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CHILD VICTIM TESTIMONY, PSYCHOLOGICAL TRAUMA, AND THE CONFRONTATION CLAUSE: WHAT CAN THE SCIENTIFIC LITERATURE TELL US?

DAVID CRUMP*

Criminal trials involving child victims are a tragic battleground for Confrontation Clause issues. Judges are properly suspicious of creating a category of cases in which convictions can be based upon evidence subjected to less careful examination than normally would be required. They are cognizant that the Constitution sets minimum standards for the quality and testing of the evidence. But at the same time, they know that rigorous rules for testimony coupled with adversary cross-examination pose a danger to some child victims. They also know, together with the rest of the population, that crimes against children are epidemic.

Several recent Supreme Court decisions involve the clash between the constitutional protections established in the Confrontation Clause and the rights or interests of child victims. For example, *Coy v. Iowa*¹ held that screening the victim from the defendant, to obtain a child victim's testimony with minimal psychological trauma, could not be used under the circumstances of that case.² *Maryland v. Craig*³ held that testimony over closed circuit television required "an adequate showing of necessity."⁴ Most recently, in *White v. Illinois*,⁵ the Court held that hearsay statements of a child victim could be used even without testimony from the child and without any independent showing of necessity,

* A.B. Harvard College, 1966, J.D. University of Texas Law School, 1969, Professor of Law, University of Houston Law Center. The author wishes to note that this paper originated in his amicus curiae brief submitted to the Supreme Court in *White v. Illinois*, 112 S. Ct. 736 (1992).

¹ 487 U.S. 1012 (1988).

² *Id.* at 1021 (no individualized finding that witnesses needed to be shielded).

³ 497 U.S. 836 (1990).

⁴ *Id.* at 855.

⁵ 112 S. Ct. 736 (1992).

provided that the statements complied with traditional and established exceptions to the hearsay rule.⁶ These cases affect the legitimacy of a wide variety of state laws authorizing admittance of hearsay or special circumstances for children's testimony.⁷

The author of this Article filed an amicus curiae brief in the *White* case on behalf of a coalition of advocates for child victims.⁸ The purpose of the brief was to explore the sociological and psychological literature concerning the testimony of child victims. The questions I addressed included whether and under what circumstances children's reports of abuse are likely to be truthful, how child victims can be harmed by testifying, and whether it is practical to require a showing of "necessity" in the form of a demonstration that the particular child is especially vulnerable to harm. The brief largely was a response to arguments advanced by the defendant that the amici considered to be unscientific and unreliable. I did not consider it likely that the Supreme Court would expressly rely upon the authorities cited in my brief, because the purpose was to avoid reliance by the Court on opposing arguments. Indeed, the *White* Court did not rely upon the sociological or psychological literature, but instead concentrated on existing precedent concerning the Confrontation Clause, as it should have.⁹

⁶ *Id.* at 743.

⁷ These laws range from the authorization of televised testimony, as in *Craig*, to the admittance of newly defined hearsay exceptions. See Jean Montoya, *On Truth and Shielding in Child Abuse Trials*, 43 HASTINGS L.J. 1259, 1260-63 nn.3-5 & 13 (1992) (reviewing state statutes); see also Michael H. Graham, *Indicia of Reliability and Face-to-Face Confrontation: Emerging Issues in Child Sexual Abuse Prosecutions*, 40 U. MIAMI L. REV. 19, 29-30 (1985) (examining statutes that required "particularized showing" that child's out-of-court statement possessed "circumstantial guarantees of trustworthiness"); Michael H. Graham, *The Confrontation Clause, the Hearsay Rule, and Child Sexual Abuse Prosecutions: The State of the Relationship*, 72 MINN. L. REV. 523, 569-70 (1988) (discussing defendant's Sixth Amendment rights and hearsay exception); Paula E. Hill & Samuel M. Hill, Note, *Videotaping Children's Testimony: An Empirical View*, 85 MICH. L. REV. 809, 819 (1987) (noting the possibility that Supreme Court could upset many state statutes drawn to protect young witnesses); Note, *The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations*, 98 HARV. L. REV. 806, 808 (1985) (hearsay and videotaping statutes are most frequently-used "legislative innovations" for dealing with child witnesses).

⁸ Brief of Amici Curiae in Support of Respondent, *The State of Illinois, White v. Illinois*, 112 S. Ct. 736 (1992). The brief was submitted by The Victim Assistance Centre, Inc., and John B. Holmes, Jr., District Attorney of Harris County [Houston], Texas, and joined by: The Youth Victim/Witness Program; Kid-Pac; Justice for Children; Houston Police Family Violence Unit; National Organization for Women (Houston Area Chapter); Grandparents Raising Grandchildren; and The Alliance for the Rights of Children.

⁹ See *White*, 112 S. Ct. at 743-44 (holding that prior cases regarding Confrontation Clause did not require showing of necessity). Although this Article concerns itself with

This Article makes publicly available the concepts from that amicus curiae brief. It restates the arguments in a scholarly format, although the reader doubtless will detect the vestiges of advocacy that carry over from the brief. The first section contains a short review of the context in which the *White* case arose. The second section examines the scientific literature relating to child victim evidence in order to compare its trustworthiness to the trustworthiness of other traditional hearsay exceptions. The third section examines the necessity of using child hearsay, with particular attention to the concept of requiring an individualized determination of necessity. The fourth section builds upon the previous sections in considering the appropriateness of excluding child hearsay that meets traditional tests or that closely parallels traditional compliance with the Confrontation Clause. The final section summarizes the author's conclusion, which is that we should not create a separate category of cases with lowered confrontation or due process expectations merely because child witnesses are involved, but at the same time, we should use reasonable accommodations to avoid the very real prospect of harm to children from testifying, and we should not be biased against children's evidence by unfounded assumptions.

I. *WHITE V. ILLINOIS*: THE FACTUAL AND LEGAL CONTEXT

In *White*, the defendant was convicted of aggravated criminal sexual assault under the law of Illinois.¹⁰ The victim was a four-year-old girl. The principal evidence was testimony recounting the child victim's hearsay statements describing the crime, offered by her babysitter, her mother, an investigating officer, an emergency room nurse, and a doctor. The gist of the statements was that the defendant had put his mouth on the victim's vagina, put his hand

social scientific research, there is considerable controversy concerning whether and to what extent such research should influence constitutional decisionmaking. Cf. Montoya, *supra* note 7, at 1280-91 (cautious view of the reliability of social science). This Article does not attempt definitively to suggest a theory for the use and limits of this kind of knowledge in constitutional cases. Cf. John Monahan & Laurens Walker, *Social Authority: Obtaining, Evaluating and Establishing Social Science in Law*, 134 U. PA. L. REV. 477, 485-87 (1986) (suggesting criteria by which courts may decide whether to rely on social science).

Presumably, social science properly can be used to negate the conclusiveness of folk wisdom or unfounded assertions or to supply the basis for a state's legislative actions. These were the purposes of the amicus brief this author filed in *White*.

¹⁰ 112 S. Ct. at 739. In addition, he was convicted of the related offenses of residential burglary and unlawful restraint. *Id.*

over the victim's mouth, choked her, and threatened to whip her if she made any noise.¹¹ The testimony about the child's statements was consistent from witness to witness as well as corroborated by certain other evidence.¹²

The trial court admitted the child's out-of-court statements under state law hearsay exceptions for spontaneous declarations and for statements made in the course of securing medical treatment. The child never testified. The state attempted on two occasions to call her as a witness, but she apparently experienced emotional difficulty on being brought to the courtroom and in each instance left without testifying.¹³ The defense made no attempt to call the child as a witness and the trial court neither made, nor was asked to make, a finding that she was unavailable to testify.¹⁴ The only indication in the record of the reason was a statement by defense counsel that she was unable to testify because of "an emotional hiatus of some sort."¹⁵

The Supreme Court granted certiorari to determine whether the admittance of the child victim's statements violated the Confrontation Clause. In seeking reversal, the defendant relied heavily upon the Court's earlier decision in *Ohio v. Roberts*.¹⁶ In that case, in the course of rejecting the Confrontation Clause claim, the Court used language that suggested that the Confrontation Clause generally requires that a declarant either be produced at trial or be found unavailable before his out-of-court statement could be admitted into evidence.¹⁷

The Supreme Court in *White* rejected this argument and affirmed the conviction. The *White* Court relied heavily upon its post-*Roberts* decision in *United States v. Inadi*.¹⁸ There, the Court rejected a categorical requirement of a showing of unavailability

¹¹ *Id.* at 739.

¹² *Id.* at 739-40. The corroboration included the scream of the child at the time of the apparent offense, which awakened the babysitter; the babysitter's witnessing of the defendant leaving the child's room; the mother's testimony to the child's demeanor; and the presence of bruises and red marks, apparently from the defendant's choking the victim. *Id.*

¹³ *Id.* at 739.

¹⁴ *Id.*

¹⁵ See Brief for the Petitioner at 26, *White v. Illinois*, 112 S. Ct. 736 (1992) (containing citation to record).

¹⁶ 448 U.S. 56 (1980). *Roberts* concerned testimony from a witness not produced at trial but who instead had been subjected to examination by defendant's counsel at the preliminary hearing. *Id.* at 59.

¹⁷ See *White*, 112 S. Ct. at 741 (characterizing holding in *Roberts*).

¹⁸ 475 U.S. 387 (1986).

before any out-of-court statement could be used.¹⁹ Indeed, *Inadi* confined the *Roberts* holding narrowly.²⁰ The *White* Court therefore read *Roberts* as standing for the proposition that "unavailability analysis is a necessary part of the Confrontation Clause inquiry only when the challenged out-of-court statements were made in the course of a prior judicial proceeding."²¹

The Court went on to emphasize that the statements in *White* qualified for admission under "firmly rooted" hearsay exceptions.²² For this reason, the statements were to be treated as "so trustworthy that adversarial testing can be expected to add little to [their] reliability."²³ A generally applicable unavailability rule "would have few practical benefits while imposing pointless litigation costs" in such a case.²⁴ The Court further distinguished *Coy v. Iowa*, which vacated a conviction that had resulted from a trial in which a child witness had testified from behind a screen, and *Maryland v. Craig*, which upheld closed-circuit television testimony only upon a showing of necessity. The Court differentiated these cases from *White* on the ground that they dealt with in-court procedures rather than with firmly-rooted hearsay exceptions.²⁵ Implicit in the holding was that the hearsay statements in *White* qualified for admittance under established rules as clearly as the statements in *Inadi*, which were co-conspirators' statements made in furtherance of a conspiracy.²⁶

II. THE TRUSTWORTHINESS OF THE CHILD VICTIM EVIDENCE IN *WHITE*: COMPARING TRADITIONAL HEARSAY EXCEPTIONS

The defendant in *White v. Illinois* made a number of arguments concerning the trustworthiness of child hearsay. For example, the defendant attempted to distinguish the statements of co-conspirators, admitted in *Inadi*, on the ground that a violated child witness

¹⁹ *Id.* at 394 (unavailability rule not applicable to co-conspirator's out-of-court statements).

²⁰ *Id.* "Roberts must be read consistently with the question it answered, the authority it cited, and its own facts." *Id.* The *Roberts* Court in fact noted that unavailability was not required in all instances. *Roberts*, 448 U.S. at 65 n.7.

²¹ 112 S. Ct. at 741 (citing *Inadi*, 475 U.S. at 394).

²² *Id.* at 743 (citing *Idaho v. Wright*, 497 U.S. 805, 809 (1990)).

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 743-44.

²⁶ *Id.* at 742.

stands in a "continuing adversarial relationship" to a defendant accused of abusing her.²⁷ Defendant further sought to distinguish *Inadi* by citing the Court's statement, in that case, that "[c]onspirators are likely to speak differently when talking to each other in furtherance of their own illegal aims than when testifying on the witness stand."²⁸ These arguments, in turn, were an effort to imply that the "adversary" child, unlike the co-conspirator during a conspiracy, was more likely to fabricate early reports of abuse and less likely to be trustworthy. Furthermore, the defendant argued that an abused child is "[u]nlike co-conspirators" in that she assertedly is "uniquely accessible to the prosecution."²⁹

A. *The Conspiracy-Like Nature of Child Abuse: Analyzing the "Continuing Adversarial Relationship" Argument*

The scientific literature shows that child abuse takes place in circumstances that closely mirror the suppression and repression of a conspiracy. For example, the vast majority of abused children are violated not by strangers, but by adults in positions of authority and trust, who exploit the victims' continuing loyalty and tendency toward secrecy. The clear majority, in fact, are abused "by family members, most frequently by fathers . . . and brothers"³⁰ Boyfriends of mothers, as in the *White* case, also are frequent sexual and physical abusers.³¹

Furthermore, as in the *White* case, the trusted adult often threatens the child implicitly or (with surprising frequency) explicitly and graphically.³² These threats, together with the relationship to the authoritative adult, usually induce both fear and repression-based shame, which motivate the child to preserve the "secret"—precisely as co-conspirators do. Thus, "[l]ove and ten-

²⁷ Brief for the Petitioner, *supra* note 15, at 21.

²⁸ *Id.* at 20 (citing *Inadi*, 475 U.S. at 395).

²⁹ *Id.* at 21.

³⁰ See Jeffrey B. Bryer et al., *Childhood Sexual and Physical Abuse as Factors in Adult Psychiatric Illness*, [144 AM. J. PSYCHIATRY 1426, 1427 (1987)] (adults with psychiatric problems more likely to have been sexually abused as minors); see also Chester Swett et al., *Sexual and Physical Abuse Histories and Psychiatric Symptoms Among Male Psychiatric Outpatients*, [147 AM. J. PSYCHIATRY 632, 633 (1990)] (fathers or family members most often abusers).

³¹ See Bryer et al., *supra* note 30, at 1427-28 (spouses and lovers most frequent abusers). In *White*, the petitioner was a friend of the child's mother. *White v. Illinois*, 112 S. Ct. 736, 739 (1992).

³² See Ofra Ayalon, *The Daughter as a Sexual Victim in the Family*, in A. CARMÍ & M. ZIMRIN, CHILD ABUSE 135 (1984) (also describing use of "physical threats and abuse").

derness, or emotional blackmail, characterize [the incestuous family member's] approaches toward [the child victim.]”³³ The abused child's mother often is a passive but knowing participant in the preservation of this malignant secret, just as a participant in a conspiracy might be. Sometimes, the mother actively works to suppress evidence of abuse, in which event the situation not only resembles a conspiracy, it is a conspiracy.³⁴

These considerations negate the defendant's argument in *White* that a child witness is in a “continuing adversarial relationship” to the father, brother, uncle, mother's boyfriend, or other trusted adult who is accused of having abused her. Instead, the Supreme Court was correct in permitting Illinois to recognize that suppression and repression occur in child abuse cases precisely as they do in conspiracies. The child victim must overcome this pressure toward secrecy to describe the abuse. In this respect, the spontaneous hearsay statements of a child victim resemble co-conspirators' statements at least to the extent that, if co-conspirator statements are admissible, child victims' statements fitting traditional hearsay exceptions also should be admissible.

B. The Scientific Literature: The Suppression, Repression and Secrecy Deliberately Induced by the Trusted Adult Often Last into the Adulthood of a Child Abuse Victim

The victim's motivations toward repression of the conspiracy-like secret survive long after the discovery or termination of the abuse. Many child-abuse survivors continue to keep the secret even after growing to adulthood because they have “repressed or suppressed memories of the abuse.”³⁵ “The memories emerge only after a period of contact with sensitive clinicians.”³⁶ The repression actually increases over time,³⁷ so that contemporaneous and spontaneous declarations are less likely to involve fabrication in the form of denial than later statements. Thus, an attempt to

³³ *Id.*

³⁴ *Id.* at 136-37. See generally JUDITH HERMAN, *FATHER-DAUGHTER INCEST* 88-89 (1981) (describing behavior of some mothers and daughters).

³⁵ Bryer et al., *supra* note 30, at 1430 (recommending that patients be asked specifically about abuse at initial interview).

³⁶ *Id.*

³⁷ See Alayne Yates, *Should Young Children Testify in Cases of Sexual Abuse?*, [144 AM. J. PSYCHIATRY 476, 477-78 (1987)] (over time children less likely to recall “disagreeable” material).

force disclosure of the secret upon a conflicted child in a hostile environment predictably will produce profound resistance by the child—or an “emotional hiatus of some sort,” as the defense attorney at trial labelled the events in the *White* trial.³⁸ In fact, this emotional hiatus is consistent with, and is some circumstantial evidence of, a child victim whose earlier statements were truthful, but whose later repression, originally induced by the trusted adult and strengthened over time, has created a resistance to testifying.

It follows that the defendant's effort to distinguish *Inadi*, by the principle that “[c]onspirators are likely to speak differently when talking to each other in furtherance of their own illegal aims than when testifying on the witness stand,” is unpersuasive. As the literature demonstrates, this rationale fits the abused child equally well. She is “likely to speak differently” when making a spontaneous utterance close in time to the abuse, than when the repression induced by the abuser causes an “emotional hiatus of some sort” while the child victim is testifying on the witness stand in the defendant's presence. In short, the threats, coercion, multiple participants, joint enterprise, secrecy, and continued repression that characterize the admittance of co-conspirator statements, also support admittance of child victims' spontaneous utterances.

C. Are Spontaneous Declarations of Child Victims at Least as Trustworthy as Co-conspirator Statements?: The Scientific Literature

The literature about child victims demonstrates the genius of the common law in evolving the traditional, firmly-rooted hearsay exception for spontaneous declarations. Specifically, the literature shows that such spontaneous utterances of child victims have strong indicia of trustworthiness and non fabrication.³⁹ Indeed, they have just the guarantees of reliability that the common law judges originally surmised.⁴⁰

This is not to say that fabrication does not occur in some un-

³⁸ Brief for the Petitioner, *supra* note 15, at 26.

³⁹ See *infra* notes 42-44 and accompanying text; see also Brief of Amici Curiae, *supra* note 8, at 8-9 (claiming that fabrication rarely occurs).

⁴⁰ See, e.g., *Thompson v. Trevanion*, 90 Eng. Rep. 179, 183 (K.B. 1694) (establishing common law rule); JOHN WIGMORE, EVIDENCE § 1747, at 195 (James H. Chadbourn rev. 1976) (common law principle based on experience that “physical shock” and “nervous excitement” produced “reflexive” spontaneous responses that were trustworthy); see also *White v. Illinois*, 112 S. Ct. 736, 742 (1992) (discussing indicia of trustworthiness in context of these two authorities).

usual cases involving allegations of child sexual abuse. In a small minority of instances, this fabrication does occur. The point, however, is that fabrication rarely occurs in the "uncoached," contemporaneous utterances of child victims, particularly young child victims. Instead, the majority of fabrications result from suggestion by an adult (and even then, the available empirical data suggest that fabrication is relatively rare).⁴¹ Thus, the literature gives the following illustration of one of these fabricated child abuse allegations, one that was not spontaneous:

In one case, for example, a mother asked her 5 ½-year-old daughter, "Don't you remember all the times when daddy rubbed your tushy? You *don't*? It was when we lived in the house down on the lake and you thought it was such a funny game and he liked to do it so much—oh, you *must* remember that!" After several additional variations on the same theme, the little girl thought that her father had rubbed her "tushy"
⁴²

Thus, defendant's reasoning might lead to exclusion of non spontaneous hearsay statements resulting from extensive suggestion or "coaching," but this was not a factor in *White*, because it is not present in spontaneous declarations or statements to treating physicians.

On the other hand, reports of abuse by children are extremely likely to be true if they are spontaneous and close to the event.

⁴¹ Precise data are unavailable, because it would depend upon disproof as well as counting of statements. Successful use of suggested fabrication would require persistence of an unusual kind. See Brief of Amici Curiae, *supra* note 8, at 8-9.

Some of the best-known work of this kind has been done by Gail S. Goodman. See Gail S. Goodman et al., *Children's Concerns and Memory: Issues of Ecological Validity in the Study of Children's Eyewitness Testimony*, in KNOWING AND REMEMBERING IN YOUNG CHILDREN 228, 249 (Robyn Fivush & Judith A. Hudson eds., 1990) (maintaining that children's ability to report abuse accurately even under suggestion is understated by earlier scholarship); Gail S. Goodman et al., *Child Sexual and Physical Abuse: Children's Testimony*, in CHILDREN'S EYEWITNESS MEMORY 1, 1-18 (Stephen J. Ceci et al. eds., 1987) ("across the studies, children never made up false stories of abuse even when asked questions that might foster such reports").

These conclusions are vulnerable to the criticism that the studies lack ecological validity since the children who were subjects of the studies did not have the same motives toward falsity that real abuse victims might have. See Montoya, *supra* note 7, at 1285-86 (reviewing methodology).

⁴² See Yates, *supra* note 37, at 476 (citing example of fabrication in custody battle); see also Jeffrey J. Haugaard et al., *Children's Definitions of the Truth and Their Competency as Witnesses in Legal Proceedings*, 15 LAW & HUM. BEHAV. 253, 269 (1991) (discussion on how children's testimony may be influenced by parental direction or by "suggestive" information supplied by an interviewer).

When the statement is "uncoached," and it describes an act improbable for a child but probable for an adult abuser (as in the *White* case), the literature shows that the indicia of trustworthiness are high.⁴³ These are precisely the kinds of statements that are covered by the common law exception for spontaneous declarations.

In conclusion, the defendant's efforts in *White* to distinguish *Inadi* were directly contrary to the literature. *Inadi* in fact furnished a close parallel to the *White* case. The spontaneous declarations of children about abuse possess characteristics of trustworthiness similar to those implicated by admissible co-conspirators' statements.

III. A STRICT APPROACH TO REQUIRING INDIVIDUALIZED PROOF OF "NECESSITY": IS IT A WORKABLE MEANS OF PREVENTING SEVERE TRAUMA TO CHILD VICTIMS?

In *White*, the defendant argued that the child victim's hearsay statements should not be admissible in the absence of an "individualized" determination that live testimony would cause exceptional harm to the particular child witness.⁴⁴ With the exception of the defense attorney's statement that the child had suffered an "emotional hiatus of some sort" when called to the stand, the record was devoid of any evidence of individualized necessity, and the acceptance of this argument by the Court could have required reversal. The defendant's argument was not without basis, because the Court had held in *Maryland v. Craig* that the use of closed circuit testimony required "an adequate showing of [individualized] necessity."⁴⁵

The Court rejected this argument in *White*, distinguishing *Craig* on the ground that the evidence was admissible under "firmly rooted" hearsay exceptions.⁴⁶ The scientific literature suggests that this result probably was correct, but not solely because of the distinction between *White* and *Craig*. In fact, the scientific literature casts doubt upon the workability of an approach that would

⁴³ Cf. Yates, *supra* note 37, at 477 (describing children's capacity to recall and relate accurately in absence of suggestion). See generally *supra* note 42 (discussing reliability of child testimony).

⁴⁴ Brief for the Petitioner, *supra* note 15, at 25.

⁴⁵ *Maryland v. Craig*, 497 U.S. 836, 856 (1990).

⁴⁶ *White v. Illinois*, 112 S. Ct. 736, 743-44 (1992).

read *Craig* strictly. The real problem with requiring an individualized showing of necessity is that the scientific literature strongly suggests that it is impossible to supply such a showing with today's scientific knowledge.

A. *The Fallibility of a "Necessity" Approach Based upon Inferences about Individualized, Long-Term Trauma: Dependency upon Future Events That Are Unknown and Unknowable*

There is an extremely high correlation between child abuse and adult psychiatric disorders.⁴⁷ Unfortunately, however, very little is known about the mechanism or predictability of such disorders.

We do not know nearly enough about the long-term effects of maltreatment during the early formative years of life. With very few exceptions, we have not followed abused infants and children from early childhood through to adolescence and adult life stages.⁴⁸

In fact, the scientific literature cited in this Article makes it doubtful that this kind of prediction ever will be possible.

The defendant's response in *White* to this evidence of long-term effect, lasting into adulthood, was to demand an "adversarial testing" of the child.⁴⁹ This "adversarial testing" is precisely opposite from the treatments that are thought to minimize the effects of child abuse. Among other difficulties, abused children suffer from repression, denial of the abuse, lack of self-worth, helplessness, and inability to trust adults.⁵⁰ The defendant's model of "adversarial testing" would have an authoritative adult, the judge, force the child to submit to "adversarial testing" through cross-examination by another adult, the defense lawyer. Worse still, this "ad-

⁴⁷ See Bryer et al., *supra* note 30, at 1429-30 (strong correlation between sexual abuse and psychiatric disorders); Elaine Carmen et al., *Victims of Violence and Psychiatric Illness*, 141 AM. J. PSYCHIATRY 378, 382-83 (1984) (half of psychiatric inpatients studied had histories of physical or sexual abuse); Brandt F. Steele, *Notes on the Lasting Effects of Early Child Abuse Throughout the Life Cycle*, 10 CHILD ABUSE & NEGLECT 283, 290 (1986) (studies indicate that one half of psychiatric patients experienced "neglect or abuse" of some form early in life); Swett et al., *supra* note 30, at 635 (forty-eight percent of patients studied reported sexual and/or physical abuse).

⁴⁸ Steele, *supra* note 48, at 283.

⁴⁹ Brief of Petitioner, *supra* note 15, at 17.

⁵⁰ See, e.g., JAMES LEEHAN & LAURA P. WILSON, GROWN-UP ABUSED CHILDREN 3 (1985) (outlining emotional and social problems).

versarial testing" of the child would be done in precisely the way that would most severely aggravate the repression, denial of the abuse, lowered self-esteem, helplessness, and inability to trust adults, that are the primary products of abuse.

B. The Contrast Between "Adversarial Testing" and the Needs of the Child Who Is a Victim of Abuse

In fact, what the child needs after abuse is reaffirmation of self-worth, reaffirmation of trust, and rejection of denial and repression.⁵¹ Ironically, therefore, it seems that the best predictor of lack of harm to the child would be the absence of a successful cross-examination, particularly of the kind that casts doubt upon the testimony of the child. But the creation of this doubt, in proper cases, is the legitimate purpose of cross-examination, as well as its price in other cases. Conversely, defendant's "necessity" reasoning in both *Craig* and *White* would erroneously lead to the conclusion that the only situation in which the judge would permit cross-examination of an allegedly abused child would be one in which the cross-examination would be least likely to be successful. That approach, of course, would be illogical.

The following description shows how the literature treats successful cross-examinations of abused children who are truthful:

Children who have been hurt by [testimony and cross-examination] cite the confusion and sense of failure attendant upon a "successful" cross-examination, guilt because they participated in the crime but were not punished, guilt over the harm done to a valued family member, terror on confronting the accused, exhaustion after hours of testimony, separation from family members who were not permitted in the courtroom, fear that they will be found guilty and put in jail, fear of the strange courtroom setting, and horror at reliving events through testimony. A common concern of young children is that the accused (who may have threatened to kill them if they tell) will jump on them in the courtroom. Many children who are the victim of incest and accuse their own parent fear that the parent will never forgive them.⁵²

⁵¹ *Id.* at 8-9.

⁵² Yates, *supra* note 37, at 478.

The "necessity" theory put forward in those cases would inherently depend, not upon the individual makeup of the child, but upon whether the cross-examination was likely to be "successful." Consequently, the most harmful combination would be a truthful child who faces a skillful defense attorney motivated to conduct a "successful" cross-examination. It would be inappropriate to have a judge decide questions of admissibility on the basis of such considerations, and this factor should weigh in favor of the state's authority to reject an "individualized" model of necessity.

C. *The Scientific Unsoundness of "Individualized" Prediction of Harm to a Child in the Long-Term Future*

More importantly, it is scientifically unsound to imagine that a judge, psychotherapist, or anyone else can predict the long-term effects, into adulthood, of vigorously cross-examining an abused child. For example, among the adult conditions caused by childhood sexual abuse are delinquency, drug abuse, and a condition known as "borderline personality disorder."⁵³ Borderline personality, in particular, has been shown in very recent years to be heavily correlated with childhood sexual abuse.⁵⁴ However, the factors that combine to "cause" borderline personality in one abused child, and that fail to produce this disorder in another, are unknown and probably unknowable. Thus,

[w]e do not know enough about the influence which variables such as age of onset and duration of assaults, violence and viciousness, subtle factors of intimidation, seduction, rewards and sympathy, surrounding circumstances, family constellation, constitutional factors, sources of support, and peer relationships have upon development of or protection from borderline traits.⁵⁵

Moreover, "[i]nformation on the long-term effects of sexual abuse

⁵³ See Steele, *supra* note 48, at 290-91 (examining personality disorder which warps interpersonal relationships, self-esteem and identity); see also KATHLEEN M. WHITE ET AL., TREATING CHILD ABUSE AND FAMILY VIOLENCE IN HOSPITALS 37-40 (1989) (information on long-term effects of sexual abuse "extremely limited").

⁵⁴ See, e.g., JEROME KROLL, THE CHALLENGE OF THE BORDERLINE PATIENT: COMPETENCY IN DIAGNOSIS AND TREATMENT 41-42 (1988) (sexual abuse is cause of many borderline patients).

⁵⁵ *Id.* at 42.

is extremely limited, and no systematic longitudinal data on childhood victims of sexual abuse exist."⁵⁶ Most of the probable factors are in the future in any event, and thus are unknowable at the time of abuse or reporting. The factors probably include genetic determinants.⁵⁷ It is far-fetched to assume that a judge would inquire into the genetic makeup of an abused child in order to determine whether she could testify without effects lasting into adulthood, but given the scientific literature, that is precisely what the individualized model of necessity would call upon the judge to do. Likewise, it seems unlikely that judges in a courtroom setting would be able to discover a young child's fear that the accused will "jump on her in the courtroom," although this fear is a common concern.⁵⁸

Taken to its extreme, the individualized necessity approach is analogous to deciding to expose a child to a carcinogen unless the child can prove that she, individually, will contract cancer because of the particular exposure. The problem is that some exposed persons will contract cancer, others will not, and all that can be

⁵⁶ WHITE ET AL., *supra* note 54, at 40. The American Psychological Association (APA) filed an amicus brief in *Craig* maintaining that an expert witness can assist the court in making an adequately informed decision on the "necessity" of protecting the child witness. The APA's brief identified four criteria: (1) traumatic sexualization (use of force combined with sexual invasion), (2) betrayal (exploitation of the child's dependence), (3) powerlessness (the child's inability to resist manipulation), and (4) stigmatization (shame). Brief for Amicus Curiae American Psychological Association in Support of Neither Party at 17, *Maryland v. Craig*, 497 U.S. 836 (1990) (No. 89-478).

The APA admitted, however, that this expert testimony might require bolstering with testimony from parents, teachers, and others. *Id.* Furthermore, the APA was unable to overcome the lack of longitudinal or follow-up studies. Therefore, the APA's solution gives no scientific basis for conclusions about avoiding harm into the child's adulthood. Furthermore, the pressures of the adversary system are not adequately taken into account by the APA's approach. One should expect to see a cottage industry of pro-defense or pro-prosecution psychologists exploiting the vagueness of mental health diagnostic criteria if the APA's approaches were generally accepted. Indeed, the views presented by the APA coincide with the financial and professional interests of APA's members for that reason.

⁵⁷ See Michael H. Stone, *Constitution and Temperament in Borderline Conditions: Biological and Genetic Explanatory Formulations*, in 1 THE BORDERLINE PATIENT 253, 259-62 (J. Grotstein et al., eds.) (1987) (discussing genetic factors common to many borderline patients).

⁵⁸ See Brief of Amici Curiae, *supra* note 8, at 14 (judge may not be able to gauge effects on child from testifying in open court). It should be added that many social scientists think that some children psychologically benefit from testifying. See, e.g., Lucy Berliner, *The Child Witness: The Progress and Emerging Limitations*, 40 U. MIAMI L. REV. 167, 174-75 (1985) (discussing benefits of participating in trial of abuser); Montoya, *supra* note 7, at 1311 & n.248 (collecting authorities). But indications are that the average effect is negative. *Id.* at 1312 & n.250 (citing Gail S. Goodman, *The Emotional Effects on Child Sexual Assault Victims of Testifying in Criminal Court* 104 (1989) (testifying induces further trauma). In any event, we cannot make long-term predictions about positive effects in a given child.

said with confidence is that exposure to carcinogens is correlated with cancer. A variety of environmental, viral, behavioral, and genetic considerations also influence who succumbs to cancer and who does not, but their impact is too speculative to predict. The same is true of cross-examination about child abuse. Although child abuse is epidemic in this country, and although it clearly is associated with adult personality disorders in a statistical sense, the severity of resulting disorders cannot be made the basis of accurate *individual* predictions regarding the affected children's adulthood.

D. An Individualized Necessity Requirement, Strictly Construed: Would It Actually Depend More upon Idiosyncratic Differences Among Trial Judges Than Upon Differences Among Cases?

The necessity model offered by the defendant in *White* implies that the trial judge would make a finding that the child is unavailable due to the short- or long-term effects of testifying and being cross-examined.⁵⁹ But this "finding" could not be made without long-term predictions of the kind described in the preceding sections of this Article. Since such a prediction cannot be made on an individual basis, it might instead be made on the basis of the idiosyncratic beliefs or preferences of the trial judge.

In fact, since denial and repression are part of the pathology of child abuse, it is precisely those children who *least* appear to suffer ill effects who may, ironically, be *most* at risk.⁶⁰ In other words, if the child "seems" to be "tough," "strong," or able to endure what defendant in *White* called "adversarial testing," the explanation may be that the child actually is suffering from denial or repression of the effects of abuse. Instead of being among those most likely to survive the "adversarial testing" intact, as she may appear to an unscientific observer such as a judge, this "tough" child actually may be among those *most* likely to be harmed.⁶¹

Thus, there is great danger that such a finding of individualized necessity would be diametrically opposed to reality. Instead, a uniform, traditionally-rooted rule of evidence—such as the rule al-

⁵⁹ See *supra* notes 45-46 and accompanying text (discussing "necessity" showing).

⁶⁰ See Bryer et al., *supra* note 30, at 1429 (high rates of suppressing memories of abuse); see also *supra* notes 35-39, and accompanying text (surveying impact of repressed memories of abuse).

⁶¹ Brief of Amici Curiae, *supra* note 8, at 14-15.

lowing spontaneous utterances or statements to treating physicians, equally applied to children and adults—should be a permissible choice for the states.

IV. CONSEQUENCES OF THE ARGUMENT FOR EXCLUSION: SOME LOGICAL FALLACIES

A. *A Multiple-Method, "Least Onerous Alternative" Approach to Preventing Psychological Harm: Would It Be Workable in Practice?*

In *White*, the defendant urged adoption of a "necessity" approach that would have required the judge to finely calibrate the procedure to be used, guessing at the precise method that would most preserve the right of cross-examination while avoiding harm to the child.⁶² The judge thus could not use traditional, firmly-rooted hearsay rules of uniform application at all. Instead, the defendant argued, "if a child will not suffer severe emotional trauma when testifying by a closed-circuit television, that procedure should be followed."⁶³ Similarly, the judge would evaluate each possible alternative to live testimony, using the alternative that was least onerous to the right of confrontation.

The preceding section of this Article, however, shows that the scientific community has conceded an inability to predict long-term harm.⁶⁴ A judge cannot reasonably be expected to predict which individual children will exhibit borderline personality disorder in adulthood as a result of testifying. Even more clearly, the pinpoint precision demanded by a "least onerous alternative" approach is unattainable.

Furthermore, this approach presumably would have the judge first exhaustively examine the child before attempting more intrusive procedures, in order to determine whether the child "will suffer severe emotional trauma." This sort of process justifies some scientists' conclusions that "[i]n some cases, procedural assault is added to sexual assault."⁶⁵ The resulting experimentation would

⁶² Brief for the Petitioner, *supra* note 15, at 25.

⁶³ *Id.*

⁶⁴ See *supra* part II.

⁶⁵ Yates, *supra* note 37, at 476. Professor Montoya expressly advocates this try-it-and-see approach: "The best way to determine whether a child will be able to communicate in the defendant's presence is to observe the child on the witness stand in the defendant's presence." Montoya, *supra* note 7, at 1310. With considerable understatement, Professor Montoya adds: "This procedure may sound insensitive to the child." *Id.* But, she asserts, the

use "lesser" procedures such as closed-circuit television only when the child actually exhibits indicia of "severe emotional trauma" from more intrusive methods. The effort to determine the harm would not only be unsuccessful because of the inaccuracy of long-term prediction, but additionally, by repeatedly subjecting the child to a sequence of procedures on the witness stand, the court would *ipso facto* cause precisely the harm that is sought to be avoided.⁶⁶

B. An Anomalous Result of the Strict Necessity Approach: If the Victim Testified, Would Her Statements Be Excluded?

A strict approach to "necessity," such as that of the defendant in *White*, would exclude spontaneous utterances by a witness unless that witness were shown to be "unavailable."⁶⁷ But if the witness actually testified, she would not be unavailable. Thus the possible consequence of this reasoning is that if the victim were unavailable, her statements could be admitted, but if the victim actually appeared in the courtroom, testified, and was subjected to cross-

contrary argument "assumes guilt inasmuch as it assumes [that the child is] a victim, and our system is grounded on a presumption of innocence." *Id.*

Professor Montoya's conclusion is unjustified. Studies indicate, for example, that jurors' perceptions of witnesses' demeanor do not add appreciably to the accuracy of their evaluation of the testimony, although jurors are much more skillful at evaluating textual indicia of reliability and are sensitive to the deficiencies of hearsay. See Margaret B. Kovera et al., *Jurors' Perceptions of Eyewitness and Hearsay Evidence*, 76 MINN. L. REV. 703, 719 (1992) ("jurors are more skeptical of the value and reliability of hearsay testimony than of eyewitness testimony"). Thus, the argument against a 'try-it-and-see' approach does not presume guilt, but instead, it assumes that alternate procedures will enable the jury to judge the case with equivalent accuracy. It also assumes that experimenting with the child's mental health is inappropriate, a point that Professor Montoya makes in a different context, elsewhere in her article. Montoya, *supra* note 7, at 1283 (discussing ethical limits of clinical experiments upon children).

Professor Montoya also suggests that the prosecutor's careful preparation of the child for testimony will reduce trauma. *Id.* at 1312. Perhaps so, but it will also increase allegations of coaching, and if it is not done by trained personnel, it may introduce suggestion. Professor Montoya further concludes that prosecutors should not find such a duty to be "unduly burdensome" because most prosecutors are divided into specialized departments where they could obtain training. *Id.* at 1312 n.252. This argument overlooks the limited size of the majority of prosecutors' offices, as well as the rate of turnover in large metropolitan offices. It is submitted that the ability to prosecute a child abuse case should not be made so complex as to be beyond the capacity of a prosecutor of average competence.

⁶⁶ Brief of Amici Curiae, *supra* note 8, at 20.

⁶⁷ See *supra* part I (discussing treatment in *White* of Roberts-based arguments). Exclusion, however, need not follow. The rules of evidence sometimes admit extrajudicial statements of a witness who actually testifies. See, e.g., FED. R. EVID. 801 (d)(1) ("Prior statement by witness"). Therefore, a state presumably could adopt rules that would admit the evidence in this instance unless the strict necessity approach were followed.

examination, her statements would be excluded. The states should not be forced to accept such an anomalous result.

C. *The Child Witness Who Is Produced in Court and Made Available for Cross-Examination: Does the Use of Pretrial Statements Violate the Confrontation Clause?*

In *White*, the prosecution argued that the defendant was not denied the right or practical ability to cross-examine the child victim, because she actually was produced in the courtroom and the state unsuccessfully attempted to call her.⁶⁸ The defendant himself made a tactical choice not to call her for cross-examination. One inference is that the defendant concluded that the danger of her testifying so as to strengthen the state's evidence, or to make clear her inability to testify, was too great, and that the odds of acquittal were greater if defendant simply accepted the evidence as it was. This tactical choice, if indeed it was made, should not obscure the fact that the witness was produced, was present, and could have been called for cross-examination by the defendant.⁶⁹ The defendant's statement in *White* that the child "was not produced for cross-examination"⁷⁰ is a misleading use of semantics if it was based on these tactical choices.

In fact, defendant's argument would stand the Confrontation Clause on its head. If the child were a fugitive hidden by her parents (as sometimes happens), or if she were provably so likely to be harmed by cross-examination as to justify a finding to that effect, the defendant in *White* apparently would recognize her "unavailability"⁷¹ and accept the evidence⁷²—even though there could be no cross-examination. But in *White*, the defendant's right and practical ability of cross-examination were preserved by the production of the victim in the courtroom.⁷³ The duty of the state to make a good faith effort to produce the witness before resorting

⁶⁸ Cf. Brief of Amici Curiae, *supra* note 8, at 17-19 (recapitulating arguments supporting prosecution's position in this regard).

⁶⁹ *White v. Illinois*, 112 S. Ct. 736, 739 (1992).

⁷⁰ Brief for the Petitioner, *supra* note 15, at 14, 24-25.

⁷¹ Cf., e.g., *Maryland v. Craig*, 497 U.S. at 857 (1990) (prevention of trauma to child as necessity for unavailability); *Barber v. Page*, 390 U.S. 719, 725 (1968) (unavailability because of prosecution's inability to produce witness).

⁷² Brief for the Petitioner, *supra* note 15, at 25.

⁷³ Except, of course, to the extent that the witness was unable to testify at all; but in that event, she would have been unavailable.

to certain kinds of pretrial statements⁷⁴ had been fulfilled, even assuming it applied in *White*. The state should not be made worse off by having produced the victim to be called for cross-examination if the defense so chooses, than it would be by not producing her at all.

One plausible argument of a defendant in this position is that he should not be forced to be the one to call the child to the witness stand in the presence of the jury. Such a procedure might cast the defendant in the role of a bully, particularly if followed by vigorous cross-examination or emotional reaction from the child. It is unclear whether these considerations give rise to a valid argument under the Confrontation Clause. Nevertheless, a fair procedural system should consider them.⁷⁵ The difficulty could be mitigated if defense counsel requested the right to call the child witness outside the presence of the jury, for examination before the jury. Alternatively, the court itself could call the child as a witness upon request by the defendant made outside the presence of the jury, thereby avoiding an implication of blame to the defendant.⁷⁶

This issue can be expected to arise, in fact, with greater frequency under modern approaches to child victim testimony. For example, some states permit the introduction of pretrial hearsay statements more broadly than would be allowed under traditional hearsay exceptions.⁷⁷ Some such statutes permit videotaped pretrial statements under limited circumstances.⁷⁸ The defendant's right to compulsory process⁷⁹ presumably enables him to call the child as a witness in most circumstances.⁸⁰ Since protection of the right to cross-examine is a major component of the Confrontation Clause,⁸¹ that clause may guarantee the availability of cross-exami-

⁷⁴ See *Barber*, 390 U.S. at 725 (authorities did not make a good faith effort to locate).

⁷⁵ Thus, for example, a draft proposed by the Criminal Justice Section of the ABA requires that the court call the child for cross-examination upon defense request, after use of a televised pretrial statement. American Bar Ass'n, *Federal Rules of Evidence: A Fresh Review and Examination* 86-95 (1989).

⁷⁶ Cf. *id.* (providing for this procedure).

⁷⁷ The Illinois law at issue in *White* was specially targeted to certain offenses. See *White v. Illinois*, 112 S. Ct. 736, 740 n.2 (1992).

⁷⁸ Cf. *supra* note 76 (ABA draft rules).

⁷⁹ See *White*, 112 S. Ct. at 742 (reviewing constitutional requirements).

⁸⁰ See *White*, 112 S. Ct. at 742 (reviewing constitutional requirements).

⁸¹ *E.g.*, *Pointer v. Texas*, 380 U.S. 400, 406-07 (1965) (one reason underlying constitutional guarantee of confrontation is to allow defendant to cross examine witnesses).

nation without unfair implication of blame. Finally, the Due Process Clause limits the state's power to convict by deprivation of a fair opportunity to test the prosecution's evidence.⁸²

These conclusions give rise to a paradox. Many kinds of pretrial statements by child victims meet the criteria of trustworthiness and necessity that are characteristic of hearsay exceptions.⁸³ Normally, they should be admissible without an individualized showing of necessity, or at least without insistence upon an overly rigorous showing, because of our inability to predict necessity in the form of a need to avoid psychological harm.⁸⁴ At the same time, however, it will often be necessary to protect the defendant's right to cross-examine the child by providing a procedure in which the child is produced on the witness stand without the implication of blame to the defendant.⁸⁵ This procedure, if the defendant uses it, may reintroduce precisely the danger of harm that the prosecution sought to avoid by calling the child in the first place.

The paradox resolves itself, however, when one realizes that there will be many instances in which the defendant will choose, for tactical reasons, not to call the child even if the right to cross-examine her is rigorously protected.⁸⁶ One might infer that this was the tactical choice of the defendant in *White*.⁸⁷ In that event, the confrontation argument, at least insofar as it is based upon cross-examination concerns, is reduced to an effort to prevent the prosecution from going forward by holding the child's psychological health hostage.⁸⁸ The criminal justice system can avoid that result by permitting the use of evidence such as that in *White*, or evidence permitted under modern statutes and rules,⁸⁹ and then

⁸² U.S. Const. amend. XIV.

⁸³ See *White*, 112 S. Ct. at 742-43 (spontaneous declarations during course of medical care are made in context that guarantee trustworthiness).

⁸⁴ See *supra* part III (reviewing "necessity" approach in minimizing psychological harm).

⁸⁵ See *supra* note 76, and accompanying text (ABA report would permit cross-examination after use of televised pretrial statement).

⁸⁶ Cf. *White*, 112 S. Ct. at 742. The Court recognized that there will be declarants whom "neither the prosecution nor the defense had any interest in calling to the stand," in which event requiring the prosecution "to repeatedly locate and keep continuously available each declarant" would "impose substantial additional burdens on the factfinding process" while doing "little to improve the accuracy of factfinding." *Id.*

⁸⁷ *Id.*

⁸⁸ The argument might remain, however, as to concerns about demeanor, the oath, and eye-to-eye testimony, all of which may be said to be additional reason for the confrontation clause. Cf. *Coy*, 487 U.S. at 1020 (the "screen" case).

⁸⁹ Cf. *supra* note 76 (ABA draft of videotape proposal).

protecting the defendant's right of cross-examination if the defendant chooses to exercise it. This approach would not protect child witnesses from psychological harm in all cases, but it would protect them from unnecessary psychological harm in the form of "adversarial testing" when the defendant would not otherwise choose that option.⁹⁰

D. Countervailing Considerations: Case-Specific Needs for Confrontation; Evidence Indicating Merely de Minimis Harm

These conclusions may, however, require accommodation to the needs of an individual case. Professor Montoya, for example, points out that even a strict necessity standard would not identify cases in which the defendant's defense particularly depends upon full cross-examination for its successful presentation.⁹¹ Thus, if identity is the major issue, it is conceivable that there will be some circumstances in which the needs of the individual case require greater protection of confrontation than would be justified simply by consideration of the child's needs.⁹² Most intra-family child abuse cases do not present this difficulty, but an occasional case may do so,⁹³ and other crimes against children might also. Additionally, as *Maryland v. Craig* indicates, confrontation requirements should not be modified merely for *de minimis* reasons, such as in cases in which the evidence affirmatively indicates that confrontation of the defendant will not appreciably threaten the child.⁹⁴

CONCLUSION

The courts are not likely to recognize crimes against children as categorically meriting a lower standard of protection of the rights of defendants. Nor should they. Our Constitution does not seem to recognize these cases as categorically different, and yet it is suf-

⁹⁰ See *supra* note 87 and accompanying text (noting burdens of maintaining availability).

⁹¹ Montoya, *supra* note 7, at 1296-1302, 1315-16. Montoya also points out that alternate media for conveying information, such as television, might have sufficient distortive effects to call for greater protection of traditional confrontation. *Id.* at 1315.

⁹² *Id.* at 1296-1302 Professor Montoya, however, calls for a relatively strict reading of the necessity standard in *Craig*, *id.* at 1306-19, an approach that the present Article rejects for reasons stated herein.

⁹³ *Cf. Id.* at 1298-1300 (discussing *State v. Sorenson*, 152 Wis. 2d 471, 496, 449 N.W.2d 280, 290 (Ct. App. 1989)).

⁹⁴ *Maryland v. Craig*, 479 U.S. 836, 867 (1990).

ficiently flexible to accommodate protections of defendant's rights in ways that reduce harm to child victims. The Confrontation, Compulsory Process, and Due Process Clauses, for example, combine to preserve the defendant's right to call an alleged child victim as a witness under most circumstances. To ensure a fair trial, we should enable the defendant to exercise this right through the court, or outside the presence of the jury, or by other means that avoid the implication of bullying tactics to the defense.

This conclusion, unfortunately, means that it is impossible to ensure against all potential psychic trauma to child witnesses while vigorously prosecuting crimes against children. But fortunately, it also means that we can rely to some extent on the availability of this compulsory-process strategy to the defendant in deciding Confrontation Clause issues. We thus may be able to adopt procedures that rely upon the defendant's right to subpoena the child at state expense (and without implication of blame) to supply confrontation, rather than insisting on confrontation during the state's case in chief. This approach would avoid the insidious possibility that the child's potential exposure to trauma may make her mental health a hostage that prevents the prosecution from going forward at all. Yet it would allow full confrontation in those cases in which it is strategically advantageous to the defendant, as distinguished from a device to avoid prosecution by the threat of trauma to the child. The *White* case supports this reasoning.⁹⁵

The flexibility of the Constitution likewise does not prevent the states from recognizing the peculiar characteristics of child abuse victims. For example, the repression that follows abuse, which often suppresses recall into adulthood and which increases with time, is well documented in the scientific literature. So too is the reliability of children's early descriptions of abuse when not created by persistent coaching from adults. These considerations should permit the states to find in pretrial declarations of abuse the factors of trustworthiness and necessity that are hallmarks of admissible hearsay in criminal cases generally. The Supreme Court's holding in *White* is consistent with these considerations, even though the Court's reasoning understandably did not rely di-

⁹⁵ *White v. Illinois*, 112 S. Ct. 736, 742 (1992). The Court reasoned that since the compulsory process clause enables defendants to call witnesses, an unavailability requirement would not produce much additional testimony but was likely to create additional burdens upon the factfinding process.

rectly on the scientific literature.

The scientific literature also demonstrates why it is difficult, if not impossible, to prove strict necessity for the use of hearsay (or modified circumstances of testimony) by predicting *which* child declarants will, and which will not, suffer psychological harm in adulthood. The factors that affect this long-term outcome are too numerous and diffuse to permit individualized guesses of this kind. Many of the factors depend on future events or on conditions that the court cannot properly consider, such as the child's genetic heritage or the likelihood of success in the cross-examination. In addition, we lack longitudinal studies of the differential effects of these numerous factors on child victims in adulthood. Given the effects of repression, in fact, it may be that the child who seems "tough" and impervious to harm actually is suffering from denial and therefore is especially vulnerable to harm. Thus, insistence upon an effort to predict which children will suffer harm from testimony is analogous to a decision to expose a population to a proven carcinogen, with the exception of those who can demonstrate that they are unusually likely to develop an actual cancer. All that we can say with confidence is that the exposure is definitively correlated with the harm and therefore increases the risk for all exposed persons, although we cannot accurately identify the precise individuals who will suffer the harm.

Judges should not, therefore, be given the impossible task of making strict findings of necessity by guessing which child victims are especially vulnerable to harm. Instead, the necessity factor should be supplied by a uniform rule. The *Coy* and *Craig* cases are open to criticism on this ground. The *White* decision, on the other hand, reaches a result that is more consistent with what we think we know scientifically about the victims of crimes against children.

