HEARING THE UNHEARD: CRAFTING A HEARSAY EXCEPTION FOR INTELLECTUALLY DISABLED INDIVIDUALS

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INTRODUCTION

Can a twenty-eight-year-old woman be considered a child of tender years? According to courts in Mississippi, that answer is "yes." During a trial for sexual battery of a mentally defective person, a judge allowed the adult victim's out-of-court statements to her aunt to be admitted pursuant to the tender years hearsay exception in the Mississippi Rules of Evidence.[1] This exception provides that a child's statements about sexual contact are admissible if the court determines that the statements are reliable and the child either testifies or is unavailable to testify and other evidence corroborates the statements.[2] In this case, the judge admitted the victim's statements because the exception does not specify that a child must be under a certain age to be considered a child of tender years; rather, while there is a rebuttable presumption that a child under the age of twelve is a child of tender years, a court can rule that chronologically older individuals are children of tender years based on the individual's mental and emotional age at the time he or she made the statements at issue.[3]

The exceptions for vulnerable persons vary in other states; however, overall, the treatment of these vulnerable persons has been far from uniform, and the majority of the focus that states have placed on vulnerable individuals has been on children. However, when it comes to violent crimes and abuse, particularly crimes of sexual abuse, people with intellectual disabilities experience far greater rates of victimization.[4]

Since sexual abuse is a prevalent problem for adults with intellectual disabilities, the justice system needs to ensure that the voices of these victims can be heard, instead of simply

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[1] *See* Russell v. State, 203 So. 3d 750 (Miss. Ct. App. 2016).

[2] MISS. R. EVID. 803(25).

[3] *See* Webb v. State, 113 So. 3d 592 (Miss. Ct. App. 2012).

[4] Leigh Ann Davis, *People with Intellectual Disability and Sexual Violence*, THE ARC (Aug. 2009), http://www.thearc.org/what-we-do/resources/fact-sheets/sexual-violence [https://perma.cc/5WKN-JMSN]; *see also* Nicholas Bala, *Canada's Empirically-Based Child Competency Test and its Principled Approach to Hearsay*, 19 ROGER WILLIAMS U. L. REV. 513, 530 (2014).

considering their needs as an afterthought when discussing children or the elderly. Nevertheless, courts must still protect the accused's Sixth Amendment right to confront his accuser, even when the accuser is intellectually disabled and deserving of special protection. Ultimately, there must be a balance between the defendant's constitutional rights, the victim's interests in having the perpetrator punished, and society's interest in having an effective justice system that operates with integrity and supports those who need it the most.[5]

This Comment will begin by discussing hearsay in general, including current practices regarding hearsay exceptions and the interaction of hearsay and confrontation rights, focusing on the changes in Supreme Court precedent over the years. Then, this Comment will discuss intellectual disability, including a history of the terminology in this area, mental age, and the participation of intellectually disabled individuals in the legal system. After this discussion, this Comment will propose a hearsay exception specifically tailored for statements made by intellectually disabled adults. The suggested exception will resemble tender years hearsay exceptions in several ways, but this Comment will maintain that the exception for intellectually disabled adults should be a separate exception because of the specific needs of these adult victims. Then, this Comment will argue that such an exception does not violate the accused's right to confrontation because the victims are either available to testify, entailing a discussion of competency, or if they are unavailable to testify, their non-testimonial statements are sufficiently reliable to be admitted. Finally, this Comment will include a discussion of the special challenges presented by statements made to medical personnel and forensic interviewers regarding their testimonial or non-testimonial nature and their interaction with the Confrontation Clause.

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[5] Eileen A. Scallen, *Coping with Crawford: Confrontation of Children and Other Challenging Witnesses*, 35 WM. MITCHELL L. REV. 1558, 1573 (2009).

I. BACKGROUND

A. A General Overview of Hearsay

Today, hearsay is regularly used in many court proceedings; in fact, one could say that "[e]xtensive use of hearsay is now the norm,"[6] leading many states to devote entire sections of their evidence codes to the topic. But what actually constitutes hearsay?

1. What is Hearsay?

Although scholars such as Jeremy Bentham have argued that no evidence should ever be excluded, giving us the principle that it is "better to admit flawed testimony for what it is worth, giving the opponent a chance to expose its defects, than to take the chance of a miscarriage of justice because the trier [of fact] is deprived of information[,]"[7] the Federal Rules of Evidence (as well as many state rules of evidence) provide that hearsay is generally inadmissible at trial.[8] A statement is hearsay if it is made out of court and is offered in evidence to prove the truth of the matter asserted.[9] One primary reason for excluding hearsay is that it has not been subjected to procedural safeguards to ensure its reliability; however, admitting it generally would simplify the rules of evidence and would be more convenient for witnesses, particularly those who are not located near the venue, not to mention the fact that "in the ordinary affairs of life hearsay is a well-recognized source of information[.]"[10]

To properly understand hearsay rules, though, it is important to look at the history of the use of hearsay in the legal system. In the early 1500s, courts "permitted and condoned the practice of

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[6] Myrna Raeder, *Remember the Ladies and the Children Too:* Crawford*'s Impact on Domestic Violence and Child Abuse Cases*, 71 BROOK. L. REV. 311, 312 (2005).

[7] Roger Park, *A Subject Matter Approach to Hearsay Reform*, 86 MICH. L. REV. 51, 51-52 (1987).

[8] *See* FED. R. EVID. 802.

[9] FED. R. EVID. 801(c). Almost any out-of-court statement admitted in court is some form of hearsay. The exception is when the statement is not offered as an alternative to testimony, but is instead offered simply to show that the assertion was made. *See* W.A. Craig, *Hearsay Evidence*, 46 THE ADVOCATE 729 (1988).

[10] Park, *supra* note 7, at 55, 60. Anytime someone says, "I heard" or "he said," their statement constitutes hearsay, but those are phrases one hears almost daily in everyday life.

the jury's obtaining information by consulting informed persons not called into court[;]" in fact, it was considered the juror's duty "to make inquiries about the facts" and "collect testimony[,]" such that verdicts were largely based on the stories of someone not brought into court.[11] As the legal system progressed in the 1500s, courts and juries began to rely on testimony offered during trial rather than out of court statements, but the pivotal moment regarding hearsay use came in the early 1600s during the trial of Sir Walter Raleigh.[12] Ultimately, the rule excluding the statements of absent declarants became standard procedure between 1675 and 1690, and in the early 1700s, courts stated that one reason for the rule was a lack of cross-examination, a reason still commonly given today.

Of course, when there is a rule, there will be exceptions. Exceptions to the rule prohibiting admission of hearsay are justifiable when the "circumstances reduce the danger that the trier [of fact] will give too much weight to a statement that has not been tested by cross-examination[,]" such as when there has been a substitute for cross-examination, there is no right to cross-examination, or the value of the out of court statement outweighs the chances of untrustworthiness.[13] Nevertheless, it can be difficult to determine whether a statement is hearsay or not, and thus whether the statement even could fall under a hearsay exception. In addition to the fact that a statement must be admitted to prove the truth of the matter asserted to constitute hearsay, "only declarative sentences ordinarily fall within the hearsay definition[,]" while imperative, exclamatory, and interrogatory sentences generally will not constitute hearsay.[14]

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[11] John H. Wigmore, *The History of the Hearsay Rule*, 17 HARV. L. REV. 437, 438-39 (1904).

[12] *Id.* at 441-43. In 1603, Sir Walter Raleigh was tried for treason, and his alleged accomplice had made statements implicating Raleigh before the Privy Council and in a letter, both of which were read to the jury. Although Raleigh attempted to persuade the judges to call his accomplice to testify, Raleigh was convicted and sentenced to death without being allowed to confront his accuser, who he believed would cave if called to testify in court. This case, and many others like it, led to the development of confrontation and hearsay rules, both of which were exported to the United States. *See* Crawford v. Washington 541 U.S. 36, 44 (2004).

[13] Park, *supra* note 7, at 69-70.

[14] Mark A. Sullivan, *Definition of Hearsay*, 140 N.J. LAW. 40, 40 (1991).

Even with such a guide, though, many statements will fall under one of the exceptions to the rule.

2. Current Hearsay Rules and Hearsay Exceptions

The Federal Rules of Evidence—and virtually every state's rules of evidence—define hearsay as a statement that "the declarant does not make while testifying at the current trial or hearing[,]" and that "a party offers in evidence to prove the truth of the matter asserted in the statement."[15] These rules provide that hearsay is inadmissible unless otherwise provided by statute or rule.[16] However, there are multiple exceptions to the rule against hearsay, and many of the exceptions are ubiquitous across the different states. The majority of those exceptions, although certainly important, are largely irrelevant to this Comment; however, two common exceptions are—the excited utterance exception[17] and the medical diagnosis or treatment exception[18]—because courts could potentially admit the statements of intellectually disabled adults under those exceptions in the absence of an exception like that proposed by this Comment, provided the statements meet the applicable criteria.[19]

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[15] FED. R. EVID. 801(c); *see also* GA. CODE ANN. § 24-8-801(c) (2016); N.H. R. EVID. 801(c); S.D. CODIFIED LAWS § 19-19-801(c) (2016). A statement generally includes oral assertions, written assertions, and nonverbal conduct when the conduct was intended as an assertion. FED. R. EVID. 801(a).

[16] FED. R. EVID. 802; *see also* ALA. R. EVID. 802; CONN. CODE EVID. 8-2; KY. R. EVID. 802; WIS. STAT. § 908.02 (2014).

[17] The excited utterance exception provides that a statement "relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused" is admissible at trial, regardless of the rule against hearsay. MISS. R. EVID. 803(2); PA. R. EVID. 803(2); TEX. R. EVID. 803(2).

[18] The medical diagnosis or treatment exception provides that any statement made for the purpose of medical diagnosis or treatment that is reasonably pertinent to that treatment is admissible in court, notwithstanding the rule against hearsay, provided that the statement "describes medical history; past or present symptoms or sensations; their inception; or their general cause." W.V. R. EVID. 803(4)(B); *see also* N.M. STAT. ANN. § 11-803(4) (LexisNexis 2017); HAW. REV. STAT. ANN. § 626-1, R. 803(b)(4) (LexisNexis 2017).

[19] *See* State v. Pyles, 2015-Ohio-5594, 2015 Ohio App. LEXIS 5391 (Ohio Ct. App. Dec. 30, 2015); Dave Gordon, Note, *Is There an Accuser in the House?: Evaluating Statements Made to Physicians and Other Medical Personnel in the Wake of* Crawford v. Washington *and* Davis v. Washington, 38 N.M. L. REV. 529, 529 (2008).

Additionally, some states have adopted hearsay exceptions for specific classes of vulnerable members of society. One such exception, although not yet adopted by every state, has become more common: the tender years exception.[20] Unlike some of the more established exceptions, tender years exceptions vary widely from state to state. Many limit the exception to children under a certain age, which could range from children under ten to children under the age of sixteen.[21] A large majority of states also require that the court find that the child's statement is reliable, and provide that the exception only applies if the child either testifies or is unavailable and there is corroborating evidence of the statement.[22] Further, some states limit the exception to trials of specific crimes;[23] while others limit it to prosecutions of certain classes of crimes, generally sexual offenses, abuse, and neglect.[24] Other states have more specific limitations on their tender years hearsay exceptions.[25]

Despite these differences and limitations, tender years exceptions provide an alternative to other hearsay exceptions,

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[20] *See generally* Nat'l Ctr. Prosecution Child Abuse & Nat'l Dist. Attorneys Ass'n, *Rules of Evidence or Statutes Governing Out of Court Statements of Children*, NAT'L DIST. ATTORNEYS ASS'N (May 2014), http://www.ndaajustice.org/pdf/Statutes%20Governing%20out%20of%20Court%20Statements%20of%20Children.pdf [https://perma.cc/VC96-RTEV]. Although this Comment is not intended to provide an exhaustive discussion of tender years exceptions in every state, it provides a sampling of some of the relevant exceptions.

[21] *See* ARK. R. EVID. 803(25); MINN. STAT. ANN. § 595.02(n) (West 2016); FLA. STAT. § 90.803(23) (2016).

[22] MISS. R. EVID. 803(25); N.D. R. EVID. 803(24). However, some states require that there be independent proof of the act regardless of whether the child testifies in court. *See* OHIO R. EVID. 807(A)(3). Not all states allow the either-or option. Some states require the child to testify, while others will only allow the out-of-court statement if the child is unavailable. *Compare* MICH. R. EVID. 803A, *with* HAW. REV. STAT. ANN. § 626-1, R. 804(b)(6) (LexisNexis 2015).

[23] *See* 725 ILL. COMP. STAT. 5/115-10 (West 2017).

[24] GA. CODE ANN. § 24-8-820 (2016); NEV. REV. STAT. § 51.385 (2015).

[25] For example, some may only admit such hearsay if the statement was recorded. *See* UTAH R. CRIM. P. 15.5. On the other hand, a recorded statement by a victim under sixteen is not even considered hearsay at all in Alaska. *See* ALASKA R. EVID. 801(d)(3). In other states, the exception may only apply when the statement was made to a specific individual. *See* MD. CODE ANN., CRIM. PROC. § 11-304 (LexisNexis 2017) (allowing statements only if they were made to a physician, psychologist, nurse, social worker, certain school officials, counselor, or therapist); TEX. CODE CRIM. P. ANN. art. 38.072 (West 2011) (applying the tender years hearsay exception only to statements the child made to the first adult he or she told about the incident).

particularly when the child's statement may be difficult to classify. Although not yet adopted by every state, these exceptions are still more prevalent than exceptions for vulnerable adults, whether that be intellectually disabled, developmentally disabled, or elderly adults.

Additionally, some states have adopted a residual hearsay exception which provides that a statement not covered by an enumerated exception is admissible if it has "equivalent circumstantial guarantees of trustworthiness[,]" is "offered as evidence of a material fact[,]" is "more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts," and admission serves the purpose of the rules of evidence and the interest of justice.[26] This exception is another avenue to admittance of an intellectually disabled individual's out of court statements. However, for some of the same reasons that vulnerable children need a specially tailored exception,[27] adults with intellectual disabilities need a specially tailored exception for their statements, and some states have responded to that need.

But, of the states that have, there is a large variety in their responses to the needs of vulnerable adults. Regarding hearsay exceptions, some states include some class of vulnerable adults within their tender years exceptions;[28] others have a separate hearsay exception for these adults,[29] and at least one state has a

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[26] S.D. CODIFIED LAWS § 19-19-807 (2016); *see also* OR. REV. STAT. § 40.460(28) (2015); N.D. R. EVID. 807.

[27] Lynn McLain, *Children are Losing Maryland's "Tender Years" War*, 27 U. BALT. L. REV. 21, 25-26 (1997).

[28] IND. CODE ANN. § 35-37-4-6 (West 2016) (including children under 14, individuals with mental disabilities, and individuals with mental illness, intellectual disability, dementia, or other physical or mental incapacity within a class of "protected person[s]"); MINN. STAT. § 595.02 (2016) (applicable to children under ten or the mentally impaired); OKLA. STAT. tit. 12, § 2803.1 (2013) (applicable to children and incapacitated persons); S.C. CODE ANN. § 17-23-175 (2006) (stating that "child" includes both individuals under twelve and those who function as if they were under twelve); TEX. CODE CRIM. PROC. ANN. art. 38.072 (West 2011) (covering children under fourteen and persons with a disability); VT. R. EVID. 804A (including children under twelve and individuals with mental illnesses or developmental disabilities).

[29] COLO. REV. STAT. § 13-25-129.5 (2016); DEL. CODE ANN. tit. 11, § 3516 (West 2018); FLA. STAT. § 90.803 (2016); MONT. CODE ANN. § 46-16-221 (2017); MONT. CODE ANN. § 46-16-222 (2017).

mixture of both.[30] Of course, there are some other notable differences between the statutes and rules of these states, including the fact that some codify the exceptions within their statutes, while others only include the exception within the rules of evidence.[31]

One important difference is the class of people covered by the rule or statute, which is not uniform among the states, regardless of whether the states included these individuals within the tender years exception or within a separate exception. Some of the language commonly used to describe these classes of individuals includes "person with an intellectual and developmental disability,"[32] adults who are impaired or incapacitated,[33] or simply disabled adults.[34] Additionally, much like with tender years exceptions, some states have specific limitations, such as inapplicability to statements made in preparation for a legal proceeding,[35] or applying only to recorded statements of investigative interviews.[36] However, hearsay exceptions cannot be considered in isolation, because admission of hearsay invites problems with the Confrontation Clause.

B. Interactions Between Hearsay Rules and the Confrontation Clause

When out of court statements are admitted, defendants will likely raise objections under the Confrontation Clause of the Sixth Amendment, as the declarant was not subject to cross-examination at the time they made the statement, nor was the jury or judge present to see the declarant's demeanor when

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[30] *Compare* 725 ILL. COMP. STAT. ANN. 5/115-10 (West 2018) (covering children under thirteen and individuals with intellectual disabilities), *with* 725 ILL. COMP. STAT. ANN. 5/115-10.3 (West 2018) (protecting elderly adults, adults with developmental disabilities, and individuals with mental incapacity).

[31] Such a distinction can prove important when it comes to consistency (in cases where other hearsay exceptions are part of the rules of evidence but this exception is statutory) and because rules of evidence are less vulnerable to lobbying groups. *See* McLain, *supra* note 27.

[32] COLO. REV. STAT. § 13-25-129.5 (2016). *See also* MONT. CODE ANN. § 46-16-221 (2017).

[33] DEL. CODE ANN. tit. 11, § 3516 (West 2018); OKLA. STAT. tit. 12, § 2803.1 (2013).

[34] FLA. STAT. § 90.803 (2016); TEX. CODE CRIM. PROC. ANN. art. 38.072 (West 2017).

[35] *See* VT. R. EVID. 804A.

[36] *See* S.C. CODE ANN. § 17-23-175 (2006).

making the statement. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]"[37] The Supreme Court of the United States has frequently been called on to interpret this amendment in light of the different hearsay exceptions.

1. *Ohio v. Roberts*

In 1980, the Supreme Court decided *Ohio v. Roberts*, a case involving charges for check forgery and possession of stolen credit cards.[38] At trial, the court admitted the transcripts of preliminary hearing testimony, despite the defendant's Confrontation Clause objection.[39] The Supreme Court stated that applying the Confrontation Clause to every statement made by an absent declarant would "abrogate virtually every hearsay exception, a result long rejected as unintended and too extreme."[40]

Granted, the Court did state that face to face confrontation is necessary for "testing the recollection and sifting the conscience of the witness," as well as for "compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief."[41] However, it also stated that the defendant's interest in confrontation must be balanced against other interests, and sometimes the defendant's interest must give way to "considerations of public policy and the necessities of the case."[42]

Ultimately, the Court ruled that the prosecution must either produce the witness or demonstrably show that the witness is unavailable.[43] In cases where the witness is unavailable, the Confrontation Clause merely requires that the statement of the absent witness have "indicia of reliability" that "afford the trier of fact a satisfactory basis for evaluating the truth of the prior

[37] U.S. CONST. amend. VI.
[38] Ohio v. Roberts, 448 U.S. 56, 58 (1980).
[39] *Id.* at 58-60.
[40] *Id.* at 63.
[41] *Id.* at 63-64 (quoting Mattox v. United States, 156 U.S. 237, 242-43 (1895)).
[42] *Id.* at 64 (quoting *Mattox*, 156 U.S. at 243).
[43] *Id.* at 65.

statement."[44] Statements bear such indicia of reliability when they either fall under a firmly rooted hearsay exception or when they have "particularized guarantees of trustworthiness."[45]

2. *Crawford v. Washington*

However, in 2004, the Supreme Court decided *Crawford v. Washington*, overruling the *Roberts* reliability framework by placing a greater emphasis on the right of confrontation. In a trial involving assault and attempted murder, the prosecution played a taped interview of the defendant's wife, even though she was unavailable to testify in court.[46] Ultimately, the Supreme Court determined that admission of the wife's statement violated the defendant's right to confront witnesses against him, finding that "[l]eaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices."[47]

The Supreme Court took issue with the "malleable standard" and "open-ended balancing tests" of *Roberts*.[48] Even though the reliability of out-of-court statements was central to the decision in *Roberts*, and the Confrontation Clause's "ultimate goal is to ensure reliability of evidence," the Confrontation Clause is a "procedural rather than a substantive guarantee[;]" it focuses on how reliability is to be determined.[49] However, since the Confrontation Clause only applies to persons who are witnesses against the accused—those who give testimony—the Confrontation Clause only bars testimonial statements.[50]

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[44] *Id.* at 65-66 (quoting Mancusi v. Stubbs, 408 U.S. 204, 213 (1972)).

[45] *Id.* at 66.

[46] The state's marital privilege barred a spouse from testifying without the other spouse's consent. Crawford v. Washington, 541 U.S. 36, 38-40 (2004). Michael Crawford and his wife, Sylvia, had gone to Kenneth Lee's apartment because Lee had allegedly tried to rape Sylvia. Both Crawford and Sylvia were interrogated about the incident. Crawford stated that he believed Lee was reaching for something in his pocket before Crawford stabbed him; however, Sylvia stated Lee did not have anything in his hands. The trial court admitted her interview, finding that her statement was trustworthy, and the Washington Supreme Court found that the statement "interlocked" with Crawford's confession, making it reliable and thus admissible. *Id.* at 38-41.

[47] *Id.* at 51.

[48] *Id.* at 60, 68.

[49] *Id.* at 61.

[50] *Id.* at 51.

Under the new framework, testimonial hearsay is admissible only when the declarant is unavailable at trial and the defendant had a prior opportunity to cross-examine the declarant. For non-testimonial hearsay, however, the Supreme Court declared that states are afforded some flexibility in determining their own hearsay rules, and many states retain some form of the *Roberts* reliability framework for such statements.[51] However, the Supreme Court provided little guidance about the distinction between the two. It did state that prior testimony and police interrogations produced testimonial hearsay; ultimately though, it stated that "[w]e leave for another day any effort to spell out a comprehensive definition of 'testimonial.'"[52] Nevertheless, when testimonial statements are involved, "the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation."[53]

3. Other Notable Cases

Of course, in order to have an adequate framework for understanding later arguments in this Comment, it is important to look at two other major cases dealing with hearsay and confrontation. One case involves special protections for child witnesses despite the right to confrontation, while the other provides some clarification on the testimonial and non-testimonial distinction.

a. Maryland v. Craig

In *Maryland v. Craig*, the Supreme Court ruled that the Confrontation Clause does not bar a child from testifying by closed circuit television when the trial court makes a specific finding of necessity for the procedure on a case-by-case basis.[54] Although the

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[51] Jonathan Scher, *Out-of-Court Statements by Victims of Child Sexual Abuse to Multidisciplinary Teams: A Confrontation Clause Analysis*, 47 FAM. CT. REV. 167, 171 (2009).

[52] *Crawford*, 541 U.S. at 68.

[53] *Id.* at 68-69.

[54] Maryland v. Craig, 497 U.S. 836, 857-58 (1990). Sandra Ann Craig was charged with child abuse, sexual offenses, perverted sexual practice, assault, and battery against children who attended her kindergarten center. A Maryland statute permitted a victim of child abuse to testify outside of the courtroom by one-way closed circuit

Supreme Court had previously held that the Confrontation Clause guarantees a "face-to-face meeting," in this case, the Court stated that it had never held that the Confrontation Clause guarantees an *absolute right* to that style of confrontation.[55] Ultimately, the Court stated that the Confrontation Clause involves several elements, including "physical presence, oath, cross-examination, and observation of demeanor by the trier of fact[,]" which combine to ensure the reliability of evidence.[56]

In part because the statute at issue in *Craig* provided all but the physical presence element, and because the statute required a case specific determination for each child, the Supreme Court ruled that such a provision was constitutional, noting that although there is a "preference" for face to face confrontation, it "must occasionally give way to considerations of public policy and the necessities of the case[.]"[57] Granted, this right is not easily dispensed with: the right to confrontation may only be denied when necessary for furthering an important public policy and where the testimony is otherwise reliable.[58]

It is important to note that *Craig* came before the Court in *Crawford* condemned the amorphous reliability standards of *Roberts*.[59] Although the Court in *Crawford* did not explicitly do so, and only the concurrence cited to *Craig* for the proposition that the Confrontation Clause was designed to ensure the reliability of evidence,[60] some commentators have argued that *Crawford*

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television if the child would suffer serious emotional distress that would render him or her unable to reasonably communicate his or her testimony in the courtroom. *Id.* at 840-41. The trial court found the children competent to testify despite the emotional distress they would face in the defendant's presence and thus allowed them to testify by closed circuit television. Although the Maryland Court of Appeals reversed, the Supreme Court ultimately upheld the use of this special procedure. *Id.* at 860. Some states also allow adults with intellectual or developmental disabilities to testify by closed circuit television. *See* FLA. STAT. ANN. § 92.54 (2017); 725 ILL. COMP. STAT. 5/106B-5 (2016); IND. CODE ANN. § 35-37-4-8 (West 2012); LA. STAT. ANN. § 15:283 (2017).

[55] *Craig*, 497 U.S. at 844. In *Coy v. Iowa*, the Supreme Court struck down a procedure that involved placing a screen in front of the child victim where there were no individualized findings of necessity. 487 U.S. 1012, 1014-15, 1022 (1988).

[56] *Craig*, 497 U.S. at 846.

[57] *Id.* at 849 (quoting *Mattox*, 156 U.S. at 243).

[58] *Id.* at 850.

[59] Crawford v. Washington, 541 U.S. 36, 60 & 68 (2004).

[60] *Id.* at 74 (Rehnquist, C.J., concurring).

overruled *Craig*.[61] However, *Craig* did not address hearsay; it dealt only with the form confrontation should take when the witness was available and competent to testify,[62] and several lower courts have declined to rule that *Crawford* overruled *Craig*.[63]

b. Davis v. Washington

Two years after *Crawford*, the Supreme Court provided further clarification on the distinction between testimonial and non-testimonial hearsay in *Davis v. Washington*.[64] First, the Supreme Court stated that it is the "testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause."[65] Therefore, the Court made clear that non-testimonial statements may be regulated under the *Roberts* reliability framework and traditional rules of evidence, while testimonial statements, or statements that are akin to testimony at trial, must satisfy the Confrontation Clause. Of course, the distinction between testimonial and non-testimonial statements was still blurred, and the Supreme Court declined to provide an exhaustive classification of all statements, or even just of statements made to police.

Therefore, some statements to police will be non-testimonial, such as statements that are made during police interrogations "under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency."[66] On the other hand, statements are testimonial if the circumstances under which they were made do

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[61] *See generally* David M. Wagner, *The End of the "Virtually Constitutional"? The Confrontation Right and* Crawford v. Washington *as a Prelude to Reversal of* Maryland v. Craig, 19 REGENT U. L. REV. 469 (2007).

[62] Scallen, *supra* note 5, at 1592.

[63] *See, e.g.*, United States v. Yates, 438 F.3d 1307, 1313-18 (11th Cir. 2006); United States v. Bordeaux, 400 F.3d 548, 553-54 (8th Cir. 2005).

[64] 547 U.S. 813 (2006). This opinion actually involved two cases—*Davis v. Washington* involved a 911 call made in the context of a domestic disturbance, and *Hammon v. Indiana* involved a police response to a domestic disturbance and interviews with the parties in separate rooms after the fact. *Id.* at 817, 819.

[65] *Id.* at 821.

[66] *Id.* at 822.

not indicate an ongoing emergency and the purpose of the police interrogation is to "establish or prove past events potentially relevant to later criminal prosecution."[67] Regardless of whether there is an interrogation, it is the statements of the declarant, not the questions asked, that ultimately must be evaluated to determine whether the statements are testimonial.[68]

Although the Supreme Court defined testimonial statements in the context of police interrogations, it did note that individuals who are not law enforcement officers, such as 911 operators, may be agents of law enforcement when they are conducting the interrogation, making some statements made to non-police officers testimonial.[69] Of course, the Supreme Court also provided several caveats to its decision in this case. First, it stated that the rules it adopted applied only to the narrow situations involved.[70] Second, it stated that "formality is indeed essential to testimonial utterance."[71] Finally, a defendant who wrongfully causes the absence of a witness forfeits any Confrontation Clause claims regarding the witness's out-of-court statements.[72] Therefore, much is up for debate regarding hearsay and confrontation, particularly in the context of crimes involving vulnerable victims.

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[67] *Id.*
[68] *Id.* at 822-23 n.1.
[69] *Id.* at 823 n.2.
[70] *Id.* at 830-31 n.5.
[71] *Id.*
[72] *Id.* at 833.

C. A Brief Overview of Intellectual Disabilities

1. Terminology and History of Intellectual Disability[73]

Intellectual disability is commonly defined as "significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social and practical adaptive skills[,]" that originate before the age of eighteen.[74] These elements were all accepted in the United States by the early 1900s; granted, the terminology and definition have been refined over time.[75] However, "[t]he history of the classification of mental disorders most likely began with the origin of human beings."[76] Of course, in the past, the demands of the environment were quite different, meaning that fewer people likely had difficulty coping intellectually with the world around them, so fewer people were seen as needing a separate support system.[77]

Nevertheless, a classification system developed, first beginning in the United States with the category of idiocy or insanity in the 1840 Census.[78] Some of the terms that have been used to refer to these individuals include feeble minded, idiot,

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[73] Many older sources refer to intellectual disability as "mental retardation;" however, there has been a shift away from this term. *See* Hall v. Florida, 134 S. Ct. 1986, 1990 (2014); Tony Mauro, *Court Throws Out 'Mental Retardation'*, USA TODAY (June 1, 2014, 8:19 PM), http://www.usatoday.com/story/opinion/2014/06/01/hall-florida-mental-retardation-intellectual-disability-supreme-court-column/9848687 [https://perma.cc/Y9WQ-WFCD]; AM. ASS'N ON INTELLECTUAL & DEVELOPMENTAL DISABILITIES, INTELLETUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 11 (11th ed. 2010) (stating that mental retardation and intellectual disabilities are essentially synonymous). Although this Comment will discuss the change in greater detail *infra*, it is important to note the change here to show the relevancy of several sources used in this Comment.

[74] SIMON WHITAKER, INTELLECTUAL DISABILITY: AN INABILITY TO COPE WITH AN INTELLECTUALLY DEMANDING WORLD 13 (2013); AM. ASS'N ON INTELLECTUAL & DEVELOPMENTAL DISABILITIES, *supra* note 73, at 11.

[75] Fred J. Biasini et al., *Mental Retardation: A Symptom and a Syndrome, in* CHILD AND ADOLESCENT PSYCHOLOGICAL DISORDERS: A COMPREHENSIVE TEXTBOOK 6, 8 (Sandra D. Netherton, Deborah Holmes & C. Eugene Walker eds., 1999).

[76] Sandra D. Netherton & C. Eugene Walker, *Brief History of DSM-IV and ICD-10, in* CHILD AND ADOLESCENT PSYCHOLOGICAL DISORDERS: A COMPREHENSIVE TEXTBOOK *supra* note 75, at 2.

[77] *See* WHITAKER, *supra* note 74, at 4 (noting that in an agricultural society where many worked the land, the intellectual demands of society were quite different than the demands placed on individuals today).

[78] Netherton & Walker, *supra* note 76.

moron, mentally retarded, or more recently, intellectually disabled.[79] Generally, the classification system, regardless of the terms used, has been based on a person's IQ.[80]

However, intelligence, or "general mental ability[,]" is only one component of intellectual disability.[81] The other major component of intellectual disability is adaptive behavior, or "the ability to perform daily activities required for personal and social sufficiency [].”[82] Impairments in both areas are ultimately what qualify an individual to be classified as intellectually disabled.

The education system developed its own classification system outside of the medical and psychosocial classifications. The focus in education is the predicted ability to learn, which has led to classifications of educable, trainable, and untrainable.[83] Regardless of the classification system used, intellectual disability is a challenge for the individuals and their families,[84] and the justice system must have "a construct that identifies people who are likely to be vulnerable to criminal behavior[.]"[85]

Another important factor to look at in considering the development of the definition of intellectual disability is mental age. In addition to sometimes being included in various "tender years" exceptions, many adults with intellectual disabilities are labeled as having the "mental age" of a child.[86] Mental age is

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79 Biasini et al., *supra* note 75, at 8-9. One reason for the relatively recent change in terminology from mental retardation to intellectual disability involved the underlying construct of the terms and where the disability resides: mental retardation "viewed the disability as a defect within the person," but intellectual disability "views the disability as the fit between the person's capacities and the context in which the person is to function." AMERICAN ASS'N ON INTELLECTUAL & DEVELOPMENTAL DISABILITIES, *supra* note 73, at 13.

80 Biasini et al., *supra* note 75, at 9. However, IQ tests do have their limitations. *See generally* AMERICAN ASS'N ON INTELLECTUAL & DEVELOPMENTAL DISABILITIES, *supra* note 73, at 35-41.

81 *Id.* at 15.

82 Biasini et al., *supra* note 75, at 15. Although adaptive behavior can be difficult to measure, assessments generally focus on "how well individuals can function and maintain themselves independently and how well they meet the personal and social demands imposed on them by their cultures." *Id.*

83 *Id.* at 9-10.

84 *Id.* at 6.

85 *See* WHITAKER, *supra* note 74, at 19.

86 *See supra* Section I.A.2.

frequently tied to IQ scores,[87] meaning that it is closely associated with intellectual disability.[88] It can be defined as the "age of an average child who would obtain the score achieved by the individual being tested."[89] Early classification systems used the developmental age of an individual to put them in groups based on where their development was halted.[90] Currently, the educational system's classifications of "educable" and "trainable" label students on the grade level he or she is likely to be able to obtain.[91] Although this may be an imperfect system in that it may cause others to view these adults as lesser,[92] it is true that the mental function of these adults is more like that of children, justifying having special exceptions for these adults.[93]

2. Intellectually Disabled Individuals and the Legal System

When it comes to the legal system, the terminology is a bit different. States have adopted a wide variety of terms to classify various groups of vulnerable individuals, and in many cases, a state will have multiple different classifications, with definitions varying depending on the needs of the state. Some states have retained the classification of mental retardation,[94] while at least one state includes "[l]unatic" in its laws.[95] However, most states have other classifications, which can include "vulnerable adult," "person with a disability or persons with a mental disability," "dependent persons," "impaired adults," "person with an

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[87] WHITAKER, *supra* note 74, at 4 (stating that with the development of the IQ test, the degree of an individual's disability could be quantified).

[88] *See supra* Section I.C.1.

[89] WHITAKER, *supra* note 74, at 5.

[90] Biasini et al., *supra* note 75, at 8.

[91] *Id.* at 9-10.

[92] *See generally* Janine Benedet & Isabel Grant, *Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Evidentiary and Procedural Issues*, 52 MCGILL L.J. 515 (2007).

[93] 13 HUMAN RIGHTS WATCH, BEYOND REASON: THE DEATH PENALTY AND OFFENDERS WITH MENTAL RETARDATION, No. 1(G) (2001), *available at* https://www.hrw.org/sites/default/files/reports/ustat0301.pdf [https://perma.cc/G4YF-KTWE].

[94] *See* N.M. STAT. ANN. § 31-9-1.6(E) (2016) (stating that mental retardation means subaverage intellectual functioning combined with adaptive behavior deficits); N.C. GEN. STAT. § 35A-1101(13) (2015).

[95] *See* GA. CODE ANN. § 1-3-3 (2016) (providing that lunatic includes anyone of unsound mind).

intellectual disability," or "persons with a developmental disability," just to name a few. However, for purposes of this Comment, a summary of the categories of vulnerable adults, persons with development disabilities, and persons with intellectual disabilities should suffice.

Vulnerable adult is probably the broadest classification commonly used, as it generally includes some of the more specific categories, but what individuals are included in this classification can vary widely from state to state. Although vulnerable adult can be defined simply as an adult who "lacks the physical or mental capacity to provide for the adult's daily needs[,]"[96] it can also be defined as a person who cannot function normally[97] due to certain debilitating conditions.[98]

Adults with developmental disabilities, although a narrower classification than vulnerable adult, can sometimes include adults with intellectual disabilities.[99] Developmental disability can be defined as either an intellectual disability or a disorder caused by some other mental or physical condition that manifests before a certain age, frequently twenty-two, that will likely continue indefinitely, and which may cause functional limitations in a person's daily life as well as reflect a need for special, individualized services and support.[100]

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[96] MD. CODE ANN., CRIM. LAW § 3-604(a)(10) (LexisNexis 2016).

[97] *See* ALASKA STAT. § 47.24.900(21) (2015) (persons who are unable to meet their own needs or seek help without assistance); MO. REV. STAT. § 491.075(5) (2016) (including persons who lack the ability to function or the mental capacity to consent or persons whose developmental level is halted around the age of fourteen or less); UTAH CODE ANN. § 62A-3-301(28) (LexisNexis 2015) (covering persons who cannot provide for their own personal protection; necessities; services for their health, safety, or welfare; or persons who cannot carry out the activities of daily living, manage their financial resources, or understand the consequences of staying in an abusive situation).

[98] ALASKA STAT. § 47.24.900(21) (2015) (persons who cannot care for themselves because of "incapacity, mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication, fraud, confinement, or disappearance"); MO. REV. STAT. § 491.075(5) (2016) (persons who cannot function because of an "inadequately developed or impaired intelligence or a psychiatric disorder").

[99] Although this is usually the case, some states only include adults with impairments similar to those caused by intellectual disabilities within the category of developmental disability. *See* 405 ILL. COMP. STAT. 5/6-103.2 (2016).

[100] *See* KAN. STAT. ANN. § 39-1803(f) (West 2018); N.C. GEN. STAT. § 122C-3(12a) (2015); 40.1 R.I. GEN. LAWS § 1-8.1 (2015); TENN. CODE ANN. § 33-1-101(11) (2015).

Finally, the last relevant category that states frequently use in identifying individuals who are in need of support and protection is that of intellectual disability. Most state definitions for intellectual disability follow the definition accepted by the scientific community.[101] As such, intellectual disability requires sub-average intellectual functioning and deficits in adaptive behavior, and it must manifest before the age of eighteen, or in some cases, twenty-two.[102]

In addition to merely classifying these adults, some states have enacted criminal provisions protecting some class of vulnerable adults, even though these adults can of course still be victims of crimes of general applicability. For example, some states have specific statutes relating to abuse of a vulnerable adult, whether it be physical abuse or sexual abuse,[103] while other states have statutes providing that a crime against a vulnerable adult will be prosecuted at a higher level than the original underlying offense.[104] However, despite the steps taken to protect these individuals from crimes, when they are victims or witnesses of crimes, they still face barriers to having their testimony admitted, making prosecutions and convictions hard to obtain.[105]

II. STATES SHOULD ADOPT A SPECIFIC HEARSAY EXCEPTION FOR INDIVIDUALS WITH INTELLECTUAL DISABILITIES

As a class, intellectually disabled adults deserve protection from crimes as well as protection from emotional trauma, and they deserve to have their claims of sexual crimes heard and taken seriously.[106] However, of the states that do have a hearsay exception for some class of vulnerable adults, there is little

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[101] *See supra* Section I.C.1.

[102] FLA. STAT. § 393.063(24) (2017); IND. CODE ANN. § 35-36-9-2 (West 2015); MISS. CODE ANN. § 41-21-61(f) (2013); 50 PA. CONS. STAT. § 4102 (2016).

[103] *Compare* ARIZ. REV. STAT. ANN. § 13-3623 (2010), *with* MISS. CODE ANN. § 43-47-18 (2015).

[104] DEL. CODE ANN. tit. 11, § 1105 (2007).

[105] Benedet & Grant, *supra* note 92, at 519.

[106] Although all classes of disabled individuals deserve to be protected and taken seriously, and states should seriously consider the language they use in drafting this proposed exception, this Comment is focused strictly on the intellectually disabled and their complaints of various sexual offenses, in part due to the difficulties in prosecuting sex crimes against these victims. *See generally* Davis, *supra* note 4; Benedet & Grant, *supra* note 92, at 519.

uniformity in the rules.[107] Given the wide variety of hearsay exceptions and the disparate treatment these individuals receive in different states, a new hearsay exception specifically designed with intellectually disabled adults in mind is in order.

A. The Proposed Exception

Crafting a single definite exception that would be applicable in every state would be virtually impossible without changing many other state laws, particularly given the wide variety of definitions and classifications present in state law as well as the variety in state criminal codes.[108] However, a template for states to follow in crafting this exception is useful. At minimum, states should consider making an exception for any individual with an intellectual disability who is a victim or a witness of a large class of sex crimes. In some cases, it may be wise for a state to include a larger class of individuals, such as vulnerable adults, within the parameters of the exception, and states should feel free to make the exception more generally applicable.

Nevertheless, as a starting point, states should consider adopting some version of the following exception:

> 1. A statement by an intellectually disabled individual (or other category to be determined by the state), as defined in ___________ (the relevant provision of the state's code or instead include a definition either at this point in the statute or at some other point in the statute), is admissible if:
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> > A_1. the individual is the victim or witness of one of a certain class of crimes (with the classes of crimes included, such as sexual offenses, listed here);[109]

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[107] *See supra* Section I.A.2.

[108] *See supra* Section I.C.2.

[109] This could be something such "any act of sexual contact[,]" or other broad classification. *See* MISS. R. EVID. 803(25).

Or, states could choose to explicitly list the crimes to which this exception is applicable, as below.

> A_2. the individual is a victim or witness of one of the crimes listed in subsection B;

If the states choose option A_2, they would have a section B that lists the provisions of the state's code to which the exception is applicable.[110]

> B (or C, if the state chooses A_2). (i) the statement is non-testimonial; or (ii) the declarant is unavailable and the defendant had prior opportunity to cross examine the declarant; and
>
> C (or D, if the state chooses A_2). nothing in this section should be understood as precluding admittance of the statement of an intellectually disabled individual under another recognized hearsay exception.

States may also choose to add a section that provides the jury will be instructed that it is for them to determine the weight and credibility to give the statement given all the circumstances, but some states may find including such a provision in the rule unnecessary. Further, some states may also choose to require that the prosecution give the defendant notice of intent to use such a statement.

B. Comparing the Proposed Exception to Tender Years Exceptions While Still Maintaining It as a Separate Exception

As one can see, this exception is somewhat similar to many of the current tender years hearsay exceptions, and for good reason. States should feel free to model this new hearsay exception on their tender years exception, but states should avoid the temptation to include the exception for intellectually disabled adults within an existing tender years exception to protect the autonomy and personhood of these adults. Nevertheless, creating

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[110] *See* COLO. REV. STAT. § 13-25-129.5(2)(b) (2016).

this exception will help these adults access the justice system, something that has been a problem for adults with intellectual disabilities throughout the developed world, and it will create flexibility in the rules of evidence to ensure both that their stories are heard and that they are respected as a human being.[111]

Modeling the proposed exception on tender years exceptions makes sense, because the reasons that justify states having tender years exceptions also justify an exception in cases of people with intellectual disabilities.[112] For example, both child abuse and abuse of vulnerable persons, in particularly intellectually disabled persons, are widespread problems.[113] Further, in both cases, the victim is likely the only witness, and the victim may have trouble remembering facts at trial or may have trouble effectively giving their testimony in court.[114] This trouble is due in part because vulnerable victims, including children, the elderly, and the intellectually disabled are likely to face higher levels of emotional or mental distress after being required to give their testimony in the courtroom,[115] and, in the cases of vulnerable adults who have been sexually abused, they face the skepticism that is often confronted by rape victims generally as well as "insensitivity" to their "developmental stage."[116] Also, similarly to child victims, it often takes special techniques to "elicit critical information from victims who have difficulties communicating[.]"[117]

These adults are "among the world's most vulnerable and at-risk populations, both because they are different and because their

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[111] Benedet & Grant, *supra* note 92, at 517 & 519.

[112] Teresa B. Watson, *Combating Crime Against the Elderly: Does the Public Interest Warrant a Special Hearsay Exception?*, 32 AM. J. TRIAL ADVOC. 585, 590-91 (2009) (noting that states have an interest in protecting every individual from crimes, but in some cases, special protections are warranted).

[113] *See* McLain, *supra* note 27, at 25; Raeder, *supra* note 6.

[114] *See* McLain, *supra* note 27, at 25; Andrew Jay McClurg, *Preying on the Graying: A Statutory Presumption to Prosecute Elder Financial Exploitation*, 65 HASTINGS L.J. 1099, 1105 (2014). "Oral testimony under oath, cross-examination, and the requirement to repeat one's story over and over again" present some major challenges for individuals with intellectual disabilities, yet these challenges should not prevent these women from being heard. Benedet & Grant, *supra* note 92, at 524.

[115] *See* Watson, *supra* note 112, at 593.

[116] Myrna S. Raeder, *Enhancing the Legal Profession's Response to Victims of Child Abuse*, 24 CRIM. JUST. 12, 14 (2009).

[117] Mike Hatch, *Great Expectations—Flawed Implementation: The Dilemma Surrounding Vulnerable Adult Protection*, 29 WM. MITCHELL L. REV. 9, 18 (2002).

disability renders them less able either to assert their rights or to protect themselves against blatant discrimination."[118] Some states already consider adults with intellectual disabilities as essentially equivalent to children, as they include these adults within their tender years hearsay exception.[119] Further, Canadian courts have already provided that adults with intellectual disabilities and children are virtually equivalent, asking "[what] is the difference between an adult with the mental capacity of a six-year-old, and a six-year-old with the mental capacity of a six-year-old?"[120] These adults are just as helpless and just as unable to escape these harmful situations as a child in their situation would be. They must have outside help to remove themselves from these situations, which includes help in telling their story and obtaining a conviction.[121]

Ultimately, individuals with intellectual disabilities are human beings, and they should be guaranteed both legal protections and legal safeguards, which may sometimes require equating these adults to children.[122]

However, even though there are many similarities between children and intellectually disabled adults, considering these adults to be children for the purpose of tender years does not sufficiently protect the interest or autonomy of these individuals. These adults, although of limited intellectual capacity, are still physically and mentally adults, and according to one Canadian study, treating these adults as children in the name of protection can actually undermine both their autonomy and their credibility in the eyes of the jury.[123] Ultimately, when too much weight is put on these adults' similarities with children, their unique characteristics and needs tend to be swept under the rug.[124]

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[118] Harold Hongju Koh, *Different but Equal: The Human Rights of Persons with Intellectual Disabilities*, 63 MD. L. REV. 1, 7 (2004).

[119] *See supra* note 28.

[120] Bala, *supra* note 4, at 531-32.

[121] Andrea Tawil, *Prosecution versus Protection: Laws Defining Drug Activity as Child Abuse and Why Such Laws Should Apply Equally to Vulnerable Adult Abuse*, 10 J.L. SOC'Y 97, 114 (2009).

[122] Koh, *supra* note 118, at 2.

[123] Benedet & Grant, *supra* note 92, at 518-22.

[124] *Id.* at 522.

Further, unlike children, who can generally be expected to continue advancing, most adults with intellectual disabilities are fairly static. For adults with intellectual disabilities, the ultimate goal is to provide them with continuous supports that enable them to function in society, whereas the supports for children will evolve and taper away as the child grows.[125] Additionally, looking to an IQ test to determine mental age is an imperfect system that will not always produce accurate results; these methods have been criticized for being "man-made" and "arbitrary."[126] Granted, imperfect systems can still lead to beneficial or useful results, but relying too heavily on mental age and classification systems fails to treat these adults as individuals.[127] Therefore, whether someone is eligible under this new hearsay exception requires a robust analysis, including more than just mental age.

Although using something such as mental age and comparing these individuals to children is an imperfect system, it is important to note that this system and exception do not deprive these witnesses or the defendants of any constitutional rights; this is merely a way to ensure that the testimony of these witnesses is heard, and such testimony does not violate a defendant's right to confrontation.[128]

III. THE PROPOSED EXCEPTION AND THE CONFRONTATION CLAUSE

The Sixth Amendment provides that a defendant in a criminal trial shall "be confronted with the witnesses against him."[129] Under *Roberts*, hearsay did not present a Confrontation Clause issue, at least if the statement was reliable.[130] However, that changed after *Crawford*, because the Supreme Court stated that testimonial hearsay violates the Confrontation Clause unless the declarant testifies or the defendant had a prior opportunity for

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[125] WHITAKER, *supra* note 74, at 11.
[126] GEORGE S. BAROFF, MENTAL RETARDATION: NATURE, CAUSE, AND MANAGEMENT 12 (2d ed. 1986).
[127] R. C. SCHEERENBERGER, A HISTORY OF MENTAL RETARDATION: A QUARTER CENTURY OF PROMISE 25 (1987).
[128] McClurg, *supra* note 114, at 1133.
[129] U.S. CONST. amend. VI.
[130] Ohio v. Roberts, 448 U.S. 56, 65-66 (1980).

cross-examination.[131] When non-testimonial statements are at issue, states are free to adopt their own regulations, and most follow the *Roberts* reliability framework.[132] However, when it comes to statements made by intellectually disabled adults, many courts are reluctant to declare these individuals competent to testify, meaning that their testimonial statements cannot be allowed in because they are not allowed to take the stand; alternatively, courts may be hesitant to declare their non-testimonial statements as reliable, denying admissions to those statements as well. The arguments stating that vulnerable individuals are incompetent and unreliable, however, are "contemptuous of and degrading to women . . . , and they are distrustful and disrespectful of both trial judges' ability to screen out unreliable hearsay and jurors' ability to assess the credibility of hearsay that is properly admitted into evidence."[133]

A. The Competency of Individuals with Intellectual Disabilities

Individuals with intellectual disabilities are competent to testify. Most states provide that any individual is competent to testify, unless they lack the capacity to tell the truth or express themselves, or if they do not understand the duty to tell the truth.[134] Although these vulnerable individuals might be limited intellectually, they are generally able to speak in front of the jury. Even if the defendant may not be able to get the answers to cross-examination that he or she desires from intellectually disabled individuals, the Confrontation Clause does not guarantee cross-examination that is effective in the way the defendant would like, only the opportunity for cross-examination; on the other hand, competence only deals with the individual's ability to be truthful

[131] Scallen, *supra* note 5, at 1603-04.
[132] *Id.* at 1573-74.
[133] McLain, *supra* note 27, at 24. *See also* Bala, *supra* note 4, at 544 (stating that admission of these statements is distinct from the question of guilt, which always must be proved beyond a reasonable doubt). Certainly, these reasons are also applicable to intellectual disabled men; however, due to the prevalence of violence against women and children and the historical treatment of women and children in the legal system, many articles limit their focus to these individuals.
[134] ME. R. EVID. 601; N.J. R. EVID. 601; VT. R. EVID. 601.

and remember and relate what happened.[135] Ultimately, as long as these individuals are willing and able to tell their story and answer questions, it is the province of the jury to "sort out the inconsistencies and determine credibility[;]" nevertheless, courts are quite reluctant to find these witnesses competent,[136] which may be due in part to findings that they are essentially children.[137]

Further, prosecutors are sometimes reluctant to call vulnerable witnesses to the stand due to the trauma they may face, despite the fact that these witnesses are actually fairly resilient, and can stand up to the pressures of testifying in court.[138] And, even when testifying in the presence of the defendant may cause trauma for the victim, prosecutors may be able to use alternative methods, such as testimony by closed circuit television.[139]

Additionally, nothing suggests that intellectually disabled individuals are less likely to tell the truth than other witnesses, even if they are not able to take the traditional oath. Inability to swear an oath is not equivalent to incompetency.[140] Even very young children, or adults with the mental age of a young child, can determine the difference between truth and fiction if they are asked developmentally appropriate questions.[141] Further, in most proceedings, since competency is not at issue, witnesses are not even asked questions about the difference between the truth and a lie, and no evidence indicates that vulnerable witnesses are less likely to tell the truth than other adults. [142] Besides, to exclude

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[135] Scallen, *supra* note 5, at 1577-78 & 1585. Therefore, as long as these individuals are truthful and the defendant can cross-examine them, the defendant has had an opportunity for effective cross-examination.

[136] *Id.* at 1585-86.

[137] Benedet & Grant, *supra* note 92, at 521. This is yet another reason for maintaining a hearsay exception for intellectually disabled adults that is separate from tender years exceptions.

[138] Raeder, *supra* note 116, at 14. *See also* McLain, *supra* note 27, at 71.

[139] *See supra* Section I.B.3.a.

[140] Scallen, *supra* note 5, at 1590.

[141] Raeder, *supra* note 116, at 20.

[142] Bala, *supra* note 4, at 524-26. Further, whether a witness will actually lie on the stand is not related to whether or not he or she can articulate the difference between the truth and a lie. *Id.* at 525.

highly relevant testimony out of a fear that someone would lie "would be to exclude all testimony."[143]

B. The Reliability and Admissibility of Non-Testimonial Statements Made by Intellectually Disabled Individuals

In some cases, the witness may truly be unavailable. In such cases, unless the defendant previously had the opportunity to cross-examine the witness, the witness's testimonial statements will not be allowed in. However, if the witness's non-testimonial statements can qualify under a state's hearsay exception (ideally a newly adopted exception like the one laid out above), those statements can be admitted.[144] However, since this new exception is not "firmly rooted" it is essential that even these non-testimonial statements be reliable, similar to the requirements of tender years[145] and residual[146] hearsay exceptions.

Although these witnesses may not be able to give as detailed of a statement as a "typical adult," vulnerable witnesses can be just as reliable in recalling the crime.[147] Further, reliability does not make a statement testimonial, which would bar admittance when the victim is unavailable—some non-testimonial statements will be reliable, others will be unreliable, and the same is true for testimonial statements.[148] Additionally, some may believe that it is impossible for a witness who has been ruled incompetent to testify to make a reliable statement at some earlier time; however, competency and reliability are not directly related.[149] For

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[143] McLain, *supra* note 27, at 71.

[144] Since these statements are non-testimonial, they do not present a Confrontation Clause problem, and the Supreme Court gave states flexibility in crafting hearsay exceptions. *See supra* Section I.B.2.

[145] *See supra* notes 20-25.

[146] *See supra* note 26.

[147] Scallen, *supra* note 5, at 1565; Bala, *supra* note 4, at 521. Granted, the large majority of sources on both the subjects of competency to testify and the reliability of statements focus on children, as there is very little to no research on the competency and reliability of intellectually disabled individuals. However, applying the social science research on children to adults with cognitive impairment is a sound practice, given their similarities to children. *See id.* at 532.

[148] Raeder, *supra* note 6, at 334.

[149] A victim who cannot withstand the pressure of testifying in court may nevertheless be trustworthy in other circumstances. *See* McLain, *supra* note 27, at 52-54.

example, a witness may be incompetent because they are unable to give their testimony in front of a jury, due to fear or some other reason. However, that same witness may have been perfectly capable of telling a trusted individual the same story that they would have told in court.

C. The Non-Testimonial Nature and Admissibility of Statements Made to Medical Personnel and Forensic Interviewers

Despite all of this, statements made to medical personnel and to forensic interviewers present a special challenge, because it can be harder than usual to classify these statements as testimonial or non-testimonial. Due to the challenges that individuals with intellectual disabilities face,[150] special considerations should be given to these statements, including those made to forensic interviewers working at children's advocacy centers in cases where an intellectually disabled adult is referred to such a center, which could be sponsored by the government, the police or even the prosecution.[151] Although these are statements made by adults, for the same reasons discussed above, the arguments that support classifying children's statements to medical personnel and forensic interviewers as non-testimonial also suggest that an intellectually disabled adult's statements in these contexts are non-testimonial.[152]

In prosecutions for sexual offenses committed against vulnerable individuals, there is often a lack of evidence and no other witness than the victim, in part because of the nature of the crime.[153] Additionally, some prosecutors may be hesitant to call these individuals to testify in court, even if they could be declared competent,[154] because testifying can be a traumatizing

[150] *See supra* Section I.C.1.

[151] *See* Raeder, *supra* note 116, at 21 (stating that the Department of Justice has encouraged the use of these centers as a way to include a variety of interested professionals, including prosecutors and police officers as well as social workers and therapists).

[152] *See supra* Section I.C.1.

[153] *See* Scher, *supra* note 51, at 170.

[154] *See supra* Section III.A.

experience.[155] As such, it may be important to convince the court that the victim's statements to medical personnel and forensic interviewers are non-testimonial in nature.

In regard to statements made to medical personnel, many individuals do not consider doctors and nurses part of the criminal justice system, hence why many states have a hearsay exception for statements made for the purpose of medical diagnosis or treatment.[156] This exception exists because the primary purpose of the visit is not to make an accusation or a formal statement, but to obtain medical aid.[157]

However, this does not answer the question of whether a statement to a doctor or nurse that identifies the perpetrator is testimonial or non-testimonial, since knowing the perpetrator is not necessarily relevant for medical treatment.[158] Nevertheless, such statements made to medical personnel are non-testimonial as they are necessary to determine what steps need to be taken to prevent the victim from being hurt further.[159] Of course, statements like this could also be considered part of an ongoing emergency, and statements made during an ongoing emergency are non-testimonial.[160]

Additionally, statements made to forensic interviewers are generally non-testimonial as well, even when there is some police or prosecutorial involvement, as long as neither the police nor the prosecution control the process. For example, one forensic interviewing technique, commonly known as R.A.T.A.C.,[161] is based on the Child First Doctrine, which places the needs of the

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[155] Jennifer E. Rutherford, *Unspeakable!* Crawford v. Washington *and its Effects on Child Victims of Sexual Assault*, 35 SW. U. L. REV. 137, 146 (2005).

[156] Gordon, *supra* note 19, at 529; *supra* note 19.

[157] *See* Davis v. Washington, 547 U.S. 813, 822 (2006).

[158] *See* Gordon, *supra* note 19, at 536-38.

[159] For example, it may be necessary to remove the victim from the home if the perpetrator is a family member. In such cases, one can argue that taking that step is part of the treatment of the victim. *See* Scher, *supra* note 51, at 176.

[160] *Davis*, 547 U.S. at 822. An ongoing emergency is not always a 911 call or someone immediately present who is threatening the victim with harm; a victim of sexual abuse or other related crimes is in jeopardy if they are still residing in the home with the perpetrator or if they have not yet received treatment for their abuse. Scher, *supra* note 51, at 176.

[161] *Id.* at 174.

child before the needs of the court or the police.[162] Ultimately, even if a forensic interview produces evidence that will be used at trial, that is an "incidental effect[,]" not the primary purpose of the interview.[163] As such, these statements are also non-testimonial, as the interviewers are not attempting to "prove past events[,]" meaning that the statements made by an intellectual disabled adult should not be barred from admission[164]

CONCLUSION

Ultimately, the goal of any program designed to provide support for intellectually disabled adults should be to enable them to live a full and satisfying life without treating them like they are outsiders in their communities. This includes providing the proper support and protections when they are involved in the criminal justice system, because despite their intellectual disabilities, they are still entitled to the fullest protection of the law.

Since intellectually disabled individuals are not more likely to be incompetent or unreliable, despite common misconceptions to the contrary, there is no reason for courts to prevent them from taking the stand for those reasons. However, when they do have difficulties communicating in the stressful environment of trial proceedings, a hearsay exception for their non-testimonial statements should be in place to give them a proper voice in the legal system, and such an exception properly comports with our notions of justice. Further, given the fact that they are intellectually disabled, many of their statements will be non-testimonial in nature, including their statements to medical personnel and forensic interviewers, and thus the statements can be admitted without violating a criminal defendant's right to confront witnesses against him.

Granted, this issue is one that must be taken up by the individual states, and the exception will vary, but at minimum, states should consider creating an exception applicable to all individuals with intellectual disabilities when they are victims or witnesses of certain sex crimes, given the prevalence of such

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[162] *Id.* at 174 n.140.
[163] *Id.* at 177.
[164] *See Davis*, 547 U.S. at 822.

crimes and the difficulty in prosecuting them. Such exceptions are essential if we are to consider individuals with intellectual disabilities as fully functioning members of our society.

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