CHILD WITNESSES, PRO SE DEFENDANTS, AND THE CONFRONTATION CLAUSE IN CALIFORNIA

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ABSTRACT

This Note analyzes the current imbalance between the constitutional rights held by criminal defendants and the rights of vulnerable child witnesses testifying against them. At the center of this issue lie the rights criminal defendants have through the Sixth Amendment: (1) the right to confront all witnesses testifying against them and (2) the right to choose to represent themselves. Both of these rights have problematic implications when the defendants are alleged child or sexual abusers, and a vulnerable, traumatized victim is forced to testify against them and face cross-examination. Currently, landmark U.S. Supreme Court cases offer conflicting and often unclear standards for lower court judges to apply in their courtrooms. This Note analyzes the state of the law, how courts have dealt with these problems, and proposes how California judges might strike a balance in order to protect vulnerable child witnesses without overly limiting defendants' constitutional rights. The Note proposes increasing witness availability and protecting traumatized vulnerable child witnesses testifying against the defendant while upholding the integrity of the judicial process.

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I. INTRODUCTION

The Sixth Amendment guarantees criminal defendants the rights both to represent themselves in court and to confront all witnesses testifying against them through cross-examination.[1] While these rights have long been a fundamental part of our legal system that protect the accused,[2] they require further examination and limitation in cases involving child witnesses. The courts must consider the rights of the accused alongside the conflicting rights and needs of vulnerable witnesses[3] to prevent further trauma and harm to the witnesses' psychological well-being. Thus, when a defendant accused of physically or sexually assaulting vulnerable victims chooses to

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[1] U.S. CONST. amend. VI.

[2] *Id.*; *see also* Faretta v. California, 422 U.S. 806, 812–814 (1975).

[3] *See generally* Maryland v. Craig, 497 U.S. 836, 852 (1990) ("We have of course recognized that a State's interest in 'the protection of minor victims of sex crimes from further trauma and embarrassment' is a 'compelling' one.").

represent oneself in trial, and therefore personally cross-examines victim-witnesses, the Sixth Amendment Confrontation Clause should be applied extremely carefully.

In 1990, the U.S. Supreme Court held 5–4 in *Maryland v. Craig* that an alleged child sexual abuse victim could testify in court through the use of a one-way closed-circuit television ("CCTV") without violating a defendant's rights under the Confrontation Clause if the child would be too intimidated or traumatized to testify in person.[4] Various states have adopted different approaches in their application of this rule depending on the level of specificity of Confrontation Clauses in the state's constitution.[5] In California, for example, CCTV has been employed in cases involving child sexual abuse several times.[6]

The *Craig* ruling was based on a legal standard of hearsay evidence set forward a decade earlier by *Ohio v. Roberts*, in which the Court held that the testimony of a hearsay declarant not present in court for cross-examination at trial could still be admissible upon showings that: (1) the declarant was truly unavailable; and (2) the testimonial hearsay statement bore an adequate "indicia of reliability."[7] However, the clarity and standing of *Craig* was cast into doubt in 2004 by *Crawford v. Washington*, in which the Court directly overturned the *Roberts* standard by holding that a criminal defendant's right to confront witnesses is violated by the admission of testimonial hearsay that has not been cross-examined.[8] As a result, *Crawford* indirectly—perhaps unintentionally—overturned parts of *Craig*

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[4] *Id.* at 855–56, 860.

[5] *See, e.g.*, Jack L. Stewart, *Closed Circuit Television: Protecting Child Witnesses while Preserving Defendant's Rights*, 26 WILLAMETTE L. REV. 405 (1990) (discussing Oregon's attempts to balance the rights of child witnesses and the rights of defendants they testify against); Linda Mohammadian, *Sexual Assault Victims v. Pro Se Defendants: Does Washington's Proposed Legislation Sufficiently Protect Both Sides*?, 22 CORNELL J.L. & PUB. POL. 491 (2012) (discussing Washington State's controversial policy of allowing standby counsel and CCTV for such cases).

[6] *See, e.g.*, People v. Powell, 194 Cal. App. 4th 1268, 1283–84 (2011) (upholding the use of the CCTV system despite the lack of a prior hearing to determine the child's unavailability as a witness); People v. Lujan, 211 Cal. App. 4th 1499, 1506–08 (2012) (noting the court's intent to protect young witnesses from undue embarrassment); *In re* Amber S., 15 Cal. App. 4th 1260, 1266–67 (2012) (holding that the trial court acted within its authority to allow the two alleged sexual abuse victims to testify using one-way CCTV in order to ensure their truthfulness).

[7] Ohio v. Roberts, 448 U.S. 56, 66 (1980); *see also* Craig, 497 U.S. at 851 (citing Roberts, 448 U.S. at 66) ("Indeed, to the extent the child witness' testimony may be said to be technically given out of court (though we do not so hold), these assurances of reliability and adversariness are far greater than those required for admission of hearsay testimony under the Confrontation Clause. . . .We are therefore confident that use of the one-way closed circuit television procedure, where necessary to further an important state interest, does not impinge upon the truth-seeking or symbolic purposes of the Confrontation Clause.")

[8] Crawford v. Washington, 541 U.S. 34, 68–69 (2004).

and created a grey area in evidentiary rules that state courts must follow in cases involving vulnerable witnesses.

This Note explores the grey area created by these conflicting Supreme Court decisions while specifically focusing on the law and precedent in California. This Note argues that California should continue to employ the CCTV system in cases involving child abuse victims, especially the underage victims of sexual assault, in order to protect the rights of vulnerable witnesses. This Note also explains how California courts should use the CCTV system in conformance with *Crawford* by applying the system only for defendants who have intimidated child witnesses testifying against them. As a societal policy, this Note argues that protecting innocent victims from the additional trauma and harm as witnesses by facing their assaulter is enough to impose limitations on the rights of the criminal defendants. Simultaneously, California courts must be mindful of *Crawford*'s requirements and implement the CCTV system only when it is appropriate—when defendants have intimidated the child victim witnesses with their actions so that they may be subject to pre-existing limitations on the constitutional rights of self-representation and confrontation. This Note examines these limitations and proposes a method California courts could use to apply these limitations to defendants in child abuse cases, balancing the integrity of the judicial process and the rights of both the defendants and the child witnesses.

II. BACKGROUND

The Sixth Amendment Confrontation Clause provides: "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[9] This Clause grants defendants a fundamental constitutional right to cross-examine each witness offering testimony against them in order to ensure that all evidence and testimony admitted against them is scrutinized for reliability and sincerity.[10] Thus, any exceptions or limitations placed upon the Confrontation Clause must face a high level of scrutiny before they can be imposed.

Separately, criminal defendants also enjoy the right to self-representation—pro se—without representation by counsel.[11] Combined with the Confrontation Clause, this right allows pro se defendants the

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[9] U.S. CONST. amend. VI.

[10] *See* Maryland, 497 U.S. at 845 ("The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact. The word "confront," after all, also means a clashing of forces or ideas, thus carrying with it the notion of adversariness.").

[11] *See* Faretta v. California, 422 U.S. 806, 812–814 (1975).

opportunity to personally conduct cross-examinations of all witnesses testifying against them,[12] providing defendants with a dangerous ability to intimidate vulnerable witnesses by forcing those witnesses to face them during cross-examination.[13]

In order to protect the integrity of the judicial system, judges and attorneys must manage the rights of the parties involved, as well as the options available to protect vulnerable witnesses from further trauma. When a pro se criminal defendant cross-examines a victim-witness in a trial, it places higher levels of stress on the witnesses.[14] If witnesses are vulnerable child victims, they deserve a heightened degree of care and protection in order to protect their psychological well-being.

A. *MARYLAND V. CRAIG*

1. The Context of the Case

Maryland v. Craig is critical for understanding the complexity of the issue that this Note discusses. To fully understand *Craig*, it is crucial to understand the context in which the Supreme Court made its decision two years before *Craig*. In 1988, the Supreme Court addressed the Confrontation Clause issue that arises when child sexual abuse victims testify against their abuser in *Coy v. Iowa*.[15] In *Coy*, the Court held that the placement of a screen between child victim-witnesses and their alleged abuser-defendant during cross-examinations in a trial was a violation of the Confrontation Clause because it obscured all visibility between the witness and the defendant, eliminating a central component of constitutional right to have a face-to-face confrontation.[16] Although the Court in *Coy* affirmed that "the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact,"[17] it also left an important framework for future cases considering potential exceptions or limitations.

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[12] *See* Sue S. Hobbs & Gail S. Goodman, *Self-Representation: Pro Se Cross-Examination and Revisiting Trauma Upon Child Witnesses*, 1 INT'L J. ON CHILD MALTREATMENT: RES., POL'Y, & PRAC. 77, 80–81 (2018).
[13] *Id*.
[14] *See* Gail S. Goodman, et al., *Testifying in Criminal Court: Emotional Effects on Child Sexual Assault Victims*, MONOGRAPHS SOC'Y FOR RES. IN CHILD DEV., July 1992, at 1, 62; CHRISTINE EASTWOOD & WENDY PATTON, AUSTL. INST. CRIMINOLOGY, THE EXPERIENCES OF CHILD COMPLAINANTS OF SEXUAL ABUSE IN THE CRIMINAL JUSTICE SYSTEM 122–23 (2002), http://www.criminologyresearchcouncil.gov.au/reports/eastwood.pdf.
[15] *See generally* Coy v. Iowa, 487 U.S. 1012, 1014–15 (1989).
[16] *Id*. at 1020.
[17] Maryland v. Craig, 497 U.S. 836, 844 (1990) (quoting Coy, 487 U.S. at 1016).

> It is true that we have in the past indicated that rights conferred by the Confrontation Clause are not absolute, and may give way to other important interests . . . We leave for another day, however, the question whether any exceptions exist. Whatever they may be, they would surely be allowed only when necessary to further an important public policy.[18]

This language set forth a test through which the Court could determine whether any limitations on the Confrontation Clause would be permitted.

Two years after *Coy*, the Supreme Court was faced with *Craig*, another case revolving around the rights of fragile child witnesses. In *Craig*, the Court elaborated that the limitation to the Confrontation Clause must "further an important public policy," and would require "individualized findings" that each particular witness needed specialized protection.[19] *Coy* and *Craig* suggest that the Court considered vulnerable witnesses' rights an "important public policy" that justified limiting Confrontation Clause protections for defendants.

In *Craig*, the defendant, an owner-operator of a preschool, was charged with child abuse, first and second degree sexual offenses, perverted sexual practice, assault, and battery of the six-year-old victims who attended the preschool.[20] During the trial, the prosecution sought to invoke a Maryland statute that allowed for the judge to receive the testimony of a child witness who was an alleged victim of child abuse through the use of CCTV.[21] To do so, the trial judge had to follow the procedure set forth in *Coy* and "determine that testimony by the child victim in the courtroom will result in the suffering serious emotional distress such that the child cannot reasonably communicate."[22] If the judge decided that these qualifications were met, the child witness, prosecutor, and defense counsel would move to a separate room where the child would be examined and cross-examined, while a video monitor recorded and displayed the witness's testimony to those in the courtroom where the judge, jury, and defendant remained.[23] During this time, the defendant would maintain electronic communication with their counsel, and objections could be made as if the child was testifying in the courtroom.[24] After determining that each of the children would have difficulty testifying in front of the defendant, the trial judge

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[18] Coy, 487 U.S. at 1020–21.
[19] Craig, 497 U.S. at 844–45.
[20] *Id*. at 840.
[21] *Id*.
[22] *Id*. at 841.
[23] *Id*.
[24] *Id*. at 841–42.

allowed the procedure.[25] The defendant objected to the use of the procedure on Confrontation Clause grounds because there were no face-to-face confrontations with the alleged victims.[26] The trial court, however, held that the defendant had retained the "essence of the right of confrontation, including the right to observe, cross-examine, and have the jury view the demeanor of the witness."[27]

At the appeal, the Maryland Court of Appeals also rejected the defendant's argument that the Confrontation Clause *always* requires face to face confrontation, but reversed and remanded the case because the witnesses were not in the presence of the defendant in the same room:

> [T]he operative 'severe emotional distress' which renders a child victim unable to 'reasonably communicate' must be determined to arise . . . from face-to-face confrontation with the defendant. Thus, we construe the phrase 'in the courtroom' as meaning, for sixth amendment and article 21 [of the Maryland state constitution] purposes, 'in the courtroom in the presence of the defendant.' Unless the prevention of 'eyeball-to-eyeball' confrontation is necessary to obtain the trial testimony of the child, the defendant cannot be denied that right.[28]

The Supreme Court granted certiorari to resolve the constitutional Confrontation Clause issues presented by the case.[29]

2. The *Maryland v. Craig* Analysis

The language in the U.S. Supreme Court opinion in *Craig* gives important insight as to the Court's interpretation of the primary concerns of the Confrontation Clause that must be considered for any exceptions or limitations to apply and will be a foundational background for this Note's analysis.

Justice O'Connor begins her legal analysis for the case by referring to the court's holding in *Coy v. Iowa*,[30] and then explains that "[t]he central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in

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[25] Maryland, 497 U.S. at 842–43. The expert testimony suggested that one child would "probably stop talking and she would withdraw and curl up," another would "become highly agitated, that he may refuse to talk or if he did talk, that he would choose his subject regardless of the questions," and another would "become extremely timid and unwilling to talk." *Id.* at 842.

[26] *Id.*

[27] *Id.*

[28] Craig v. State, 316 Md. 556, 564–65 (1989).

[29] Maryland v. Craig, 497 U.S. 836, 843–44 (1990).

[30] *Id.* at 844 (citing Coy v. Iowa, 487 U.S. 1012, 2016 (1989)).

the context of an adversary proceeding before the trier of fact."[31] However, Justice O'Connor also noted that the Confrontation Clause contributed several other important factors to supplement the face-to-face presence of the witness in front of the defendant:

> Confrontation: (1) insures that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the 'greatest legal engine ever invented for the discovery of truth'; (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.[32]

As such, the Confrontation Clause provides several additional components separate from the physical presence of the defendant and the witness in the same room at trial: the oath, opportunity for cross-examination, and a jury determination of credibility based upon the witness's demeanor.[33] The use of the state CCTV system would not affect any of those other components.[34]

Although face-to-face confrontation meets Confrontation Clause standard, the Court recognized "[t]he Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose [testimonial] infirmities [such as forgetfulness, confusion, or evasion] through cross examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness's testimony."[35]

In other words, the Court held that the admission of hearsay statements against the defendant was sometimes permitted despite the defendant's inability to confront the defendant at trial.[36] The Court recognized that "in certain narrow circumstances, 'competing interests, if "closely examined," may warrant dispensing with confrontation at trial'" because "a literal reading of the Confrontation Clause would 'abrogate virtually every hearsay exception, a result long rejected as unintended and too extreme.'"[37] Here, Justice O'Connor applied the *Roberts* standard, and determined that

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[31] *Id*. at 845.
[32] *Id*. at 845–46 (quoting California v. Green, 399 U.S. 149 (1970)).
[33] *Id*.
[34] *Id*. at 847.
[35] Maryland v. Craig, 497 U.S. 836, 847 (1990).
[36] *Id*. at 847–48 (holding "For this reason, we have never insisted on an actual face-to-face encounter at trial in *every* instance in which testimony is admitted against a defendant. Instead, we have repeatedly held that the Clause permits, where necessary, the admission of certain hearsay statements against a defendant despite the defendant's inability to confront the declarant at trial.").
[37] *Id*. at 848 (quoting Ohio v. Roberts, 448 U.S. 56, 63 (1980)).

the rights of vulnerable child witnesses were a competing interest that justified the dismissal of confrontation in its usual form.

Thus, the Court concluded that while its "precedents establish that 'the Confrontation Clause reflects a preference for face-to-face confrontation at trial,' . . . a preference that 'must occasionally give way to considerations of public policy and the necessities of the case[,]'"[38] the interest of the state in protecting the physical and psychological well-being of child victims could outweigh a defendant's right to face-to-face confrontation with his or her accusers in court.[39] Finally, the Court gave the final rule of law: if a trial court finds it so necessary, the Confrontation Clause does not prohibit a state from using CCTV to receive testimony from a child witness in a child abuse case.[40]

Justice Scalia's dissenting opinion focused on the "subordination of explicit constitutional text to currently favored public policy" proposed by the court's holding.[41] He would later expand on these views in his *Crawford* opinion.[42]

B. THE *OHIO V. ROBERTS* STANDARD

However, the solution posed by the *Craig* Court has come under fire. The *Craig* Court relied on the idea that face-to-face confrontation, while at the core of the Confrontation Clause's values, was ultimately not an indispensable Sixth Amendment protection—a standard established by the Court in a landmark Supreme Court case *Ohio v. Roberts*.[43] Before discussing *Roberts*'s eventual overturning, this Note examines the opinion in *Roberts* in order to understand how the Court's focus on the values of the Confrontation Clause has changed.

The defendant in *Roberts* was charged with check forgery and possession of stolen credit cards.[44] In the preliminary hearing, the defense called as a witness the daughter of the check and credit card owners.[45] The daughter testified that she had let the defendant use her apartment, but denied giving the defendant the checks and credit cards without informing him that she did not have permission to use them.[46] The defendant never

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[38] *Id*. at 849.
[39] *Id*. at 853.
[40] *Id*. at 860.
[41] Maryland, 497 U.S. at 861.
[42] *See infra* Section C.
[43] Craig, 497 U.S. at 847–50 (citing Ohio v. Roberts, 448 U.S. 56, 63, 64, 69 (1980)).
[44] Ohio, 448 U.S. at 58.
[45] *Id*.
[46] *Id*.

cross-examined her at the preliminary hearing.[47] At the trial, the defendant argued that the witness had given him the checks and credit cards with the understanding that he had permission to use them.[48] The daughter, however, had left the state and could not be found, so the prosecution attempted to offer her testimony from the preliminary hearing.[49] The defense challenged the use of the transcript, alleging a violation of his Confrontation Clause rights.[50]

The case made its way to the Supreme Court of Ohio, which held that the transcript was inadmissible because there is normally little incentive to cross-examine a witness at a preliminary hearing, and the mere opportunity to cross-examine at preliminary hearing did not satisfy Confrontation Clause for the purposes of trial.[51] On review, the U.S. Supreme Court acknowledged its own preference for face-to-face confrontation at trial, but made a point to underline the fact that "closely examined" competing interests may warrant dispensing of confrontation at trial.[52] Indeed, the U.S. Supreme Court specifically noted that the Confrontation Clause "must occasionally give way to considerations of public policy and the necessities of the case."[53] The Court then develops an important standard—the "indicia of reliability" test—which states that: "when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate 'indicia of reliability.'"[54] In other words, if substantial compliance with the purposes behind the confrontation requirement can be shown, the mere opportunity to cross-examine at a preliminary hearing satisfies the Confrontation Clause and hearsay statement could be admitted.[55] Shortly after *Roberts*, the Court in *Idaho v. Wright* established several factors for determining whether or not testimony from unavailable child witnesses met the "indicia of reliability" test: spontaneity and consistent repetition, mental state of the declarant, use of terminology unexpected of a child of similar age, and lack of motive to fabricate.[56]

This "indicia of reliability" test, along with the notion that face-to-face confrontation is not an essential part of the Confrontation Clause

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[47] *Id*.
[48] *Id*. at 59.
[49] *Id*. at 59–60.
[50] Ohio, 448 U.S. at 59.
[51] *Id*. at 61.
[52] *Id*. at 63–64.
[53] *Id*. at 64 (quoting Mattox v. United States, 156 U.S. 237, 243 (1895)).
[54] *Id*. at 66.
[55] *See id*. at 69–70.
[56] Idaho v. Wright, 497 U.S. 805, 821–22 (1990).

requirements, was later directly invalidated by the court in *Crawford v. Washington*.[57] The next Section examines the *Crawford* opinion, its treatment of both *Roberts* and *Craig*, how it challenged the established notions of Confrontation Clause values and requirements, the impact that *Crawford* has had on vulnerable child witnesses, and the remaining limits on the Confrontation Clause.

C. *CRAWFORD V. WASHINGTON*

The main issue of this Note stems from Justice Scalia's 2004 *Crawford* opinion, which overturned the *Roberts* standard as well as presumably the components of the *Craig* decision. The *Crawford* case involved a defendant who stabbed another man who allegedly tried to rape his wife.[58] During the trial, Confrontation Clause issue arose when the jury was played a tape recording of statements of the defendant's wife, unfavorable to the defendant, without his opportunity for cross-examination.[59] The defendant's wife's statement was admitted in the trial court as passing the *Roberts* "indicia of reliability" test because she had been attempting to corroborate her husband's story of self-defense, had direct knowledge as an eyewitness, had been describing recent events, and had been questioned by a neutral law enforcement officer.[60] After having his conviction affirmed by the Washington Supreme Court,[61] the defendant petitioned the U.S. Supreme Court to reconsider the "indicia of reliability" standard, arguing that the *Roberts* standard strayed from the meaning and purpose set out by the Constitution in the Confrontation Clause.[62]

In his *Crawford* opinion, Justice Scalia begins with an in-depth analysis of the historical roots of the Confrontation Clause to help understand the meaning of the term "witnesses against."[63] He arrives at two distinct conclusions: (1) the Confrontation Clause's original purpose was to combat a civil-law mode of criminal procedure; and (2) the Framers of the Constitution would not have allowed the testimonial statements of a witness who did not appear at trial unless he or she was unavailable to testify, and the defendant had had a prior opportunity for a cross-examination.[64]

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[57] *See* Crawford v. Washington, 541 U.S. 36, 38 (2004).
[58] *Id*. at 38.
[59] *Id*.
[60] *Id*. at 40.
[61] *Id*. at 41.
[62] *Id*. at 42.
[63] *See* Crawford, 541 U.S. at 42–50.
[64] *Id*. at 50–54.

Within Justice Scalia's breakdown of his first conclusion, he specifically alludes to the definition of "witnesses" against the accused, specifying that:

> [A]n accuser who makes a formal statement to a government officer bears testimony in a sense that a person who makes a casual remark to an acquaintance does not. The constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement.[65]

This has major implications for the rights of child and vulnerable witnesses. Although *Crawford* had nothing to do with vulnerable witnesses, the opinion represented a significant shift in the Court's procedural application of the Confrontation Clause. For example, Justice Scalia specifically notes that testimony taken during the course of police interrogations would meet this standard as well: "even if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object, and interrogations by police officers fall squarely within that class."[66] Consider, for example, the traumatic nature of a child abuse victim's first statement to an investigating police officer. According to Justice Scalia's line of reasoning, the child witnesses' initial statements would be inadmissible unless the child continues on through the trial process and presumably submits to cross-examination.

Justice Scalia's second conclusion is even more limiting: "[w]e do not read the historical sources to say that a prior opportunity to cross-examine was merely a sufficient, rather than necessary, condition for admissibility of testimonial statements. They suggest that this requirement was dispositive, and not merely one of several ways to stablish reliability."[67] With this conclusion, Justice Scalia in *Crawford* directly overturned *Roberts*, arguing that the *Roberts* was simultaneously overly broad and overly narrow resulting in a failure to protect against confrontation violations.[68] In other words, if a defendant has not had a chance to cross-examine any piece of testimonial hearsay, it cannot be admitted at trial unless it falls into an established hearsay exception category. In the child victim-witnesses context, this means that the testimony of a victim who has given testimony initially before the trial (perhaps to a police officer) will be inadmissible unless the child is willing to testify again, in front of the court,

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[65] *Id*. at 51.
[66] *Id*. at 53.
[67] *Id*. at 55–56.
[68] *See id*. at 60.

subject to cross-examination by the defendant. The potential harmful implications, including short-term and long-term trauma, to these child victim-witnesses are explored in a later section.[69]

However, in *Crawford,* Justice Scalia failed to address any of the policy issues concerning the rights of vulnerable witnesses. The opinion briefly acknowledges *Craig*, but only in Justice Rehnquist's concurrence.[70] Even there, Justice Rehnquist's use of *Craig* ignored the prior case's acknowledgements of limitations and exceptions to the hearsay rule, and instead selectively quotes the *Craig* opinion to singularly emphasize the purpose of the Confrontation Clause as a method of determining the reliability of a witness's statements.[71] In doing so, Justice Rehnquist's opinion ultimately used the language of Justice O'Connor to endorse a holding antithetical to the spirit of her actual opinion in *Craig*.[72] Furthermore, the seemingly purposeful reference to *Craig* seems to suggest that other policy factors, perhaps including the rights of vulnerable witnesses, should not play a factor in the decision to enforce face-to-face confrontation.[73] Still, although the Court invalidated the rules of evidentiary procedure upon which *Craig* relied, *Crawford* simultaneously treated *Craig* as good law.[74] In this way, while *Craig* was never directly overruled, the evidentiary principles on which it relied have been rejected.[75]

Perhaps most importantly, *Crawford* represented an underlying shift in the Supreme Court's method of interpretation of the Confrontation Clause. *Crawford* pushed for a purely *procedural* interpretation of the Clause rather than a *functional* interpretation.[76] This shift does more than re-emphasize the importance of determining the veracity of witnesses' statements—it also suggests that *any* procedural deviation or limitation is a violation of the Confrontation Clause, even if the deviation preserves the Clause's function by preserving the reliability of evidence.[77] While Justice

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[69] *Infra* Section IV.

[70] Crawford v. Washington, 541 U.S. 36, 74-75 (2004) (Rehnquist, J., concurring).

[71] *Id*. at 74 (Rehnquist, J., concurring) ("The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversarial proceeding before the trier of fact.").

[72] *Compare* Crawford, 541 U.S. at 74 (Rehnquist, J., concurring) (failing to discuss any policy issues or exceptions to the Confrontation Clause), *with* Maryland v. Craig, 497 U.S. 836, 580 (1990) ("[O]ur precedents confirm that a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured.").

[73] Crawford, 541 U.S. at 74 (Rehnquist, J., concurring).

[74] *See id*.

[75] *Id*.

[76] Crawford, 541 U.S. at 55–56 (majority opinion).

[77] *Id*.

O'Connor's opinion in *Craig* stated that the use of the CCTV system would not have enough of an effect on the components of the Confrontation Clause to endanger a jury's ability to make these determinations,[78] her determination was founded on an assumption that ensuring the reliability of the testimony was the most important factor to be considered.[79]

Crawford had several major implications within the context of victim-witnesses testifying about the allegations of child abuse. The child victims who give testimony must go through the cross-examination process at the trial if their testimony is to be admissible, and for the reasons previously discussed, the confrontation standard by which that cross-examination is conducted has been raised.[80] In other words, any prosecution that wishes to introduce the testimony of child victims must allow the victims to be questioned during cross-examination—an extremely stressful and intimidating process. This Note next analyzes how these types of in-court interactions can impact young and impressionable children and suggests how California courts should handle these types of situations when the criminal defendant elects to represent themselves for the questioning. This Note argues that when a pro se defendant elects to cross-examine a child victim-witness, the courts should intervene before allowing unnecessary further intimidation of the child. However, it is first necessary to understand how California courts are already handling situations involving vulnerable witnesses.

III. HOW CALIFORNIA IS HANDLING *MARYLAND V. CRAIG* CASES

The *Crawford* decision had several important effects on sexual and child abuse cases, and its impact has been made clear in several California cases involving vulnerable witnesses. Prior to the *Crawford* holding in 2004, *Craig*'s CCTV system had been implemented by California courts in order to protect the "[s]tate's interest 'in the protection of minor victims of sex crimes from further trauma and embarrassment." [81] However, although California courts had applied the CCTV system and a level of discretion in order to protect vulnerable child witnesses, the courts still struggled with the applications of the *Craig* framework, especially in cases where the limitation on face-to-face confrontation was not the CCTV system.[82] For

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[78] *See* Maryland v. Craig, 497 U.S. 836, 846 (1990).

[79] *See id*. at 845–47.

[80] *See generally* Crawford v. Washington, 541 U.S. 36 (2004).

[81] People v. Murphy, 107 Cal. App. 4th 1150, 1155 (2003) (citing Craig, 497 U.S. at 846).

[82] *See* Murphy, 107 Cal. App. 4th at 1157–58 (2003) (allowing a one-way glass partition between the witness and defense table); People v. Sharp, 29 Cal. App. 4th 1772, 1778 (1994) (allowing the child witness to look away from the defense table).

example, in *People v. Sharp*, the California appellate court held that allowing the child witness to face away from the defense table so that the witness would not have to look at the defendant directly was not a constitutional violation of the defendant's confrontation rights.[83] The *Sharp* court noted that "the only limitation on appellant's right to confront was that he did not have a full, frontal view of her face."[84]

Despite the implications of *Crawford* in 2004, California has strengthened its devotion to the rights of vulnerable witnesses and the validity of the *Craig* standard.[85] Both the court system and the California legislature have ensured that avenues for the protection of child witnesses remain open.[86] Specifically, California Penal Code Section 1347 provides "the court with discretion to employ alternative court procedures to protect the rights of a child witness, the rights of the defendant, and the integrity of the judicial process."[87]

However, before implementing a *Craig*-style CCTV system or other limitation on the Confrontation Clause, several requirements must be met.[88] First, the minor's testimony must involve a recitation of facts about an alleged sexual offense committed on or with the minor, an alleged violent felony, or an alleged felony concerning willful harm or injury to a child.[89] In addition, clear and convincing evidence must show that the impact on the minor will be so substantial as to make the minor unavailable unless the CCTV system is used.[90] In other words, the *Craig* framework is a high bar only to be employed sparingly in cases involving children so traumatized that they would be unable to testify without significant accommodation.

Despite the high bar, California courts are committed to applying the *Craig* system for cases involving particularly vulnerable child witnesses and can and will exercise discretion to protect vulnerable child witnesses. In *People v. Powell*, for example, California's Sixth District Court of Appeals held that the trial court did not abuse its discretion by implementing a *Craig*-style CCTV system for a child witness to testify against the abuser, although the trial court did not question the child to determine that the

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[83] Sharp, 29 Cal. App. 4th at 1778.
[84] *Id.* at 1783.
[85] *See, e.g.*, CAL. PENAL CODE § 1347(a) (amended 2016); People v. Powell, 194 Cal. App. 4th 1268, 1283–84, (2011) (upholding the use of the CCTV system despite the lack of a prior hearing to determine the child's unavailability as a witness); People v. Lujan, 211 Cal. App. 4th 1499, 1506–08 (2012) (noting the court's intent to protect young witnesses from undue embarrassment).
[86] *Id.*
[87] CAL. PENAL CODE § 1347(a).
[88] *Id.*
[89] *Id.* § 1347(b)(1).
[90] *Id.* § 1347(b)(2).

witness would be unavailable if the CCTV system was not used.[91] The court relied on the prosecution's "substantial evidence that the victim would suffer great emotional distress if forced to testify, to the point that she might not be able to provide a useful account of events for the jury."[92] In *People v. Lujan*, California's Fourth District Court of Appeals held that the trial court did not abuse its discretion when it allowed a child witness to testify via a CCTV system even though the child witness was not the victim,[93] because the child witness was testifying about the torture and death of her younger brother, and the intent of California Penal Code Section 1347 was to provide the court with discretion to protect vulnerable child witnesses (as opposed to just child *victim* witnesses).[94]

However, while California courts may have been undeterred by *Crawford*, the *Craig* standard has come under fire on the national scale.

IV. THREATS TO *MARYLAND V. CRAIG*

Because of the tension between *Craig* and *Crawford*, the Supreme Court has been faced with several petitions for writ of certiorari arguing that *Craig* should be reconsidered. A 2007 petition pointed to the fact that state legislatures are divided on how to apply the *Craig* standard.[95] For example, states, including, but not limited to, Arizona, Delaware, and Florida, have enacted statutes that permit child witnesses to testify outside of the defendants' presence without finding that the defendant's presence would impair their ability to testify.[96] Other states, including California, have enacted statutes that require some showing that the child witnesses' ability to testify would be impaired.[97] Further, the petition broke down *Craig*'s reliance on a discredited approach to interpreting the Confrontation Clause.[98] The petition argues:

> The time for this Court to reconsider *Craig* has come. *Crawford* and *Craig* cannot rationally coexist . . . Until this Court intervenes, defendants will continue to be convicted on the basis of a decision that no longer has a coherent

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[91] People v. Powell, 194 Cal. App. 4th 1268, 1283–84 (2011).
[92] *Id*. at 1284.
[93] People v. Lujan, 211 Cal. App. 4th 1499, 1506–08 (2012).
[94] *Id*. at 1507–08, (quoting CAL. EVID. CODE § 765) (stating that the intent of the court is to "'take special care to protect' witnesses under 14 years of age 'from undue harassment or embarrassment.'").
[95] Petition for Writ of Certiorari at 18, Vogelsberg v. Wisconsin, 550 U.S. 936 (2007) (No. 06-1253).
[96] *Id*.
[97] *Id*. at 19.
[98] *Id*.

> rationale and that relies on a methodology that the Court has since excoriated as 'do[ing] violence to [the Framers'] design.'[99]

The Supreme Court faced another petition in 2012 that argued that the Court must review *Craig* in order to decide the continuing vitality of the case.[100] It stated that:

> To be sure, *Crawford* and *Craig* address different questions—*Crawford* deals with circumstances in which an out-of-court declarant must be subjected to confrontation, and *Craig* deals with the nature of the confrontation. But *Crawford* represents a conception of the Confrontation Clause that is utterly incomprehensible with the theoretical foundation on which *Craig* rests.[101]

This petition, unlike the 2007 petition, did not argue for *Craig* to be overruled. Instead, it implored the Supreme Court to clarify the issues presented, while suggesting that the cases *could* coexist peacefully, if the Supreme Court was to explain the underlying tensions.[102]

Thus far, the Supreme Court has been unwilling to reconsider its stances on either *Crawford* or *Craig*. Both of the aforementioned petitions for writ of certiorari were denied.[103] But as recently as 2017, prominent voices and judges have continued to argue that the Supreme Court should take the matter back up for re-examination.[104] With the shifting makeup of the Supreme Court, there is certainly a strong chance that the Court could decide to reconsider an issue that has consistently simmered since the 2004 *Crawford* decision.

V. THE IMPACT OF TRAUMATIC TESTIMONY AND CROSS-EXAMINATION ON CHILDREN

Child witnesses who are subjected to cross-examination, especially when they are the victim, often risk potential trauma during the trial process. In the course of a criminal trial, a child witness may be forced to testify several times: in depositions, in preliminary hearings, at trial, and at sentencing hearings.[105] A study of children complainants of sexual abuse in

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[99] *Id*. at 28–29.
[100] Petition for Writ of Certiorari at 7, Rose v. Michigan, 567 U.S. 918 (2012) (No. 11-9259).
[101] *Id*. at 19.
[102] *Id*.
[103] *See* Rose v. Michigan, 567 U.S. 918, 918 (2012) (denying petition for writ of certiorari); Vogelsberg v. Wisconsin, 550 U.S. 936, 936 (2007) (same).
[104] *See, e.g*., United States v. Cox, 871 F.3d 479, 492–94 (6th Cir., 2017) (Sutton, J., concurring).
[105] Hobbs & Goodman, *supra* note 12, at 81.

three Australian jurisdictions found that children found cross-examination to be horrible, confusing, upsetting, and unanimously agreed that the worst part of the process was being accused of lying.[106] Children in Western Australia were cross-examined for shorter periods of time, were given certainty that they would not have to see the accused, and were allowed to be cross-examined through CCTV.[107]

These concerns are heightened when a defendant elects to assert the right to self-representation and personally cross-examines the child victim-witness. Subjecting a child victim—especially in cases involving sexual abuse and domestic violence—to cross-examination at the hands of an alleged defendant can force the child to relive the memories of abuse and the negative feelings associated with that experience.[108] It is often particularly traumatic because of the nature of cross-examination, which can entail defense attorneys posing questions and assertions that indicate or suggest a lack of truth to the child's explanation or accusation.[109] In one study, children specifically listed fear of seeing the defendant as among their greatest fears for the cross-examination process.[110] Furthermore, studies have proven that the cross-examination process can have detrimental effects on both the short-term and long-term mental health of the child.[111] As such, the possibility that a defendant could use the process of cross-examination to embarrass or threaten a child witness into silence or altering his or her testimony is a significant threat that courts should not ignore.[112]

In recent years it has been proven that child sexual assault victims who are forced to testify in criminal trials exhibited long-term behavioral effects, especially when they were forced to testify multiple times.[113] The majority of children reported feelings of apprehensiveness before they had to testify.[114] Innovative practices, such as removing spectators from the courtroom and ensuring that the child witness had a loved one in the room, while uncommon, were associated with higher levels of confidence; a reduction in likelihood of recanting previous testimony; and an increase in

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[106] EASTWOOD & PATTON, *supra* note 14, at 4–5 (referencing a foreign judicial system that, like the United States, places a significant emphasis on the adversarial nature judicial proceedings in a criminal prosecution, with cross-examination as the centerpiece of the judicial process).
[107] *Id*.
[108] Hobbs & Goodman, *supra* note 12, at 84.
[109] *Id*.
[110] *Id*.
[111] *Id*. at 86.
[112] *See id*. at 87–88.
[113] Goodman, et al., *supra* note 14, at 62.
[114] *Id*. at 76.

perceived credibility.[115] By contrast, feelings of intimidation stemming from having to testify in front of the defendant affected the children's ability to answer attorneys' questions and made them appear more anxious on the stand.[116] This feeling did not change after the children had testified, and the most negative responses the children gave involved questions about having to testify in front of the defendant.[117]

When questioned regarding whether there was a procedure that could have better facilitated their testifying process, the most common answer was that the children would have preferred the defendant to be absent.[118] The reasoning behind the children's negative feelings toward the presence ranged from intimidation, fear for their own and their family's safety, anger, and the feeling that seeing the defendant "brought the memory all back again."[119] Based on these findings, the study calls for lending "support to recent innovative procedures, such as the use of closed-circuit television, that remove the child or the defendant from the courtroom."[120] In sum, children generally feel that testifying in court is a stressful and sometimes traumatizing experience, and these feelings are exacerbated by both cross-examination and the presence of a criminal defendant in the room.

To help address these issues, the criminal defendant's Sixth Amendment rights to both self-representation and confrontation of witnesses testifying against them are examined in the next Section. Then, a solution for California courts to balance those rights against the rights of vulnerable witnesses to protection is proposed.

VI. THE RIGHT TO SELF-REPRESENTATION AND THE CONFRONTATION CLAUSE: *FARETTA V. CALIFORNIA*

The Court has interpreted that Sixth Amendment includes the right to self-representation.[121] In *Faretta v. California*, a 1975 case, Justice Stewart underlined the necessity and limitations on the right to self-representation, iterating that the Sixth Amendment gives criminal defendants a constitutional right to represent themselves:

> Although not stated in the Amendment in so many words, the right to self-representation—the right to make one's own defense personally—is thus necessarily implied by the

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[115] *Id*. at 85–86.
[116] *Id*. at 94–95.
[117] *Id*. at 98.
[118] *Id*. at 99–100.
[119] Goodman, et al., *supra* note 14, at 101.
[120] *Id*.
[121] U.S. CONST. amend. VI.

> structure of the Amendment. The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails.[122]

In *Faretta*, the Court decided that the notion of "compulsory counsel" was never the intention of the Framers of the Constitution and that "to force a lawyer on a defendant can only lead him to believe that the law contrives against him."[123] This places a particular emphasis on the fact that the right to self-representation solely belongs to the accused and warns against the dangers of allowing courts to impose counsel on defendants who wish to assert this right. Justice Stewart straightforwardly states that "[t]he language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant—not an organ of the State interposed between an unwilling defendant and his right to defend himself personally."[124] However, this set future courts up for dealing with disruptive and threatening pro se defendants.

The *Faretta* Court explained that the main limitations on the right to represent oneself were those designed to protect the accused. Justice Stewart warns that "the accused must 'knowingly and intelligently' forgo those relinquished benefits" of having trained counsel.[125] This implies that the Court was concerned with protecting the rights of the untrained and unsophisticated defendant while ignoring the rights of the other participants in the trial process. In other words, the Court largely ignored the harm a pro se defendant can have on other individuals.

VII. LIMITATIONS ON THE RIGHT TO SELF-REPRESENT

A. *ILLINOIS V. ALLEN*

The *Faretta* Court addressed that the Sixth Amendment right to self-representation is not insurmountable: "the trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct."[126] So, if a defendant clearly engages in acts of intimidation against vulnerable witnesses, the right to self-representation can be terminated by a presiding judge. Then, "[a] State may—even over objection by the accused—appoint a 'standby counsel' to aid the accused in

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[122] Faretta v. California, 422 U.S. 806, 819–20 (1975).
[123] *Id*. at 833.
[124] *Id*. at 820.
[125] *Id*. at 835.
[126] *Id*. at 834 n.46.

the event that termination of the defendant's self-representation is necessary."[127] However, how judges may interpret when they may terminate the defendant's right is less clear.

Generally, abusive or disorderly behavior has been enough to terminate a defendant's right to self-representation.[128] The boundaries of permissible actions taken by would-be pro se defendants were explored in *Illinois v. Allen*, in which the defendant was so disruptive to the court proceedings that the trial judge terminated his right to self-representation and removed him from the courtroom while the trial continued in his absence.[129] In *Allen*, the defendant asserted his Sixth Amendment right to self-representation, but after he engaged in several rowdy and uncontrolled outbursts, the trial judge elected to order his removal from the courtroom and continued the trial.[130] The defendant filed a writ of habeas corpus in federal court alleging wrongful deprivation of his constitutional rights by being excluded from the courtroom during his trial.[131] The *Allen* Court held:

> [A] defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom.[132]

Even here, the Supreme Court tailored its opinion to consider, first and foremost, the rights of the accused, only infringing upon them when the integrity of the judicial process and courtroom decorum are so significantly impinged that continuing would be impossible: "[i]t would degrade our country and our judicial system to permit our courts to be bullied, insulted, and humiliated and their orderly process thwarted and obstructed by defendants brought before them charged with crimes."[133] If the Supreme Court was willing to go to such lengths to protect the courts from bullying, it follows that it should be willing to protect vulnerable witnesses from aggressive pro se defendants on cross-examination—especially in light of the fact that even well-mannered defendants, particularly those that are accused of child abuse or molestation, can clearly have a severe impact on

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[127] *Id*.
[128] Faretta, 422 U.S. at 834 n.46.
[129] *See* Illinois v. Allen, 397 U.S. 337, 339–41 (1970).
[130] *Id*. at 339–40.
[131] *Id*. at 339.
[132] *Id*. at 343.
[133] *Id*. at 346.

vulnerable child witnesses without being a belligerent presence in the courtroom.[134]

B. THE FORFEITURE-BY-WRONGDOING EXCEPTION

The forfeiture-by-wrongdoing exception is a well-established limitation to the Confrontation Clause.[135] This exception provides that when a witness is unavailable in court because of a defendant's wrongdoing, the defendant cannot subsequently insist on his or her constitutional right to confrontation.[136] In other words, a defendant's Sixth Amendment right to confrontation can be terminated when a defendant's own wrongful behavior is deemed to have made a witness unavailable.[137] In fact, the Supreme Court has specifically stated that "[t]he Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts. It grants him the privilege of being confronted with the witnesses against him; but if he voluntarily keeps the witnesses away, he cannot insist on his privilege."[138] The Court in its *Crawford* opinion carefully explained that the forfeiture-by-wrongdoing exception is based on equitable grounds principles, as opposed to an "alternative means of determining reliability."[139] In this sense, the forfeiture-by-wrongdoing exception contains the same major underlying idea as *Allen*: if a defendant's actions have an effect on the integrity and fairness of the judicial process, judges have the authority to terminate their Sixth Amendment right to confrontation.[140] This exception was later codified in the Federal Rules of Evidence, rule 804(b)(6) as a hearsay exception, allowing hearsay statements offered against parties that wrongfully caused the declarant's unavailability as a witness.[141]

The forfeiture-by-wrongdoing exception to the Confrontation Clause is designed only to apply to actions of the defendant intended to prevent the witness from testifying.[142] Since its common-law introduction, the exception was intended to remove any negative incentives for defendants to "intimidate, bribe, and kill" the witnesses against them, so that courts could protect "the integrity of their proceedings."[143] This intent makes the

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[134] Goodman, et al., *supra* note 14, at 94–95.
[135] *See, e.g.*, Reynolds v. United States, 98 U.S. 145, 158 (1878); Crawford v. Washington, 541 U.S. 36, 62 (2004).
[136] *See* Reynolds, 98 U.S. at 158.
[137] *Id.*
[138] *Id.* at 158.
[139] Crawford, 541 U.S. at 62.
[140] *Compare* Crawford, 541 U.S. at 62, *with* Illinois v. Allen, 397 U.S. 337, 346 (1970).
[141] FED. R. EVID. 804(b)(6).
[142] Giles v. California, 554 U.S. 353, 359–60 (2008).
[143] *Id.* at 374.

forfeiture exception especially relevant to the rights of vulnerable child witnesses as vulnerable witnesses can easily be intimidated into silence and subjected to unnecessary additional trauma.

Furthermore, in many cases the forfeiture-by-wrongdoing exception must, by nature, be applied against defendants who have not yet been convicted of the crimes charged against them. While this Author did not find an example of a court opinion exploring the application of the forfeiture doctrine to cases involving intimidated child victim witnesses, an argument can be made that the doctrine was intended to apply to a defendant accused of intimidating, threatening, or wrongful behavior against a potentially vulnerable witness. In these cases, if a child feels significantly intimidated by potentially facing the defendant, courts *could* consider the child to be an unavailable witness and elect to terminate the defendant's right to confrontation. In doing so, the courts would be holding that certain defendants' misbehavior prior to the trial process resulted in an intimidated and unavailable witness during trial, which therefore limits the defendant's confrontation rights to protect the integrity of the judicial process. Next, how California courts should examine and employ these limitations to the Confrontation Clause is proposed.

VIII. PRO SE DEFENDANTS AND CHILD WITNESSES

A. PROPOSAL

This Note's proposal has three major goals: (1) reducing the intimidating and stressful environment faced by vulnerable witnesses in a post-*Crawford* world, (2) addressing when and how courts can seek to employ the *Craig* standards without running afoul of *Crawford*'s evidentiary standards, and (3) suggesting a way to increase the availability of vulnerable witnesses that might be discouraged from testifying because of the threat of an intimidating cross-examination.

California courts must be aware of the tenuous state of *Craig* nationwide and be prepared to protect the rights of vulnerable child witnesses in the event that the Supreme Court reconsiders the case. The major dissonance between *Crawford*'s interpretation of the Confrontation Clause and its rejection of the *Roberts* and the *Craig* standards cannot be ignored. However, judges and prosecutors should seek to supplement the *Craig* framework by using the *Allen* and forfeiture-by-wrongdoing exceptions when trying pro se defendants facing vulnerable child witnesses that they are accused of abusing. If judges are willing to consider that the actions of the defendants have caused the child victims to be unavailable as witnesses or unlikely to provide constructive testimony, the courts could

then determine that the pro se defendants have lost their full rights to face-to-face confrontation by using a *Craig* style CCTV. The *Allen* rule[144] and the forfeiture-by-wrongdoing exception revolve around the idea that judges should not sit idle while criminal defendants tamper with the integrity of the judicial process. To protect this central goal, judges should be able to consider whether the actions of criminal defendants before trial will have the effect of intimidating and silencing child witnesses during trial, especially when a criminal defendant elects to represent themselves while questioning a child victim-witness. The very nature of cross-examination conducted by a pro se defendant in these types of cases suggests that the defendant will have more influence over the case. A child victim is obviously vulnerable to the influences of an adult who has traumatized them, and the mere fact that they will have to answer direct questions posed by their alleged abusers undoubtedly increases the levels of intimidation that a child will be forced to endure. This undoubtedly affects the integrity of the judicial process in much the same way as does general unruliness in court and threats towards adult witnesses at trial.

Judges presiding over cases involving pro se defendants and child victim witnesses would be able to determine whether the testifying child is likely to be intimidated by the defendant. Upon finding some potential for intimidation, judges would be able to exercise broader discretion in limiting the defendants' confrontation rights, as they would not be constrained by the limits and justifications of the *Craig* framework. In addition, if *Craig* is reconsidered or overruled by the Supreme Court, the courts would retain an avenue to continue to protect vulnerable child witnesses. The courts would have the ability to introduce a layer of separation between the child and the defendant—including perhaps, the same CCTV framework suggested by *Craig*—while avoiding a total termination of the defendant's confrontation right that *Allen* and the forfeiture exception would usually entail. This is a convenient middle ground that should be applied to defendants, who have not yet been convicted of wrongful witness intimidation tactics during the trial process, but who have the potential to increase fear and coercion on a vulnerable witness. In a child sexual abuse case, this potential of intimidation should be implied by the defendant's assertion of their rights to self-representation and confrontation.

The application of the *Allen* standard and the forfeiture-by-wrongdoing exception, which gives courts greater discretion in order to protect vulnerable witnesses, would enable judges to make vulnerable child witnesses feel more comfortable with testifying in court against intimidating defendants, thus remaining an "available witness." This would

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[144] *See* Illinois, 397 U.S. at 343–46.

alleviate the stress placed on child victims subject to cross-examination, while also hopefully increasing the number of child victims who are willing to remain involved in the trial process. In addition, it would decrease the likelihood of prosecutors losing valuable evidence and testimony in cases involving vulnerable child victims and witnesses because the children or their parents or guardians have decided that cross-examination would only prolong or exacerbate the trauma faced by the child.

There are several concerns that should be addressed if this proposal is to be taken into consideration. The main concern revolves around the fact that *Crawford* and the current rules of evidence place an emphasis on confrontation as a method of determining veracity in a witness.[145] While the *Craig* system allows for all of the traditional components of determining veracity via traditional face-to-face confrontation, with the exception of physical proximity between the defendant and the child witness,[146] *Crawford* suggests that procedural limitations to the Confrontation Clause are unconstitutional and that face-to face confrontation is a key component for maintaining veracity of witness statements. However, whether this should constitute a major concern for judges—when considering whether to allow the use of CCTV or other layers of separation between defendant and witness in these cases—is addressed next.

B. VERACITY AND THE USE OF SEPARATION IN INTERVIEWING CHILD WITNESSES

One of the key takeaways from *Crawford* is the Court's increased emphasis on the necessity of assessing the veracity of witnesses facing cross-examination; Justice Scalia's opinion made it clear that judges in the United States are to consider this as the central component of the Confrontation Clause.[147] If the *Craig* CCTV procedure or other layers of separation are to be implemented in California courts as suggested by this proposal, it is necessary to consider whether or not these layers of separation would be a significant hindrance to the truth-seeking process of cross-examination.

Sara Landström revealed that viewers of in-person and CCTV interviews with children actually perceived the statements of the children interviewed in person more positively than statements from children interviewed through CCTV, and reported that they found the children who

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[145] Crawford, 541 U.S. at 55–56.
[146] *See* Maryland v. Craig, 497 U.S. 836, 846 (1990).
[147] *See* Crawford, 541 U.S. at 54–56.

were interviewed in person to be more convincing altogether.[148] The viewers in both situations reported that they relied on verbal cues, as opposed to visual cues, most heavily in making their assessments of the children's veracity.[149] Landström confirmed that a child expressed increased stress and anxiety when in close proximity to the interviewer and those who were interviewed in person reported the highest levels of anxiety.[150] This is particularly perplexing for the truth-seeking process, given that distress during the time of memory retrieval—which includes testifying in a courtroom—can negatively impact the quality and veracity of memory reports.[151] This suggests that any methods taken to decrease the stress of testifying children may actually have a positive impact on their testimonial recollection.

Landström's study focused on two major components of cross-examining children: determining credibility and the placement of stress on the participating children.[152] In balancing these two factors, Landström came to the conclusion that the proximity between the child and the interviewer (importantly, the interviewers in these studies were attorneys, not defendants) played a crucial role in both aspects.[153] Viewers of the pre-recorded video interviews—but not viewers of live or CCTV interviews—were better than chance at accessing the veracity of the children's statements.[154] The inverse relationship was true in determining the self-reported levels of stress and anxiety placed in the children—they found the live interviews to be stressful, while the pre-recorded video interviews were more pleasant.[155] Landström concluded her study by expressing the importance of finding a balance between the two ends of the spectrum in order to promote a credible and ethical process for conducting cross-examination on children.[156]

Landström's study supports the notion that an added layer of separation—such as the prerecorded video or the CCTV system—between the witness and the defendant would reduce the levels of stress and anxiety child witnesses face during cross-examination.[157] It also suggested that

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[148] *See* Sara Landström, CCTV, Live and Videotapes: How Presentation Mode Affects the Evaluation of Witnesses, at 35–40 (2008) (Ph.D. dissertation, University of Gothenburg) (ResearchGate).
[149] *Id*.
[150] *Id*. at 32.
[151] Hobbs & Goodman, *supra* note 12, at 87–88.
[152] Landström, *supra* note 148, at 14.
[153] *Id*. at 32–33.
[154] *Id*. at 32.
[155] *Id*.
[156] *Id*.
[157] *Id*. at 33.

while the implementation of a CCTV system could have implications on determining the veracity of their statements, other factors would come into play to balance out the equation: the added layer of CCTV increased the level of scrutiny the viewers gave to the children's statements.[158] At the same time, she made an important conclusion that should encourage future judges to feel comfortable in utilizing this procedure: the viewers of this study (and therefore potential jury members) tended to rely more heavily on verbal cues from the children's testimony and answers, rather than visual cues.[159] Verbal cues would be the least affected factor when CCTV systems are used—the children's answers are recorded exactly as they give them, whereas visual cues might be less clear through the screen. In sum, taking away the component of physical proximity to the defendant from the confrontation process would not significantly diminish jury members' ability to determine the veracity of child witness's statements and would significantly alleviate stress placed on the testifying children.

C. INCREASING WITNESS AVAILABILITY

Perhaps the more important conclusion of the aforementioned research was its suggestion that increased stress on child witnesses due to the proximity to the defendant was remedied by use of the CCTV system.[160] There are many recorded cases of child abuse victims being declared unavailable as witnesses due to being too traumatized or anxious to withstand cross-examination[161]—presenting a clear witness availability issue for prosecutors without admissible testimonies. Furthermore, *Crawford* implies that prosecutors on child abuse cases often have to change their whole strategy because the child does not wish to testify at trial.[162] Many of these cases result in watered-down charges in exchange for guilty pleas or lighter sentences.[163] The studies discussed above would suggest that the *Craig* CCTV system would alleviate psychological pressures felt by

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[158] Landström, *supra* note 148, at 32.
[159] *Id*. at 40.
[160] *Id*. at 33.
[161] *See, e.g*., State v. Pitt, 147 P.3d 940, 943 (Or. Ct. App. 2006) (noting that at the state court trial the two children had appeared frightened and refused to answer questions during a competency hearing); State v. Noah, 162 P.3d 799, 804–805 (Kan. 2007) (noting in part that the child witness had difficulty answering preliminary hearing questions, began crying, and required several court recesses before being declared unavailable); People v. Sharp, 29 Cal. App. 4th 1772, 1783 (1994) (noting that the child "was experiencing considerable distress and suffering inexplicable memory lapses about sex acts she had theretofore consistently reported").
[162] *See* Thomas D. Lyon, *Child Witnesses and the Confrontation Clause,* 102 J. CRIM. L. CRIMINOLOGY 1181, 1187–90 (2012).
[163] *Id*. at 1189.

child victims. This system could be the difference between the availability or unavailability of a witness, which can be the difference between a conviction or an acquittal. The accepted use of the *Craig* CCTV framework as an intermediary ground for cases in which the alleged abusers have intimidated child witnesses would create a less-stressful cross-examination, while still giving judges flexibility to forgo terminating the Sixth Amendment rights of a defendant on *Allen* or forfeiture-by-wrongdoing grounds.

Although *Crawford*'s prohibition on the use of evidentiary testimonial statements that have not been subject to cross-examination has led to the aforementioned problems, this proposal would offer a way to continue to combat the unavailability of vulnerable child witnesses. The increased discretion given to courts would provide them with more accommodating and flexible ways of conducting cross-examination, tailored specifically to the witnesses' needs to encourage them to continue with the criminal trial process while still preserving the rights at the core of the Confrontation Clause.

D. THE PRESERVATION OF THE CONFRONTATION CLAUSE

California judges can comfortably adopt this proposal because the Supreme Court has already gone into depth as to how measures like the CCTV system preserve the central focus of the Confrontation Clause: ensuring the reliability of the witness's testimony through an adversary proceeding.[164] Justice O'Connor's opinion in *Craig* emphasized the components of the Confrontation Clause that would be preserved through the use of the CCTV system: the oath, the opportunity for cross-examination, and the jury determination of credibility based upon the witness's demeanor.[165] If this proposal were to be put into practice, the only limitation that would be placed on the traditional confrontation standards would be the physical proximity of the face-to-face confrontation. As Justice O'Connor explicitly stated in *Craig*, the Confrontation Clause may be satisfied in its entirety if the face-to-face proximity component is the only factor removed.[166] Although out-of-court testimonial hearsay would still be prohibited under *Crawford*, vulnerable children (and their guardians) would likely feel more comfortable to endure cross-examination if they were given the option to avoid face-to-face questioning by their alleged abuser. In addition, while the *Crawford* opinion effectively re-emphasized the

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[164] Maryland v. Craig, 497 U.S. 836, 844–45 (1990).
[165] *Id.*
[166] *Id.*

importance of traditional confrontation,[167] it also focused on determining the veracity of witness's statements, suggesting that future lower courts may feel comfortable employing these minor limitations on the Sixth Amendment right if it helps to determine witness veracity.[168]

In addition, California courts would have broader discretion in determining when to employ the CCTV system. In most cases involving alleged child or sexual abusers, the defendant's wish to represent themselves instead of using a defense attorney during cross-examination would suggest an inherent likelihood of influence, if not actual intimidation, from the defendant. The *Craig* CCTV system already seems perfectly tailored, as it focuses on the state interests in protecting the physical and psychological well-being of vulnerable victims over a defendant's right to face-to-face confrontation, even without the added layer of intimidation stemming from being questioned directly by their abuser. As such, California courts could continue to employ the CCTV system whenever a criminal defendant facing allegations of child abuse from a child witness elects to represent themselves pro se, even if *Craig* itself is reconsidered. From there, California courts should be able to exercise discretion in choosing whether to extend that privilege to vulnerable adult witnesses on a case-by-case basis, considering the level of trauma experienced by the victim and their current emotional state.

IX. CONCLUSION

California courts should continue to utilize the *Craig* CCTV system or other means of protecting vulnerable child witnesses during cross-examination whenever a defendant accused of child abuse elects to represent themselves pro se. Both *Allen* and the forfeiture-by-wrongdoing exception lay a compatible framework for limiting criminal defendants' Sixth Amendment rights in cases in which their behavior has had an intimidating effect on testifying witnesses. By electing to personally cross-examine the child witness they are accused of abusing, defendants are intimidating vulnerable witnesses susceptible to manipulation. While *Craig* has been heavily scrutinized since the *Crawford* decision in 2004, *Allen* and the forfeiture-by-wrongdoing exception can and should be applied to remedy the same issues. In the event that *Craig* is reconsidered or overturned, California courts have other doctrines available to protect vulnerable child witnesses from a stressful and intimidating cross-examination. Protecting the rights of vulnerable witnesses is a crucial

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[167] Crawford v. Washington, 541 U.S. 36, 38 (2004).
[168] *See id*. at 74.

component of maintaining witness availability in child abuse cases. At the same time, the *Crawford* evidentiary standard requiring cross-examination for all testimony introduced in a criminal trial would still be upheld. Whether the limitation placed on a defendant's right to confrontation is a termination of the right to pro se representation or the introduction of a CCTV system, this proposal would give judges discretion to protect a defendant's confrontation rights to the maximum extent possible while preserving the mental stability of child witnesses. The sections in *Craig* regarding the state's interest in protecting the psychological well-being of vulnerable children through a slight modification to the Confrontation Clause have never been questioned nor invalidated and can be employed in these situations without fear or running afoul of *Crawford*'s intent.

Using this system would protect vulnerable children, who have already been subject to abuse and trauma, from another unnecessarily intimidating encounter with the individuals who took advantage of their youth and innocence, while also providing a route for judges and prosecutors that both avoids overreliance on *Craig* and affords further discretion to protect the integrity of the judicial process. Most importantly, this system would allow California courts—and like courts nationwide—to better serve child victims who deserve our sympathy and protection.