOWLEDGED NULLIFICATION OF THE ANTI-OPINION POSITION

### A. Context and Frequency of Children's Interviews by Professionals

The focus of this Article is on the conflict between the generally articulated doctrines that bar opinion evidence on credibility and the actual practice that seems to contradict those doctrines. This conflict arises with some frequency in child abuse prosecutions.<sup>23</sup> In those cases, testimony about a child's out-of-court statement is common for a variety of reasons. For example, a child's parents or guardians may decide to keep the child off the witness stand. In terms of the hearsay rules, courts often find that child witnesses are "unavailable"<sup>24</sup> to

18. *Id.* at 587.

19. DAVID L. FAIGMAN ET AL., *MODERN SCIENTIFIC EVIDENCE* § 17:9 (2012–2013 ed.).

20. 4 JACK B. WEINSTEIN & MARGARET A. BERGER, *WEINSTEIN'S EVIDENCE* § 702.06[1][a] (Joseph M. McLaughlin ed., 2d ed. 2012).

21. A provocative articulation of the pro-exclusion doctrine is found in Daniel D. Blinka, *Why Modern Evidence Law Lacks Credibility*, 58 *BUFF. L. REV.* 357, 417 (2010) ("Trials are not social science seminars").

22. DAVID H. KAYE ET AL., *THE NEW WIGMORE: EXPERT EVIDENCE* § 2.4 (2010).

23. *See infra* notes 44–51.

24. *FED. R. EVID.* 804(a) reads:

(a) **Criteria for Being Unavailable.** A declarant is considered to be unavailable as a witness if the declarant:

- (1) is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies;
- (2) refuses to testify about the subject matter despite a court order to do so;
- (3) testifies to not remembering the subject matter;

testify because they lack competence, because testifying would be traumatic, or because the child takes the stand but is nonresponsive.<sup>25</sup> Also, a trial judge may question a prospective child witness and find the child incompetent to testify based on a lack of memory, an inability to communicate, or an inability to understand and take the oath.<sup>26</sup> There thus can be many cases where testimony about a child's statements may come from a professional interviewer. These interviewers are the witnesses whose opinions about credibility are the focus of this Article. The Appendix to this Article analyzes the continuing admissibility of testimony about out-of-court children's statements under contemporary Confrontation Clause jurisprudence.

Many interviews of alleged victims of child abuse take place at a Child Advocacy Center ("CAC").<sup>27</sup> CACs were developed in the 1980s to minimize trauma to children by using multi-disciplinary teams from law enforcement, prosecution, child protective services, and the medical and mental health professions to conduct interviews and to produce statements that might be admissible in criminal trials.<sup>28</sup> The CAC process "pulls together law enforcement, criminal justice, child protective service, medical and mental health workers onto one coordinated team."<sup>29</sup> At present, more than 750 CACs, supported by federal funding, are in operation.<sup>30</sup> Before the development of CACs, child sexual abuse

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(4) cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or

(5) is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure:

(A) the declarant's attendance, in the case of a hearsay exception under Rule 804(b)(1) or (6); or

(B) the declarant's attendance or testimony, in the case of a hearsay exception under Rule 804(b)(2), (3), or (4).

But this subdivision (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying.

25. See Kimberly Y. Chin, "Minute and Separate": Considering the Admissibility of Videotaped Forensic Interviews in Child Sexual Abuse Cases After Crawford and Davis, 30 B.C. THIRD WORLD L.J. 67, 86-87 (2010); Robert P. Mosteller, *Testing the Testimonial Concept and Exceptions to Confrontation: "A Little Child Shall Lead Them,"* 82 IND. L.J. 917, 988-92 (2007).

26. Mosteller, *supra* note 25, at 992; see also Chin, *supra* note 25, at 87.

27. The Authors are grateful for contributions regarding CACs, in this Section and the Appendix, by Jacquelyn Mather Hutzell, a member of the University of Denver Sturm College of Law class of 2011.

28. History, NAT'L CHILDREN'S ADVOCACY CTR., <http://www.nationalcac.org/history/history.html> (last visited Feb. 25, 2012).

29. History of National Children's Alliance, NAT'L CHILDREN'S ALLIANCE, <http://www.nationalchildrensalliance.org/index.php?s=35> (last visited Feb. 25, 2012).

30. See 42 U.S.C. § 13001 (2012); *Providing Child Advocacy Services for Victims of Child Abuse*, NAT'L CHILDREN'S ALLIANCE, <http://www.nationalchildrensalliance.org/index.php?s=6> (last visited February 25, 2012).



victims might tell their stories as many as 15 times to a variety of professionals over the course of an investigation.<sup>31</sup> Under the CAC model, a child talks to an average of three people.<sup>32</sup> The adoption of the CAC model has been said to produce “more immediate follow-up to child abuse reports; more efficient medical and mental health referrals; reduction in the number of child interviews; increased successful prosecutions; and consistent support for child victims and their families.”<sup>33</sup> The CAC model is recognized in federal law as a means to “increase the reporting of child abuse cases, reduce the trauma to the child victim, and increase the successful prosecution of child abuse offenders.”<sup>34</sup>

Recognition that out-of-court statements by alleged child victims could be crucial in trials is also found in state statutes that provide hearsay exceptions for statements made by these children.<sup>35</sup> Some of the statutes require a showing that the statement was made in circumstances that support a belief in the statement’s credibility. Interviews conducted by trained professionals would likely be an example of such circumstances.

### ***B. Empirical Data on Interviewers’ Beliefs***

An empirical study conducted for this Article suggests that the professionals who testify about children’s statements commonly perceive that they are often able to identify truthful statements, although they also believe that identifying truthfulness can be difficult. Many respondents have confidence that they do have the ability, in some instances, to sort out truth from falsehood.

The study also shows that many of these professionals identify with alleged victims. The professionals characterize their work as intended to protect victims and to help in the prosecution of those who may have abused them. Attitudes of this type likely influence the style in which a professional testifies about statements a child has made in an interview and are likely to contribute to the professional’s conscious or unconscious interest in presenting the child’s views to the jury in a positive way. When professionals believe they are good at spotting lies or are able to identify truthful speakers and *also* believe that part of their job is to support the credibility of children who report abuse, they are likely to indicate a belief in the truth of the children’s statements when professionals testify. This cumulative effect might be called “implicit vouching.”

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31. *Changing the Child Abuse System*, CHI. CHILDREN’S ADVOCACY CTR., <http://www.chicagocac.org/who-we-are/how-we-changed-the-system/> (last visited Feb. 25, 2012) (currently accessible by searching the Internet Archive index).

32. *Id.*

33. *The CAC Model*, NAT’L CHILDREN’S ADVOCACY CTR., [http://web.archive.org/web/20101221062813/http://www.nationalcac.org/professionals/model/cac\\_model.html](http://web.archive.org/web/20101221062813/http://www.nationalcac.org/professionals/model/cac_model.html) (last visited July 25, 2011) (currently accessible by searching the Internet Archive index).

34. 42 U.S.C. § 13001(6) (2012).

35. See statutes collected in ARTHUR BEST, WIGMORE ON EVIDENCE 2011-3 CUMULATIVE SUPPLEMENT 1047-71 (2011).

### *1. Methodology*

The study consists of interviews with professionals who conduct interviews with children who may have been victims of abuse. The interview subjects were selected by circulating an e-mail request for participation to a large number of interviewers, and then conducting interviews with volunteers. Those volunteers suggested additional interview subjects. The total number of interviews is eight, with each interview covering about five main topics in a span of about an hour. This Article does not draw quantitative conclusions from this research, but the data reveal a number of patterns that may have qualitative value in understanding the reactions experienced professionals may have to the children whom they interview.

### *2. Interviewers' Perceived Ability to Identify Truthful Statements*

Respondents expressed confidence in their ability to identify truthful statements by children. This is likely to cause implicit vouching, because a person who describes a statement he or she thinks is true is likely to describe it with words and with affect that are consistent with the idea that the statement is a true one.

Respondents showed their beliefs that they can identify truthful statements in remarks like the following:

- I feel like in the moment, when I am in the interview, it is easier to tell if the child is not being honest than it is to tell if they are telling me the entire truth or a portion of the truth.
- There are times when I interview the child that I do strongly believe that what they told me is accurate based on their experience. So, I guess in that way, you know, I do feel that I can tell when a child is being truthful, and I don't see any reason that the child has shown me that they are lying.
- Personally, there are times when I, yes, I am very convinced that what the child is saying is indeed true.
- I think with older kids, I am good at spotting the truth versus lie, but not as much with younger children because it is more complicated, that is the hardest for me.
- I will have a personal opinion, but we generally, as the interviewer, we try to leave it up to law enforcement.
- Generally, we will have a feeling or an opinion [about a child's credibility]. We have to be careful how to express that.
- I definitely try [to tell whether a child is telling the truth] and how should I say this, I have been burned about the kids who are absolutely telling the truth and then we got evidence in the contrary, and I about fell out of my tree, and then I'm like, what, how could I have been so wrong, and I can't believe I misjudged this.

These responses reflect the idea that the respondents can identify truthful statements by the children whom they interview. This may be understandable,

when we consider that these respondents have likely conducted many interviews and learned the outcomes of prosecutions based in part on those interviews. It is also noteworthy that these respondents did not indicate the highest possible level of confidence in their ability to discern truth. Their statements reflect the difficulty of that endeavor, as, for example, when respondents made statements about being better at identifying truth than identifying falsehoods, or defining truthfulness as the absence of an indication of lack of truthfulness.

A number of respondents made additional statements that show an appreciation of the difficulty of identifying truthful statements. They expressed ideas like:

- When I started doing [forensic interviews], I honestly had no idea about a child's credibility.
- In all honesty, I wasn't there, and I don't know what went on, so all I can know is what the child tells me.
- [To judge credibility] I think that a person would need to look at the history of the child, past statements, who they talked to, what they said, and perhaps even a mental health assessment.
- I would like to think [I could judge credibility], but I know it is not just as black and white as that.
- So we just dance around it, but basically say the words, you know, "the child is being truthful" without saying that, and giving ourselves an out if for any reason, you know, we get one of those "holy mackerel, how in the world did we not see that?" which has only happened a few times, but when it does it's alarming.

These responses indicate a range of attitudes about the difficulty of identifying truthful statements. Two statements suggest that it cannot be done ("all I can know is what the child tells me," and "would need to look at the history of the child"). Another statement is ambiguous, stating that the respondent "would like" to have the ability to judge credibility. And two others suggest some belief in the ability to accomplish that task ("dance around it," and "when I started"). They provide additional qualitative support for the likelihood that interviewers' testimony may be influenced by interviewers' perceptions of their ability to discern truth-telling.

### *3. Interviewers' Identification with Alleged Victims*

A number of our respondents made statements indicating a general orientation of supportiveness for the children they interview. The idea that one is an ally of a child whose statements one describes to a jury might well have some impact on the ways in which one conveys that description.

For example, respondents stated:

- All of us want to believe a child and just want to support them in any way we can, and that is why we do the work that we do in order to help create a viable case for them. . . . It is taboo for anybody in the

field to say that they do not believe a child or they have concerns about the child's statement.

- [I/We would like training about] really emphasizing the role that we have in how we can help the child to demonstrate their credibility.
- Hopefully when it goes to the jury, they feel like this is credible and that this then indeed did happen to this child.
- Unless there is a reason I am given not to believe them, my sense is to believe them.
- It is best for the neutrality of the [forensic interviewer] so we are not put in the position to be viewed as finding them credible simply because "I did the interview." This can boost the child's credibility because the jury sees that someone else views their statements as credible, in addition to the interviewer.
- [I]t just does not sit right with me if I were to give an opinion [about a child's credibility] necessarily. But on the flip side . . . if the defense attorney asked me if the child that you interviewed, did you feel that she was being truthful during the interview, I am not sure that I would necessarily have a problem with answering that either if I believed that child was.
- It might be helpful [for interviewers to testify] about what makes you believe this child. I don't think it would necessarily be something that would inappropriately sway a jury, just because I say I believe them, that automatically they are going to believe the child too, but I think being able to understand the why may be helpful.

These ideas could likely lead an interviewer to present a description of a child's statements in ways that increase the likelihood that jurors will believe the content of the statement. For instance, note the references to boosting a child's credibility, interest in being allowed to testify directly about why a child is believable, and helping a child's statement seem credible. Especially when combined with the feelings described above about being able to identify truthful statements, an idea that one is supporting a victim could likely lead to choices of words, body language, and other unspoken cues that give a jury the impression that the interviewer has confidence in the accuracy of the child's narrative.

### *C. Implicit Vouching in Descriptions of Victims' Statements*

The implicit vouching suggested by our empirical study involves the mental processes of witnesses whose affect and narration are likely to be influenced by: (1) their belief they can identify truthful statements; (2) their belief that a particular child has made truthful statements; and (3) their overall sense of identification with children who are victims of abuse. The occurrence of this implicit vouching could be verified with an analysis of actual testimony in real cases, but it is consistent with common sense: When we quote someone whose views we think are true, we are likely to act differently than when we quote someone whose views we think are false. The implicit vouching our study suggests

takes place contradicts the professed standards of contemporary evidence law. But because it is ordinarily unacknowledged, the violations are ignored and an opportunity to clarify the legal standards never arises.

All witnesses manifest their confidence in the accuracy of what they say. But that is different from conveying to jurors an opinion about what someone else has said. The implicit vouching suggested by our data is troublesome because it is a communication of confidence about the credibility of someone other than the witness. Furthermore, in assessing the significance of this implicit vouching, the status of the witness may be particularly important. Whether characterized as an expert or a lay witness, the professional who reports the child's statements to the jury will almost always be described to the jury as a person who has training and experience in responding to child abuse, in interviewing victims, or in providing services to victims.<sup>36</sup> Jurors are likely to give substantial weight to the opinion such a professional might have about the truthfulness of an alleged child victim, even if the opinion reaches them in a camouflaged style.

Another kind of implicit vouching may be present in the testimony of professionals who have interviewed children. When a professional relays a child's statements to a jury, even if the professional could limit his or her testimony to a literally neutral presentation of the out-of-court words the child spoke, the testimony would very likely imply an endorsement of the child's statement. This vouching or bolstering of the child's truthfulness would be unintentional on the part of the witness, but it is highly likely to be inherent in the witness's testimony. This is because the professional will be presented to the jury by the prosecution. In this setting, jurors may well perceive the professional as cooperating with the prosecution. From that point of view, it is likely that jurors will infer that the professional agrees that the state has identified the proper defendant. When an ordinary fact witness testifies in the prosecution's case, jurors are likely to assume that the witness is in court because, whether a volunteer or not, the witness was once in a position to observe something that is relevant to the case. If the witness has a motive to favor the prosecution, that motive will undoubtedly be explored in cross-examination. In contrast, when a professional who conducts interviews of children is among the prosecution's witnesses in a child abuse case, jurors may

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36. *Louisiana v. Friday* provides an illustration of the kind of information jurors receive about professionals who interview alleged victims:

The prosecutor sought to have Caruso qualified as an expert in the field of child and family counseling and sought to establish, as part of Caruso's expertise, her experience in counseling and treating children who had been sexually abused. Caruso testified she has been a clinical social worker for eleven years. She has had her own practice since 2002. As part of her practice, she counseled and treated children who had been victims of sexual assault. She has a master's degree in social work and completed an internship at Dallas Child and Family Guidance. Her first year working on her degree was dedicated in large part to child physical and child sexual abuse. She has been qualified in court before as an expert in child and family counseling, and has testified as an expert.

2010-2309, pp. 24-25 (La. App. 1 Cir. 6/17/11); 73 So. 3d 913, 930-31.

well assume that the interviewer has made a choice to participate in the prosecution and therefore believes in it.<sup>37</sup> Also, jurors are likely to view the interviewer as a member of the helping professions. They may well conclude that the interviewer has faith in the prosecution's case, reasoning that if the interviewer considered the case weak or had concluded that the alleged victim had been untruthful, the professional would have declined to testify or would in other ways have avoided being part of the prosecution's team.

#### *D. Implicit Vouching in Descriptions of Patterns of Narration*

Professionals who testify about children's statements sometimes offer implicit vouching of the truthfulness of those statements by giving opinions about general styles of narration. Because these descriptions are general, courts treat them as different from explicit statements about the accuracy of any particular statement. And courts make a "critical distinction between admissible expert testimony on general or typical behavior patterns of minor victims and inadmissible testimony directly concerning the particular victim's credibility."<sup>38</sup> Many decisions analyze whether statements by experts "fall on the latter side of that spectrum"<sup>39</sup> or "cross the line."<sup>40</sup> In their treatise on expert evidence, Professors David H. Kaye, David E. Bernstein, and Jennifer L. Mnookin devote a section to expert testimony on credibility in child abuse cases.<sup>41</sup> They clearly depict courts' efforts to distinguish between pattern testimony and specific-speaker testimony but do not present a rationale for that distinction, noting only that courts do make it.<sup>42</sup> Some examples will show that testimony characterized as general (and therefore permissible) may be essentially the same as testimony that a particular alleged victim has spoken truthfully. For this reason, a witness who offers testimony about general patterns may fairly be described as offering implicit

37. Berger, *supra* note 17, at 611 ("[T]he jury will experience [an expert's] testimony as an endorsement of [an alleged victim's] story. The doctor's omission of words explicitly characterizing [the alleged victim's] veracity will make no difference. . . . Why else does the prosecution want [the expert] to testify if not to bolster [the alleged victim's] story?").

38. Connecticut v. Spigarlolo, 556 A.2d 112, 123 (Conn. 1989); *see also* United States v. Rouse, 111 F.3d 561, 571 (8th Cir. 1997) ("That leaves a troublesome line for the trial judge to draw—as the expert applies his or her general opinions and experiences to the case at hand, at what point does this more specific opinion testimony become an undisguised, impermissible comment on a child victim's veracity?").

39. Connecticut v. Favoccia, 986 A.2d 1081, 1093 (Conn. App. Ct. 2010).

40. Duckett v. Texas, 797 S.W.2d 906, 915 (Tex. Crim. App. 1990); Carter v. Indiana, 754 N.E.2d 877, 882–83 (Ind. 2001) (concluding that expert did not "cross the line" into impermissible vouching for credibility of autistic alleged victim when she said children with autism almost never lie and that when they do lie they are poor liars); *see also* Iowa v. Myers, 382 N.W.2d 91, 98 (Iowa 1986) (holding that here is a "fine but essential" line between helpful expert testimony and impermissible comments on credibility (quoting Iowa v. Horton, 231 N.W.2d 36, 38 (Iowa 1975))).

41. KAYE ET AL., *supra* note 22, § 2.4.2.

42. *Id.*

vouching for a particular person whose circumstances fit the pattern the witness has described.

An effort by the Michigan Supreme Court to articulate the difference between pattern testimony and specific-speaker testimony may illustrate the difficulty of making that distinction:

We emphasize that the purpose of allowing expert testimony in these kinds of cases is to give the jury a framework of possible alternatives for the behaviors of the victim at issue in the case in relation to the class of abuse victims. In this respect, the expert's role is to provide sufficient background information about each individual behavior at issue which will help the jury to dispel any popular misconception commonly associated with the demonstrated reaction. Thus to assist the jury in understanding the unique reactions of victims of sexual assault, the testimony should be limited to whether *the behavior of this particular victim* is common to the class of reported child abuse victims. The expert's evaluation of the individual behavior traits at issue is *not centered on what was observed in this victim*, but rather whether the behavioral sciences recognize this behavior as being a common reaction to a unique criminal act.<sup>43</sup>

Treating "speakers-in-general" opinion testimony differently from "speaker-specific" opinion testimony may be illogical. The Michigan Supreme Court believes that testimony about "the behavior of this particular victim" must not be "centered on what was observed in this victim," suggesting a distinction that may be very hard to apply.

Consider these examples of two styles of possible opinion testimony:

- A. "Young children who have been abused often describe sexual practices that are ordinarily unknown to young children who have not been abused. These descriptions are usually truthful."
- B. "The young child who is alleged to have been abused described sexual practices that are ordinarily unknown to young children who have not been abused. The child's description is likely to be truthful."

In a case where a child who is an alleged victim of sexual abuse has reported that abuse with descriptions of sexual practices that are ordinarily unknown to young children who have not been abused, virtually all courts would admit the "speakers-in-general" testimony in example "A." However, virtually all courts would exclude the "speaker-specific" testimony in example "B."<sup>44</sup> The testimony that would be

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43. Michigan v. Beckley, 456 N.W.2d 391, 406-07 (Mich. 1990) (emphasis added).

44. See, e.g., Martin v. Kentucky, 170 S.W.3d 374, 382-83 (Ky. 2005) (finding testimony was properly admitted that, in general, it is not unusual for child victims of sex crimes to reveal the abuse in bits and pieces); Wisconsin v. Dunlap, 2002 WI 19, ¶¶ 36-41, 250 Wis. 2d 466, 640 N.W.2d 112, 122-23 (holding expert properly permitted to testify

admitted differs from the way in which people with expert knowledge usually communicate with lay people. A car mechanic would rarely say to a customer something like “the pattern of engine overheating and apparent loss of coolant usually occurs when the water pump is malfunctioning.” Instead, the mechanic would say something like “I think your car needs a new water pump.” An expert’s application of knowledge and experience to facts is the essence of expert or professional judgment. Yet to protect the province of the jury, or to avoid expert opinions on ultimate issues (although that form of opinion is expressly permitted under the Federal Rules of Evidence<sup>45</sup>), courts allow experts to communicate general data but prohibit them from explaining how that information could affect analysis of the other facts in the case.

Even though this required general mode of communication might be somewhat confusing to jurors, they would likely understand from either statement “A” or statement “B” that the expert’s information supports a conclusion that the child was truthful. But when we recall that a trial is a search for truth, and that assistance to jurors from experts is the fundamental purpose of expert testimony, restricting the style of expert testimony in this way seems counterproductive. There is no good reason to require vague communication from expert witnesses to jurors. An unintended consequence of this practice may be quite harmful: Appellate courts may reverse convictions because of their findings that particular statements by experts “crossed the line.”<sup>46</sup>

If the difference between the “speaker-specific” and “speakers-in-general” types of expert testimony is slight, it is understandable that trial and appellate courts might have trouble applying doctrines that allow one style and prohibit the other. Examples of this occurrence are set out in Table 1 below. Illustratively, appellate courts have treated a psychotherapist’s answer “yes” to the question “did you find him credible” as properly admitted, while reaching the opposite result for a CAC Director’s testimony that she found an alleged victim “credible.” In contrast, the statement “[v]ery rarely are children making up these stories [of sexual abuse]” was held to have been properly admitted expert testimony, while a psychologist’s statement that when teenage boys report sexual assaults, “[g]enerally they tell the truth” was held to have been wrongly admitted.

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about inconsistencies in narration as behaviors commonly displayed by victims of sexual assault).

45. See FED. R. EVID. 704.

46. See, e.g., *Montana v. Henderson*, 877 P.2d 1013, 1016–18 (Mont. 1994); *South Carolina v. Hudnall*, 359 S.E.2d 59, 62 (S.C. 1987).



**Table 1. Admissible and Inadmissible Testimony Related to Credibility:  
Is There a Difference?**

<u>Properly-Admitted Testimony</u>	<u>Wrongly-Admitted Testimony</u>
Psychotherapist answered “yes” to the question “during the disclosure that [the victim] made to you, did you find him credible?” <sup>47</sup>	Director of a child advocacy center testified that she found the victim “credible.” <sup>48</sup>
Psychologist testified that a person with the victim’s level of intelligence “would have difficulty fabricating a detailed fictional account of abuse.” <sup>49</sup>	Psychiatrist testified that “[i]t’s hard for me to imagine that an eight-year-old child would be able to put together such a plan [to falsely portray herself as a victim].” <sup>50</sup>
Nurse-practitioner testified that in her experience “very rarely are children making up these stories [of sexual abuse].” <sup>51</sup>	Psychologist testified that when teenage boys report sexual assault, “[g]enerally, they tell the truth.” <sup>52</sup>
Licensed counselor testified that the victim “is not a good liar” because she “telegraphs it” when she lies.” <sup>53</sup>	Social worker stated the victim seemed “spontaneous” and “unrehearsed.” <sup>54</sup>

In many cases, courts conclude that testimony about patterns of narration is *not* equivalent to testimony about a particular child’s truthfulness, but a neutral observer might reasonably conclude the opposite—that the jury would in fact have taken the testimony as having particular application to the child whose narration was crucial in the case. For example, the Wisconsin Supreme Court described the following testimony by a child protective services investigator who had interviewed an alleged victim as properly admissible:

[The investigator] testified that children at age six often do not grasp the concepts of “in” and “out” in reference to something being put

47. *Hobgood v. Mississippi*, 2004-KA-01917-SCT (¶ 18) (Miss. 2006); 926 So. 2d 847, 853.

48. *Cox v. Arkansas*, 220 S.W.3d 231, 233 (Ark. App. 2005).

49. *Mullis v. Georgia*, 664 S.E.2d 271, 274 (Ga. App. 2008).

50. *Colorado v. Wittrein*, 221 P.3d 1076, 1081 (Colo. 2009).

51. *Lyons v. Rhode Island*, 909 A.2d 490, 493 (R.I. 2006).

52. *Lopez v. Texas*, 288 S.W.3d 148, 156 (Tex. Crim. App. 2009).

53. *Large v. Wyoming*, 2008 WY 22, ¶ 33, 177 P.3d 807, 817–18.

54. *Bell v. Com.*, 245 S.W.3d 738, 744–45 (Ky. 2008).

into their genitalia. [The investigator] also testified that six-year-olds are often confused about the details that surround a sexual assault, that they focus on the core activity, and that they sometimes have problems grasping the concepts of “before” and “after.” [The investigator] noted that [the alleged victim] had reported the incident to her mother at a location away from where the incident took place, and stated that factors such as fear, guilt and embarrassment could have explained [the alleged victim’s] inconsistencies and her delay in reporting certain aspects of the alleged assault. [The investigator] also noted certain behaviors [the alleged victim] had displayed during their 1989 interview—fidgeting, kicking the table, putting her hands in her mouth, and reticence to talk about the assault. [The investigator] indicated that [the alleged victim’s] behavior was consistent with that of other sexual assault victims *in all of these regards*.<sup>55</sup>

The Wisconsin Supreme Court stated that this testimony “did not indicate, either implicitly or explicitly, [the investigator’s] opinion regarding the veracity of [the alleged victim’s] allegations.”<sup>56</sup> It also stated that “[w]e recognize that the line between substantive comparisons and comparisons offered for explanation is sometimes fine, but we hold that the testimony here fell within the boundaries of [applicable precedents].”<sup>57</sup> The court’s conclusion that the testimony conveyed no impression of the witness’s beliefs about the child’s credibility is, of course, supported only by the justices’ personal reactions to the testimony.<sup>58</sup> If those

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55. Wisconsin v. Dunlap, 2002 WI 19, ¶ 6, 250 Wis. 2d 466, 640 N.W.2d 112, 115 (emphasis added).

56. *Id.* ¶ 40, 640 N.W. 2d at 123.

57. *Id.*

58. For a similar example, see *Connecticut v. Crespo*, 969 A.2d 231, 248–49 (Conn. App. Ct. 2009). The court there stated, with reference to testimony by a psychologist named Johnson:

Having reviewed Johnson’s testimony in its entirety, it is clear that, on the basis of his extensive experience, the court properly concluded that he was able to evaluate a hypothetical victim’s behavior by comparing it with that of sexual abuse victims generally. . . . [T]he defendant argues that the state’s hypothetical questions so closely tracked the facts of this case that Johnson’s testimony unfairly bolstered the victim’s credibility. In terms of admissibility, courts must distinguish between expert testimony from which the trier of fact may evaluate a victim’s credibility and expert testimony that a particular witness has testified truthfully. The former type is admissible; the latter type is not. . . . The fact that the prosecutor asked a number of hypothetical questions that tracked the facts of this case does not lead us to conclude that Johnson opined that the victim was credible. That the questions tracked the facts of this case bolstered their relevance, and in each hypothetical question Johnson was asked merely to compare the hypothetical victim’s conduct to that of a typical sexual assault victim. The questions did not call on Johnson to opine that the victim either was credible or was a victim of any crime. The questions called on Johnson to evaluate whether the victim’s

reactions are wrong, then the case may have been decided wrongly. If it is difficult to know whether those reactions are wrong, that would call into question the legitimacy of a doctrinal analysis that gives decisive effect to those types of reactions.

### III. RESPONDING TO IMPLICIT VOUCHING

#### A. Significance of the Problem

The empirical data from our study and an analysis of judicial decisions demonstrate a pervasive problem. While the legal system characterizes opinion testimony about credibility as generally forbidden, when professionals testify about children's out-of-court statements, they likely present their testimony in ways that convey their beliefs in the truthfulness of those children. Additionally, when professionals describe patterns of narration, juries almost certainly understand that testimony as conveying the witness's belief that the child was truthful.

The phenomenon of implicit vouching has been ignored in theory and practice. This "benign neglect"<sup>59</sup> is understandable, given the subtle nature of this problem and recognizing the challenge it presents to deeply entrenched customs. Nonetheless, where the credibility of accusers is central to the proper outcomes of cases, the legal system ought to recognize that its current approach has two major flaws. First, it harms defendants by denying them the opportunity to use cross-examination to develop the limitations of the professional's conclusion in support of credibility. Because it has not been presented, the topic is not available as a proper subject for inquiry on cross-examination. Second, allowing implicit but not explicit vouching, and allowing "pattern" information as a disguised form of

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conduct was uncommon or unusual as compared to that of other victims of sexual abuse.

*Id.* For an opposing analysis, see *Steward v. Indiana*:

Furthermore, we decline to distinguish between expert testimony which offers an unreserved conclusion that the child in question has been abused and that which merely uses syndrome evidence to imply the occurrence of abuse. Where a jury is confronted with evidence of an alleged child victim's behaviors, paired with expert testimony concerning similar syndrome behaviors, the invited inference—that the child was sexually abused because he or she fits the syndrome profile—will be as potentially misleading and equally as unreliable as expert testimony applying the syndrome to the facts of the case and stating outright the conclusion that a given child was abused. The danger of the jury misapplying syndrome evidence thus remains the same whether an expert expresses an explicit opinion that abuse has occurred or merely allows the jury to draw the final conclusion of abuse.

652 N.E.2d 490, 499 (Ind. 1995).

59. Charles Sumner Stone, Jr., *Thucydides' Law of History, or from Kerner, 1968 to Hacker, 1992*, 71 N.C. L. REV. 1711, 1719 (1993) (stating that "benign neglect" was recommended to President Richard M. Nixon in 1970 as a national policy with regard to race relations).

information about a particular child's statement, deprives the prosecution's witnesses of the opportunity to communicate in a direct and authentic way. Hypocrisy of this kind is something witnesses and jurors may identify, and it is of course inimical to confidence in the judicial system.

There is a simple solution to these problems: Allow witnesses who now offer implicit vouching to offer explicit commentary on the credibility of the children whose interviews they describe.

### ***B. Reasons for Tolerating Implicit Vouching***

#### *1. "Province of the Jury"*

Implicit vouching is a response to the prohibition of explicit testimony about credibility. The primary justification for that prohibition is that it protects against invading the "province of the jury." Unfortunately, the "province of the jury" phrase impedes careful analysis.<sup>60</sup> The persistence of that concept underscores the pattern of current practice that reflexively but unthoughtfully claims to exclude expert evaluations of credibility.

Certainly, the jury's task of finding facts and applying those facts in line with the instructions it receives from the judge can actually only be performed by the jury. But all evidence must relate to the facts the jury is meant to find (in order to be relevant and therefore eligible for admission). For that reason, it might be said that all relevant evidence invades the jury's province, and that therefore invading that province is *not* a bar to admissibility. Additionally, it should be noted that the judge is authorized to shape the frontiers of the "province of the jury." For example, the trial judge may take an issue away from the jury when all reasonable jurors would necessarily reach a particular conclusion on it. In some circumstances, the trial judge may enter judgment as a matter of law in spite of a contrary jury verdict.<sup>61</sup>

What might explain the persistence of the province of the jury idea? In an article analyzing some 500 years of common law history, George Fisher describes the trend to allocate the jury more and more of the truth-finding function at trials.<sup>62</sup> In an earlier era, the legal system could support its claim to legitimacy of trial outcomes by relying on the power of the oath, most clearly at a time when criminal defendants were prohibited from testifying. When only the prosecution's witnesses gave sworn testimony, an outcome that relied on that testimony was based on the belief that no person would violate an oath (due to the expectation of divine retribution). Once defendants were permitted to testify, and once other doctrinal changes increased the instances in which conflicting sworn testimony would be given, outcomes could no longer be justified as reflecting sworn testimony. They

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60. The maxim is criticized in 7 JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 1920 (James H. Chadbourne ed., 1978) and MCCORMICK ON EVIDENCE § 12 (Edward W. Cleary ed., 3d ed. 1984).

61. See FED. R. CIV. P. 50.

62. George Fisher, *The Jury's Rise as Lie Detector*, 107 YALE L.J. 576, 577-78 (1997).

reflected, obviously, choices among various narratives all of which were supported by the oath. This circumstance led to greater reliance on the jury as the fact-finder and led to our current choice to insulate the jury's fact-finding work from scrutiny. As Professor Fisher states:

[A]lthough the jury does not guarantee accurate lie detecting, it does detect lies in a way that appears accurate, or at least in a way that hides the source of any inaccuracy from the public's gaze. By permitting the jury to resolve credibility conflicts in the black box of the jury room, the criminal justice system can present to the public an "answer"—a single verdict of guilty or not guilty—that resolves all questions of credibility in a way that is largely immune from challenge or review. By making the jury its lie detector, the system protects its own legitimacy.<sup>63</sup>

Currently, evidence law preserves two related taboos. It prohibits analysis of how a jury reaches its conclusions, and it prohibits parties from supplementing jurors' knowledge to assist them in separating truth from falsehood.<sup>64</sup> These doctrines share an uncomfortable foundation that privileges privacy over scrutiny and limits information in the name of producing accurate and therefore legitimate results. For reasons of logic and fairness, the concept of shielding the jury (by protecting its "province") ought to be limited. And for instrumental reasons, it may be that the practice should be curtailed because it can undermine, rather than strengthen, confidence in trial outcomes.

## 2. *Technical Concerns*

Some technical aspects of evidence doctrine may seem to support avoidance of expert testimony about credibility, but reliance on them is likely a product of habit rather than careful analysis. For example, it might be thought that credibility is an ultimate issue that necessarily must be considered by the jury in the absence of information that might relate to it. In the Federal Rules of Evidence, Rule 704<sup>65</sup> conclusively contradicts this common law position. It authorizes expert

63. *Id.* at 578–79.

64. It has been suggested that some of evidence law's antipathy toward expertise on credibility stems from two circumstances well known to previous generations, and whose lingering effects may influence this attitude. In the famous trial of Alger Hiss, psychological testimony about truthfulness was admitted but was widely criticized. And the preeminent scholar John Henry Wigmore famously advocated that all alleged victims in sex crime cases should be required to undergo psychological examinations. See KAYE ET AL., *supra* note 22, § 2.4.1(d).

65. FED. R. EVID. 704 states:

(a) **In General—Not Automatically Objectionable.** An opinion is not objectionable just because it embraces an ultimate issue.

(b) **Exception.** In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone.

opinion evidence on all issues (except certain aspects of the mental state of criminal defendants).

Where the Federal Rules of Evidence do offer explicit treatment of opinion testimony about credibility, the provisions control only proof of a person's *character* to show the person's credibility. For example, FRE 608 limits the admissibility of specific instances of conduct by the person whose credibility is being scrutinized.<sup>66</sup> Testimony by an expert or other professional about a person's conduct, interpreted by the witness as shedding light on the person's credibility, is different from testimony about character. For that reason, it is not controlled by Rule 608.

Finally, opinion testimony about credibility might be curtailed by whatever requirements a jurisdiction imposes on the qualifications of expert witnesses and the basis for their opinion. For jurisdictions that continue to recognize "experience-based" expertise,<sup>67</sup> establishing a basis for this kind of opinion testimony by experienced professionals who conduct interviews of children may be relatively simple. For jurisdictions that treat all expert opinion (experience-based or "scientific" in nature) as subject to the foundational requirements of the Federal Rules,<sup>68</sup> trial courts would have to examine those underlying aspects of the testimony. What is crucial is that current practice generally excludes opinion testimony on credibility categorically without examining whether it could satisfy a jurisdiction's standards for the quality of expert opinions. Trial courts have great discretion in deciding whether an adequate basis for expert opinion has been offered. So it is reasonable to assume that without a categorical prohibition, opinion evidence on credibility would be admitted in some courts, and a trend that counters the current traditional prohibition could develop.

### C. *Proposals for Change*

#### 1. *Prohibition*

An impractical and theoretically difficult response to the problem of implicit vouching would be to attempt to prohibit it. Because implicit vouching

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66. FED. R. EVID. 608.

67. While federal courts may require a particularly clear showing of scientific reliability even for experience-based expertise, following *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), many states reject that framework. The strength of experience-based expertise may arguably depend on the degree of feedback obtained by the practitioner in the field, so that the practitioner's ideas get tested and refined as the practitioner gains experience that shows which estimates were correct and which were wrong. This process is likely to be found in the work of professional interviewers. For an analysis of the role of feedback in experience-based expertise, see Mark P. Denbeaux & D. Michael Risinger, *Kumho Tire and Expert Reliability: How the Question You Ask Gives the Answer You Get*, 34 SETON HALL L. REV. 15, 55–59 (2003).

68. FED. R. EVID. 702 (requiring showings that the testimony is based on sufficient facts or data, is the product of reliable principles and methods, and that the expert has reliably applied the principles and methods to the facts of the case).

occurs without the witness's intention, it would likely be impossible to require witnesses to avoid the conduct that may impart a pro-child message to jurors. Could a witness be barred entirely from testifying because the witness's testimony was likely to be marked by implicit vouching? That rationale might support the exclusion of a witness because the witness's testimony carries the risk of conveying inadmissible information to the jury. A judge could rule that the witness's testimony bore an improper risk of misleading the jury.<sup>69</sup> This type of ruling is permitted only if the risk of juror misapprehension substantially outweighs the probative value of the witness's testimony.<sup>70</sup> That standard would unlikely be met in the comparison of straightforward testimony quoting a child's interview statements and the concomitant risk that because of the witness's own thought processes the jury may receive a misleadingly positive impression of the credibility of the child. The narration of what the child said would have high probative value, and although the risk of juror confusion is likely to be present, its magnitude cannot be known.

### 2. *Adding Cautionary Jury Instructions to the Status Quo*

A simple intermediate remedy would be the development of cautionary jury instructions. Where a witness describes a child's out-of-court words in a jurisdiction that prohibits witnesses from testifying about the child's credibility, a jury instruction could make it clear that: (1) the witness might or might not have an opinion about the child's truthfulness; and (2) regardless of whether the witness does have such an opinion, evaluating the child's truthfulness is entirely the responsibility of the jury. The benefits of this approach are that it is simple and that it would be a step in the direction of acknowledging the risks of implicit vouching. However, the power of limiting instructions may be weak, and this instruction might have unintended effects of directing the jury's attention to guessing whether or not the witness did have an opinion about the child's truthfulness.<sup>71</sup> It might also foster doubt or uncertainty in the minds of jurors even though the witness personally might have virtually no doubts about the child's credibility because it suggests that the witness might have no insight into the child's truthfulness.

### 3. *Explicit Acceptance of Opinion Testimony*

The reforms discussed above would not provide jurors with more or clearer information. They would only attempt to prohibit implicit vouching or supplement it with a cautionary jury instruction. Other treatment of implicit vouching would eliminate it by replacing it with an authorized, explicit exploration of the witness's perceptions and opinions, in the specific contexts of lay witness or

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69. See FED. R. EVID. 403.

70. *Id.*

71. See J. Alexander Tanford, *The Law and Psychology of Jury Instructions*, 69 NEB. L. REV. 71, 86–87 (1990) (stating that jurors have difficulty ignoring evidence that seems reliable to them, even when instructed to ignore it). *But see* Regina A. Schuller & Angela Paglia, *An Empirical Study: Juror Sensitivity to Variations in Hearsay Conveyed Via Expert Evidence*, 23 LAW & PSYCHOL. REV. 131, 142–43 (1999) (noting that cautionary instructions affect jurors' assessment of hearsay evidence).

expert witness testimony. It should be noted that witnesses who quote children's statements may plausibly be characterized either as lay or expert witnesses, depending on the strategy of the party for whom they testify and, of course, on the trial court's analysis of the rules governing expert testimony.

For lay witnesses, recognizing the risk of implicit vouching presents a dilemma. Lay witnesses are required to describe facts and are forbidden to express opinions. But the phenomenon of implicit vouching is closely equivalent to the expression of an opinion. When a professional interviewer is classified as a lay or non-expert witness, the problem of illogical classifications of types of expert testimony about credibility will not arise, because the witness will be completely barred from giving opinions on any subjects. The problem of implicit vouching will be present because implicit vouching is usually unrecognized and is therefore uncontrolled by the bar against opinion testimony by lay witnesses.

When lay witness testimony includes implicit vouching, the jury receives an ambiguous and untested message about the credibility of the alleged victim. A solution to this problem would build on the common-law treatment of certain cases in which lay witnesses are allowed to give opinion testimony—namely, cases where lay witnesses are allowed to testify in the form of opinion on subjects such as another person's drunkenness or the speed of a vehicle.<sup>72</sup> The reasons why this opinion testimony is permitted may vary. Some courts state that limiting a witness to concrete facts for a topic like inebriation is foolish, because the use of a conclusory opinion is the clearest way to convey the information. For testimony about speed, courts assume that all people can have impressions of speed and that it would be artificial to require a witness to be explicit about particular observations that support an opinion about speed.<sup>73</sup>

For our inquiry, the reasons for permitting lay witness opinion testimony are not important, because we are considering how to respond to circumstances where lay witnesses *do* present opinions, albeit implicitly, about another person's credibility. Where witnesses give opinion testimony about intoxication or a vehicle's speed, cross-examination on those topics is allowed.<sup>74</sup> The same response could occur when witnesses present testimony about veracity. Cross-examination could develop the reasons that influence the witness's belief in the child's credibility. Additionally, redirect examination could further develop that testimony. The same benefits would accrue from allowing cross-examination and development in direct testimony on the topic—the alleged victim's credibility—that nowadays is only presented implicitly. It would surely be desirable for jurors to know the basis of the witness's belief, instead of the current practice of

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72. Many courts have recognized, additionally, that a lay witness may testify about his or her beliefs about another person's mental or emotional state if those beliefs are based on the witness's observations. *See, e.g.,* *Wolk v. Wolk*, 464 A.2d 780, 782–83 (Conn. 1983) (opinion on someone's emotional instability); *Connecticut v. Palozie*, 334 A.2d 468, 474–75 (Conn. 1973) (opinion on whether someone was fearful); *Connecticut v. McGinnis*, 256 A.2d 241, 244 (Conn. 1969) (opinion on whether someone was nervous).

73. *See, e.g.,* *New Jersey v. McLean*, 16 A.3d 332, 343 (N.J. 2011).

74. *See* FED. R. EVID. 611(b).



tolerating jurors' observation of the consequences of that belief while being unaware of its sources.

Another treatment of this problem in the context of lay witnesses would identify implicit vouching as the product of unconscious bias in favor of the child (or more precisely, the prosecution). A court willing to recognize a witness's possible interest in the outcome of the case would then be positioned to authorize cross-examination of the witness to allow the jury to understand the possible strength and origin of the witness's interest. This also could accomplish the desirable result of revealing the witness's impressions of the child's credibility instead of conveying them to the jury in a vague and therefore unreliable way.

For expert witnesses, the obstacles to reform are the "province of the jury" tradition and various standards for admission of experience-based expert opinion. When a professional interviewer is classified as an expert witness, our system will encounter both the problem of illogical classifications of kinds of expert testimony on credibility and the problem of implicit vouching.<sup>75</sup> An improved understanding of modern rules concerning expert testimony will remedy each of these problems.

Proposing a wholesale adoption of the now-rejected view that the modern Federal Rules of Evidence take a wide-open stance on opinion testimony concerning credibility would be drastic. Nonetheless, in the setting analyzed in this Article, a move in that direction might be particularly sensible. This is because of the importance of credibility determinations in child abuse cases and because of the apparent prevalence of implicit vouching. Assuming it is supported by a proper basis, an expert's opinion about the credibility of a witness could be based on findings of either the witness's character for truthfulness or attributes of the witness's statement (regardless of the witness's general character traits associated with truthfulness).<sup>76</sup>

If an expert's testimony was based on conclusions about a witness's character, it would be governed by FRE 608, which allows opinion evidence about character (although it allows character evidence to support truthfulness only if character evidence to show the witness's untruthful character has been previously admitted). On the other hand, expert opinion about credibility that is based on an analysis of a particular statement or interview, and not on an analysis of the witness's character trait of truthfulness, would be outside the coverage of Rule 608. It would instead be governed by the general rules for expert testimony. Under Rule 702, it would be admissible if it would "assist the trier of fact to understand

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75. See *supra* Part II.C–D.

76. With regard to testimony based on an evaluation of a speaker's statement, see Ric Simmons, *Conquering the Province of the Jury: Expert Testimony and the Professionalization of Fact-Finding*, 74 U. CIN. L. REV. 1013, 1059 (2006) ("If a lay witness has built up twenty years of expertise interrogating suspects, and a judge determines that the witness has specialized knowledge that will assist the jury, why should the jury not hear the information? Law enforcement officers already testify about many other aspects of their investigative expertise, such as how drug deals are structured or the pricing of narcotics." (footnotes omitted)).

the evidence or to determine a fact in issue.” For either style of opinion on credibility—opinion based on character or opinion based on attributes of a particular statement—the Federal Rules of Evidence offer a legitimate basis for admissibility.<sup>77</sup>

Experts are usually allowed to explain to juries that delayed reporting of sexual assaults<sup>78</sup> and recantations of accusations<sup>79</sup> are often associated with truthful reporting. And many courts allow expert testimony about sources of inaccuracy in eyewitness identifications.<sup>80</sup> The rationale supporting admission of these categories of expert testimony is that they provide the jury with information that empowers the jury to understand particular testimony better and protect the jury against otherwise likely misimpressions. Courts have assumed that jurors would draw incorrect conclusions from the fact that an alleged victim waited a long time to report an offense or from an eyewitness’s apparent certainty about what the eyewitness had seen. Courts have reasoned that psychological data are helpful to protect against the risk of jurors overvaluing eyewitness testimony. They have concluded that jurors should be protected against assuming that because a report of abuse is delayed it is likely false, when experts have determined that many delayed reports of abuse are accurate.<sup>81</sup> In the same way, jurors who hear testimony that is colored by implicit vouching may deserve to be educated about the influences that may have caused that phenomenon, so that they can make a valid assessment of the credibility of the statement the witness has reported.

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77. This analysis has prevailed in one state for a period of about ten years. See *Hawaii v. Kim*, 645 P.2d 1330, 1338 (Haw. 1982) (approving testimony in which an expert witness “utilized his expertise to provide the jury with two types of information, first, he provided the jury with specific characteristics he had observed to be shared among children who had been raped by family members, and second, [the expert] testified that he observed the complainant to exhibit many of those characteristics he found common to other victims so that he believed her story to be believable.”), *overruled by Hawaii v. Batangan*, 799 P.2d 48, 53 (Haw. 1990) (“We are cognizant that cases involving allegations of child sexual abuse are difficult to prove, but they are equally difficult to defend against. Courts must proceed with caution in admitting expert testimony in these cases. The trial court must be satisfied that the witness is indeed an expert and that the testimony is relevant. The testimony must further be shown to assist the jury to comprehend something not commonly known or understood. And experts may not give opinions which in effect usurp the basic function of the jury. The trial court must keep in mind that an expert’s opinion on the credibility of a victim is always suspect of bias and carries the danger of unduly influencing the triers of fact. Furthermore, even objective opinions of experts regarding a victim’s credibility is [sic] no more reliable than the determination of the victim’s credibility by the triers of fact.”).

78. See, e.g., *Ex parte Hill*, 553 So. 2d 1138, 1139 (Ala. 1989) (explaining delay in reporting); *Louisiana v. Myles*, 04-434, p. 11 (La. App. 5 Cir. 10/12/04); 887 So. 2d 118, 125 (describing styles of accurate disclosures of abuse).

79. See, e.g., *New Mexico v. Neswood*, 2002-NMCA-081, ¶¶ 12–18, 132 N.M. 505, 51 P.3d 1159, 1162–64.

80. See, e.g., *Tennessee v. Copeland*, 226 S.W.3d 287, 298–304 (Tenn. 2007).

81. See *Neswood*, 2002-NMCA-081, ¶¶ 16–17, 51 P.3d at 1163; *Copeland*, 226 S.W. at 300.

Full recognition that general expert testimony rules can sensibly apply to the topic of credibility would eliminate the confusion inherent in the current practice that seeks to admit “pattern” evidence relevant to credibility but also seeks to exclude “speaker-specific” evidence relevant to credibility. This difficult distinction would no longer matter, because evidence of either type would be permitted. Allowing vouching to be explicit would give jurors a fair basis for evaluating the professional’s assessment, especially because it would be subject to the scrutiny of cross-examination.

### CONCLUSION

The legal system currently seeks to heighten its legitimacy by protecting the “province of the jury” from a certain class of information—professionals’ opinions about credibility. But that information now reaches jurors, despite the doctrinal bars. This occurs through the phenomenon of “implicit vouching,” identified in this Article’s empirical research. It also occurs when witnesses testify about patterns of narration even though jurors are told that the testimony is *not* about the specific credibility of a specific individual.

Acknowledging these phenomena and replacing tolerated implications with scrutinized explicit statements would make the fact-finding process more authentic and likely more reliable. Transforming currently hidden vouching into explicit testimony about credibility would allow a careful examination of the strengths of the reasons that support the witness’s formerly concealed opinion about the child’s credibility. It would allow prosecutors to present all the strengths of their cases in a forthright manner. And it would allow defendants to have the full benefit of cross-examination concerning the credibility of accusers, which in many cases is likely to be the most important topic in a criminal trial. Because the testimony of interviewers is likely to be affected by their own conclusions about the credibility of the children they interview—no matter what evidence rules our system might apply—it makes sense to accept that reality and respond to it by allowing open expression of those perceptions and open scrutiny of their validity.

**APPENDIX: CONTINUING ADMISSIBILITY OF TESTIMONY ABOUT  
OUT-OF-COURT CHILDREN'S STATEMENTS UNDER  
CONTEMPORARY CONFRONTATION CLAUSE JURISPRUDENCE**

*A. The Crawford and Davis Framework*

The recurring circumstance that is the focus of this Article—testimony by professionals about children's statements—requires a constitutional analysis. When out-of-court statements are introduced against a criminal defendant, the Confrontation Clause of the Sixth Amendment must be satisfied. It states that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”<sup>82</sup> The Confrontation Clause is binding on states under the Fourteenth Amendment.<sup>83</sup> For many years, the Confrontation Clause was interpreted to allow the introduction of a statement of an unavailable witness if the statement was “within a firmly rooted hearsay exception” or if it had “particularized guarantees of trustworthiness.”<sup>84</sup> The 2004 decision in *Crawford v. Washington*<sup>85</sup> changed the analysis, holding that the Confrontation Clause applies only to “testimonial” hearsay. Testimonial hearsay must be excluded unless the declarant is unavailable and the defendant against whom the statement is sought to be introduced had an opportunity to cross-examine the declarant.<sup>86</sup> *Crawford* defined testimonial as including prior testimony at a preliminary hearing, before a grand jury, at a former trial, and in a police interrogation.<sup>87</sup> The *Crawford* framework was elaborated in *Davis v. Washington*,<sup>88</sup> holding that some, but not all, police interrogations produce testimonial statements. The Court stated:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.<sup>89</sup>

Thus, under *Crawford* and *Davis*, a child's statement to a CAC interviewer describing past events might be outside the Confrontation Clause prohibition if it was made in the context of an ongoing emergency or if it was made with a primary purpose different from establishing facts for a later

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82. U.S. CONST. amend. VI.  
83. *Pointer v. Texas*, 380 U.S. 400, 403 (1965).  
84. *Ohio v. Roberts*, 448 U.S. 56, 66 (1980).  
85. 541 U.S. 36 (2004).  
86. *Id.* at 68.  
87. *Id.*  
88. 547 U.S. 813 (2006).  
89. *Id.* at 822.

prosecution.<sup>90</sup> Another factor could also withdraw Confrontation Clause requirements from such statements. In *Crawford*, the statements the Court evaluated had been made to police officers,<sup>91</sup> but some of the statements in *Davis* were made to a 911 operator.<sup>92</sup> The Court treated 911 operators as agents of the police but reserved the question of “whether and when statements made to someone other than law enforcement personnel are ‘testimonial.’”<sup>93</sup> This is significant for CAC interviews because they may be wholly independent of police or may have various types of associations with police.

Applying *Crawford* and *Davis* to CAC-type interviews has led to some apparently conflicting decisions in state and federal courts, although the fact-intensive nature of the application problems may explain some of the differences. In *United States v. Bordeaux*, a child made statements to a forensic interviewer at a “center for child evaluation.”<sup>94</sup> The district court admitted a videotape of the interview and testimony quoting the child’s statements from a doctor who watched the interview.<sup>95</sup> The Eighth Circuit held the statements made to the forensic interviewer were testimonial and their admission violated the defendant’s Sixth Amendment Confrontation Clause right<sup>96</sup> because they were elicited in an interview that was formal, involved the government, and had a law enforcement purpose.<sup>97</sup> Similarly, in *Bobadilla v. Carlson*,<sup>98</sup> a habeas corpus case, a district court held that a state court wrongly admitted statements made by a child in an interview at police headquarters in the presence of a detective.<sup>99</sup> The district court held that the interview produced testimonial statements because it was equivalent to a police interrogation.<sup>100</sup> The district court reasoned that the interview occurred days after the investigation had begun; a detective was present; there was no evidence that the main purpose was to protect the health and welfare of the child; the social worker did not ask questions that were consistent with an overriding

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90. No Confrontation Clause issues would arise if the child who was the declarant of an out-of-court statement was available at trial and subject to cross-examination. In that event, without regard to the Confrontation Clause, the child’s out-of-court statement would be examined in terms of specialized child hearsay statutes or the statements for the purpose of medical diagnosis or treatment or catch-all hearsay exceptions. They might also be admissible as prior consistent statements. See, e.g., *Minnesota v. Bobadilla*, 709 N.W.2d 243, 256 n.8 (Minn. 2006).

91. 541 U.S. at 38.

92. 547 U.S. at 823 & n.2.

93. *Id.* at 823 & n.2.

94. 400 F.3d 548, 555 (8th Cir. 2005).

95. *Id.*

96. *Id.* at 556 (noting that the appellate court held that the child was not subject to cross-examination because of trial court error in applying doctrines related to appearance of child witnesses on closed circuit television).

97. *Id.*

98. 570 F. Supp. 2d 1098 (Minn. 2006) (ruling that the child’s statements to a social worker during an interview were not testimonial and were therefore admissible under *Crawford*).

99. *Id.* at 1101.

100. *Id.* at 1107.

purpose of protecting the child's health and welfare; and there were no imminent risks to the child at the time of the interview.<sup>101</sup> In contrast, in another habeas review, the Fourth Circuit held that the admission of a child's statements to a CAC therapist were *not* unreasonable.<sup>102</sup> The Department of Social Services had referred the child to the CAC, and no police officer was present during the interview.<sup>103</sup> A concurring judge stated that *Crawford* "provides little guidance for applying the Confrontation Clause in the specific case of a child declarant's statement to therapists serving an investigative function for law enforcement."<sup>104</sup>

In state courts, treatment of statements made to social workers has been varied.<sup>105</sup> Illustratively, in *Missouri v. Justus*, the Missouri Supreme Court held that the child's statements to a social worker at a CAC were testimonial.<sup>106</sup> The social worker who conducted the interview described it as "an official legal interview done for law enforcement."<sup>107</sup> The court supported its conclusion that the statements were testimonial by referring to the formality of the interview, the government referral, the social worker's statement that the purpose of the interview was to preserve testimony for trial, and the absence of any immediate danger to the child.<sup>108</sup> On the other hand, in *Connecticut v. Arroyo*, the Connecticut Supreme Court found that a child's statements to a social worker were nontestimonial.<sup>109</sup> The social worker was part of a multi-disciplinary team, and the interview was conducted at a hospital's sexual abuse clinic.<sup>110</sup> Although most of the interviews were observed by law enforcement, the court noted the interview's location at the clinic, the system of pairing the mental health interviewer with a medical care provider, the medical care provider's reliance on the child's interview, and the interviewer's participation in the medical diagnosis and treatment plan.<sup>111</sup> It found that the presence of law enforcement only indicated the desire to avoid subsequent interviews and trauma to the child,<sup>112</sup> and it concluded that the interviewer was not an agent of law enforcement.<sup>113</sup> An alternative

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101. *Id.* at 1109.

102. *Blount v. Hardy*, 337 F. App'x 271, 272 (4th Cir. 2009).

103. *Id.* at 273.

104. *Id.* at 277 (Michael, J., concurring).

105. Decisions holding that these statements are testimonial include *Myer v. Maryland*, 943 A.2d 615 (Md. 2008); *Maryland v. Snowden*, 867 A.2d 314 (Md. 2005); *Oregon v. Mack*, 101 P.3d 349 (Or. 2004); and *Oregon v. S.P.*, 178 P.3d 318 (Or. Ct. App. 2008). For decisions finding that they are not testimonial, see, for example, *Ohio v. Muttart*, 116 Ohio St. 3d 5, 2007-Ohio-5267, 875 N.E.2d 944; *In re T.L.*, 186 Ohio App. 3d 42, 2010-Ohio-402, 926 N.E.2d 346; *Ohio v. Sheppard*, 164 Ohio App. 3d 372, 2005-Ohio-6065, 842 N.E.2d 561; *Ohio v. Barnes*, 149 Ohio Misc. 2d 1, 2008-Ohio-5609, 896 N.E.2d 1033 (Ohio Ct. Com. Pl. 2008); and *Ohio v. Muttart*, 875 N.E.2d 944.

106. 205 S.W.3d 872, 874 (Mo. 2006).

107. *Id.* at 876.

108. *Id.* at 880.

109. 935 A.2d 975, 998-99 (Conn. 2007).

110. *Id.* at 993, 998.

111. *Id.* at 997.

112. *Id.* at 998.

113. *Id.* at 998-99.

approach has been used by the Ohio Supreme Court. In *Ohio v. Arnold* that court held that the Confrontation Clause requires analysis of the purpose of each question, instead of the purpose of the questioner.<sup>114</sup>

### **B. Bryant and Its Implications**

The 2011 Supreme Court decision in *Michigan v. Bryant*<sup>115</sup> is important for understanding how the ongoing emergency, primary purpose, and attributes of interviewer concepts may apply to statements made by children to CAC and similar interviewers. The opinion also may provide some overall implications for Confrontation Clause jurisprudence. In *Bryant*, a number of police officers questioned Anthony Covington, who was lying on the ground, mortally wounded, at a gas station parking lot.<sup>116</sup> He told them that Bryant had shot him outside Bryant's house and that he (Covington) then drove himself to the parking lot.<sup>117</sup> Covington died before Bryant's trial,<sup>118</sup> and testimony quoting Covington's statements about the shooting was admitted at trial. *Bryant* held that the Confrontation Clause allowed use of this evidence.<sup>119</sup>

The *Bryant* majority reached this result with three important elaborations of the prior Confrontation Clause jurisprudence. First, the Court concluded that its analysis should include the motivations of both the declarant and the questioner instead of only the questioner.<sup>120</sup> Second, it made references to conventional hearsay doctrine that may reinstitute the *Roberts* reliability approach.<sup>121</sup> And third, it applied the concept of "ongoing emergency" to the facts of the case in a way that could mean that an emergency, for Confrontation Clause purposes, may last for a very long time and cover a very broad geographic area.<sup>122</sup> Each of these developments increases the likelihood that the Confrontation Clause will allow admission of children's statements made to CAC interviewers.

The *Bryant* majority stated that "the statements and actions of both the declarant and interrogators provide objective evidence of the primary purpose of the interrogation."<sup>123</sup> It suggested that this approach would work well particularly when interrogators and declarants have mixed motives.<sup>124</sup> Applying this idea to CAC interviews, it is likely that interviewers have motives both to assist an alleged

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114. 126 Ohio St. 3d 290, 2010-Ohio-2742, 933 N.E.2d 775, 76, at ¶ 44.

115. *Michigan v. Bryant*, 131 S. Ct. 1143 (2011).

116. *Id.* at 1150.

117. *Id.*

118. *Id.* The prosecution relied on the excited utterance exception to the hearsay exclusionary rule to support admission of these out-of-court statements. It might have been able to support their admission as dying declarations. Subsequent to the trial in *Bryant*, the Supreme Court decided *Crawford* and noted in dictum that dying declarations may for historical reasons be outside the scope of Confrontation Clause protections. *Id.* at 1151 n.1.

119. *Id.* at 1166–67.

120. *Id.* at 1160.

121. *Id.* at 1157.

122. *Id.* at 1164.

123. *Id.* at 1160.

124. *Id.* at 1161.

victim and to assist law enforcement. The children who are interviewed may have no motives at all; on the other hand, these children may have some motive to support state action against a wrongdoer but may be relatively ignorant of details of the criminal justice system.<sup>125</sup> The majority's position—that in addition to considering the motives of interrogators it is necessary to consider the motives of declarants—makes application of the Confrontation Clause more subject to judgment and therefore less predictable. That freedom of application may support pro-admissibility decisions by courts that are influenced by society's strong interest in bringing criminal sanctions to bear against those who commit crimes against children.

Another aspect of *Bryant* may foreshadow more frequent admission of statements children make in CAC interviews. The Court treated traditional hearsay exceptions and a statement's likely reliability as relevant to the Confrontation Clause analysis.<sup>126</sup> These ideas are consistent with the earlier *Roberts* analysis and represent a significant deviation from the "testimonial or nontestimonial" approach in *Crawford* and *Davis*.<sup>127</sup> The Court treated this idea at two points in its opinion. First, it stated that in determining whether the primary purpose of an interrogation is the acquisition of statements for use at a trial, "standard rules of hearsay, designed to identify some statements as reliable, will be relevant."<sup>128</sup> But it explained this comment by referring to circumstances where the Confrontation Clause does not apply (*because* the primary purpose of the interrogation did not require application of the Clause) and then recognizing that absent Confrontation Clause restrictions, admissibility of out-of-court statements would be controlled by general hearsay rules.<sup>129</sup>

More significant is the Court's second reference to the hearsay doctrine and reliability. The Court referred to its position in *Davis* that a statement made during an ongoing emergency is likely to be nontestimonial because its declarant will be focused on ending a threatening situation instead of on providing information for the purpose of a possible criminal prosecution.<sup>130</sup> It then provided an entirely new characterization of this view. The Court wrote: "Implicit in *Davis* is the idea that because the prospect of fabrication in statements given for the

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125. Considering the somewhat analogous setting of domestic violence, the majority hypothesized that victims might have a wide range of motives of which only some would support characterizing their statements as testimonial: a victim might want threats to end but not want or envision prosecution, for example. *Id.*

126. *Id.* at 1157.

127. Although *Crawford* and *Davis* adopted an analysis that ignores the reliability of out-of-court statements, the opinions did recognize that because dying declarations had been treated as admissible in early common law, they might be a category of statements intended to be outside the prohibition of the Confrontation Clause. *Crawford v. Washington*, 541 U.S. 36, 72–74 (2004). This acknowledgement of a standard hearsay exception was based on history, not on a judgment about the typical reliability of statements covered by the exception.

128. *Bryant*, 131 S. Ct. at 1155.

129. *Id.*

130. *Id.* at 1157.



primary purpose of resolving that emergency is presumably significantly diminished, the Confrontation Clause does not require such statements to be subject to the crucible of cross-examination.”<sup>131</sup>

The Court built on this observation by referring to the excited utterance hearsay exception as grounded in the belief that a person’s stress decreases the likelihood that the person’s statements will be false. It analogized this to the ongoing emergency circumstance present in *Davis*.<sup>132</sup> It also described eight additional hearsay exceptions and exemptions as sharing the reliability that it ascribed to the *Davis* ongoing emergency statements.<sup>133</sup> The Court’s statement that the reliability of ongoing emergency statements is “implicit” in *Davis*’ application of special treatment to them is itself a recognition that the reliability concept was not an explicit basis for the *Davis* court’s position. The *Davis* opinion was silent about reliability because its Confrontation Clause analysis paid attention only to its concepts of “testimonial” and “nontestimonial” hearsay.<sup>134</sup> The reliability notion introduced in *Bryant* may allow admission of out-of-court statements that might otherwise have been classified as testimonial and therefore barred by the Confrontation Clause. Statements by children to interviewers like CAC interviewers may well be characterized as within the hearsay exception for statements for the purpose of medical diagnosis or treatment, or the excited utterance exception, or the specific statutory exceptions for children’s hearsay statements in abuse circumstances (which inherently recognize reliability in those statements in the view of the legislatures that have adopted those statutory provisions).

With regard to one more aspect of Confrontation Clause analysis—definition of an ongoing emergency—*Bryant* increases the likelihood of admissibility of CAC-type interview statements. A statement made during an ongoing emergency is likely to be characterized as nontestimonial and therefore outside the coverage of the Clause, because its primary purpose was likely to be responding to the crisis rather than obtaining statements for criminal prosecution. The *Bryant* court stated that “the existence and duration of an emergency depend on the type and scope of danger posed to the victim, the police, and the public.”<sup>135</sup> Referring to the domestic violence contexts of both *Davis* and its companion case *Hammon*, the Court stated that a proper assessment of the existence of an ongoing emergency considers whether there was continuing threat to the particular victim in each case.<sup>136</sup> The Court suggested that in a domestic violence case an emergency may no longer be ongoing when “the threat . . . to the first victim has been neutralized.”<sup>137</sup> This attribute may not be present as clearly in a child abuse case, because the identity of the wrongdoer may not be known. When a child seems to have been abused, the abuser may or may not be a member of the child’s

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131. *Id.*

132. *Id.*

133. *Id.* 1157 n.9.

134. *Davis v. Washington*, 547 U.S. 813, 826, 829 (2006).

135. *Bryant*, 131 S. Ct. at 1162.

136. *Id.* at 1158.

137. *Id.*

household or family. Thus, it might be difficult to know whether the threat had been neutralized, and it might be wrong to assume that the threat was directed only at the current identified victim (in a domestic violence circumstance, an abuser's spouse may be the only likely victim, whereas in a child abuse case the adult wrongdoer may be a threat to numerous children). The *Bryant* court was careful to say that the definition of ongoing emergency did not continue in that case until the shooter was arrested in a far away state a year after the shooting.<sup>138</sup> But its analysis makes clear that an interrogator's reasonable belief that there is an ongoing threat to safety can contribute to a conclusion that the primary purpose of the interrogation was something other than the acquisition of statements for use at a trial.

*Bryant* did not deal with applying the Confrontation Clause in cases where statements were made to individuals other than police officers. The *Bryant* court developed its apparent limitations on the role of the Confrontation Clause in the context where the Clause has its greatest potential power to bar the introduction of evidence: the circumstance when the statements were made to police officers.<sup>139</sup> For that reason, considering whether CAC interviewers would or would not be treated as equivalent to police officers for a Confrontation Clause analysis may become relatively unimportant. Even if CAC interviewers *are equivalent* to police officers, children's statements may be outside the Confrontation Clause bar when the Confrontation Clause is applied under the new *Bryant* formulations.

For cases where it might matter whether CAC-type interviewers are equivalent to police officers, the *Bryant* opinion is relevant in two ways. First, the Court discussed in detail the notion that "first responders" may have roles that vary during a single interaction with a declarant.<sup>140</sup> Thus, a police officer may act in a police role and something like a first-aid role at different times when eliciting statements. That analysis would be particularly pertinent to CAC employees. Also, to the extent that classifying a CAC as equivalent to the police or different from the police might involve a close call on the facts, the overall direction of the *Bryant* opinion can fairly be read as seeking to limit the exclusionary effect of the Confrontation Clause. With that jurisprudential mood in mind, it is reasonable to predict that finding CAC employees "non-police" would be a conclusion likely to be affirmed by appellate courts in cases where it is within the range of possible conclusions supported by the facts associated with any particular CAC interview.

In sum, *Bryant* provides a number of bases for predicting modest and sparing applications of the Confrontation Clause to those interviews in the future. The child's motivations are among the factors a court may use in deciding if there was a testimonial statement, and many children will have little or no sense of the relationship of their statements to the workings of the criminal justice system. Additionally, the reliability of the statements may have been reintroduced to the Confrontation Clause analysis, and this would likely authorize the admission of

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138. *Id.* at 1164.

139. *Id.* at 1150.

140. *Id.* at 1148.

most accusatory out-of-court statements under a range of hearsay exceptions used for this purpose prior to the decision in *Crawford*. Finally, the definition of ongoing emergency, relevant for determining if the purpose of a statement was testimonial, has been made much more expansive than it seemed to be in the earlier Confrontation Clause cases.

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